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Judge-made standards of national procedure in the post-Lisbon constitutional framework

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Impact v Minister for Agriculture and Food (C-268/06) [2008] E.C.R. I-2483 (ECJ (Grand Chamber))

Vlaamse Federatie van Verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW v Raad voor de Mededinging (C-439/08) [2011] 4 C.M.L.R. 12 (ECJ (Grand Chamber))

***90** Abstract

Unlike remedies enabling the enforcement of EU rights, national procedural rules have so far largely remained within the province of Member State autonomy. Recent judgments nevertheless indicate that the Court of Justice is now more than ever willing directly to shape national procedural mechanisms as part of an emerging EU procedural standards framework. Judicially established "standards of national procedure" impose positive obligations on Member States' legal orders and provide an EU-wide alternative to inadequate national procedural provisions. This contribution outlines the Court's standard-setting approach and identifies the constitutional mandate enabling its development.

Introduction

National rules regulating judicial proceedings have traditionally played an "ancillary" [1] or subservient role in the European Union's decentralised system of judicial enforcement. Although national legal orders did remain competent to establish and implement procedural rules enabling the application of EU rights, [2] those rules were not supposed to restrain the effectiveness of EU rights and remedies. [3] To the extent that they significantly impeded effective EU law enforcement, national procedural provisions were to be disapplied. [4]

Recently, the Court of Justice [5] appears to have reconsidered its case law on national procedural rules. In a number of judgments, it has identified and developed new EU standards for national procedures, expressly requiring national legislators or judges to modify or even *transform* national procedural rules. Those judicially established standards impose *positive procedural obligations* on Member States' legal ***91** orders. [6] This reflection outlines the Court's shift towards developing positive procedural obligations and identifies the constitutional basis for this development.

National procedural rules in a decentralised EU law enforcement environment

In the absence of a common EU procedural law framework, the application of EU rules in national legal systems requires judges to apply their national procedural framework for a purpose that transcends the national legal order for which these rules had been crafted. This situation inevitably generates frictions and requires a move away from fully fledged national procedural autonomy in this field. [7]

The scope of supranational judicial intervention in national procedural systems has been most extensive in the field of remedies enabling the enforcement of rights recognised in EU law. [8] As a matter of principle, [9] remedies should first be provided at the national level. It was felt, however, that disparate and variegated sets of remedies at the national level did not always sufficiently promote a legal order that values uniform rights and their effective enforcement. In addition to recognising the existence of EU rights, the Court of Justice therefore explicitly and directly established new remedies. [10] All court-established remedies follow a similar pattern. First, the Court commands a particular class of action to be allowed before national courts. Subsequently, the Court determines somewhat detailed conditions for the application of that class of action by national courts. In so doing, it allows at least some discretion to the national courts to apply and refine these criteria within their national procedural law framework. A Member State's procedural autonomy is therefore relegated to the underlying procedural framework--the day-to-day rules that structure and order the enforcement of EU rights through remedies. With respect to remedies, procedural autonomy could aptly be called a "misnomer". [11]

In contrast to the case law establishing such remedies, the Court's role in shaping national procedural law provisions traditionally remained limited to an inquiry into the effectiveness of these provisions in order to ensure the application of EU rights and remedies. [12] A procedural "rule of reason" has been identified ***92** as a tool to assess the role and scope of the national procedural provisions at stake. [13] To the extent that these provisions imposed unreasonable restraints on the effective enforcement of EU rights through Europeanised remedies, they were to be disapplied in the case at hand. [14] For a long time, this model of national procedural *competence* subject to *effectiveness* modifications remained the only paradigmatic format in the assessment of national procedural rules. [15]

Towards judicially crafted EU-wide standards of national procedure

A combined reading of recent judgments projects a different and complementary perspective on to the classical presentation summarised above. In these recent cases, the Court did not shy away from proposing a more direct assessment of procedural rules and developing alternative procedural solutions to be implemented in national legal orders. Three judgments--in the *Impact, VEBIC* and *DEB* cases--stand out in that regard.

The *Impact* judgment marked a first step towards a new approach focused on national procedural provisions. In *Impact,* an Irish judge asked the Court whether a specialised national court was required by EU law directly to apply the provisions of a directive even if national law did not explicitly grant it permission to do so but, rather, entrusted this role to the general court system. [16] The ECJ held that specialised national courts should extend their jurisdiction to hear and determine an applicant's claims arising directly from a directive, in respect of the period between the deadline for transposing the directive and the date on which the transposing legislation entered into force, if it is established that the obligation on that applicant to bring, at the same time, a separate claim based directly on the directive before an ordinary court would involve "procedural disadvantages" liable to render excessively difficult the exercise of the rights conferred on him by EU law. [17]

The choice of words in *Impact* is both innovative and puzzling. On the one hand, the judgment introduces "procedural disadvantages" as a yardstick to assess procedural operations at the national level. This is the first time that the Court has relied on this notion and thus might present a new approach to assessing the "effectiveness" of national procedural rules and the institutional framework in which they operate. On the other hand, this reliance on procedural disadvantages does not provide clarity as to the scope of Member State scrutiny that the Court will exercise in that regard. The notion of procedural disadvantages could be understood to indicate that the Court might be willing not just to reflect upon the effectiveness of the national procedural system but also on the *adequacy* of national institutional and procedural organisation. This in turn implies that the Court would not just demand the non-application of national rules, but also encourage the development of positive obligations in the realm of national procedural rules. The "disadvantages" notion presupposes, therefore, a more direct, appreciative connotation than a mere reference to effectiveness.

***93** In *VEBIC,* [18] the Court identified a particular set of procedural disadvantages and replaced them with an EU-wide procedural alternative. In so doing, it delivered a first concrete application of its adequate judicial protection approach. The case concerned the national procedural organisation of judicial review against competition authorities' decisions when applying EU competition law under Regulation 1/2003. [19] According to Belgian law, the national competition authority, the Competition Council, could not appear as a defendant in appellate proceedings against its decisions taken at first instance. [20] The Competition Council is itself an administrative court, and courts are unable to participate in appellate proceedings against their own decisions. [21] The ECJ was invited to assess the legality of this Belgian arrangement in the light of EU effective judicial protection requirements. It considered that the lack of participation rights for a national competition authority--although formally a court of law--in appellate proceedings was contrary to EU law. [22] More than the outcome in this case, the Court's reasoning is innovative. Although the Court referred to the possibility of *precluding* and thus disapplying a national rule such as the one at stake, [23] it also acknowledged that non-application of a national rule did not provide an adequate solution in this case. It therefore directly ruled that national competition authorities should have the *right* to participate in appellate proceedings against their decisions as a matter of EU law. [24] The Court did not rely on classical procedural rule of reason arguments to justify this conclusion, but bluntly stated that a national rule must not jeopardise the attainment of objectives of EU law, including the effective enforcement of its competition rules. [25] To the extent that the current system did jeopardise this goal, it could not remain in place without the *adaptation* of national procedural rules. [26] The Court therefore adopted a direct positive obligation approach to these procedural rules. While the establishment of positive obligations is hardly novel in the Court's case law, [27] its extension into the realm of national procedural rules, long considered a competence sphere firmly within the Member States' domain, [28] represents a novelty.

The *DEB* judgment complemented the approach identified in *VEBIC. DEB* concerned the provision of legal aid to corporate legal persons in German civil procedure. According to the German law at stake, corporations could not file for legal aid unless their claim benefited the public interest. [29] That provision ***94** had been interpreted very narrowly by the German *Bundesgerichtshof,* thus impeding the grant of aid to the corporation in *DEB.* [30] The *Bundesgerichtshof* asked the ECJ whether this interpretation squared with EU law. [31] In its reasoning, the Court assessed whether the right to legal aid, as incorporated in the Charter of Fundamental Rights, [32] precluded a national rule under which a legal person does not qualify for legal aid even though the latter is unable to make the necessary advance payment. [33] It concluded on the basis of a comparative analysis that art.47 of the Charter must be interpreted so that "it is not impossible for legal persons to rely on" the principle of effective judicial protection to claim legal aid in national procedures. [34]

The "not impossible to rely on" condition presents a remarkable evolution in the Court's reasoning. Whereas *VEBIC* directly mandated the participation of a national competition authority in appellate proceedings against its own decisions, the novelty of *DEB* lies in the way it approaches and qualifies the specific obligation to provide legal aid for

legal persons. In positing that it is not impossible to rely on the Charter to transform the scope of national procedural law, the Court expressly confirms its willingness to rely on the Charter to develop directly applicable judicial standards of national procedure. *DEB* does not, therefore, directly *preclude* particular national rules. It does, however, *require* these rules to be in conformity with the EU approach to legal aid evinced from the Charter of Fundamental Rights. The Court does not propose the discarding or non-application of national procedural rules. Rather, it superimposes a particular standard of national procedure and leaves it to the national procedural systems to render that standard operational. In so doing, it confirms the Charter's role as a potential source of positive procedural obligations and also provides a direct basis for the standards-establishing reasoning adopted in *VEBIC.*

In general, this development of judicial standards as EU principles of national civil procedure does not fit into the classical paradigmatic structure of national procedural autonomy in EU legal scholarship and practice. In that image, the Court laying down uniform rules of procedure and its making of policy choices as to the appropriate level of intervention would amount to usurping the roles of both Union and national legislative organs. [35] National procedural rules could only be precluded by EU law, not be redeveloped directly by a supranational court. *VEBIC* and *DEB* showcase that the non-application of procedural rules cannot, however, always provide an adequate solution and should therefore be complemented by a more direct positive obligation through the recognition of EU-wide procedural standards. Member States' competence to regulate national procedure is then relegated to regulating procedure *in extension to and in accordance with* EU procedural standards.

A constitutional framework for standards of national procedure

The creation of adequate judicial protection standards without substantial constitutional grounding, which seemed to have been the case in *VEBIC,* could threaten the Court's legitimacy. [36] Concerns about judicial ***95** encroachment on national sovereignty--phrased in judicial activism critiques [37] --could indeed resurface in that regard. [38] Finding an appropriate constitutional basis for its actions therefore enhances the Court's legitimacy in its procedural standard-setting endeavours. Building upon the Court's reliance on the Charter in *DEB,* this section outlines that constitutional basis in a post-Lisbon setting.

Traditionally, the Court's scrutiny of national procedural mechanisms has been justified by reliance on what is now art.19(1) TFEU as a basis for the Court's observation of the rule of law in the application and interpretation of the Treaty. [39] Two additional and specific constitutional bases can be found, the combination of which empowers the Court to develop its standards: the fundamental right to an effective remedy and the principle of sincere co-operation. *DEB* specifically refers to the first basis, whereas the second features implicitly in both *DEB* and *VEBIC.* A combined reliance on both principles also presents new pathways for an innovative judicial dialectic on procedural law provisions, requiring national judges to adopt a self-critical attitude towards national requirements. These issues will now be addressed in detail.

Constitutional principles

This subsection identifies the fundamental right to an effective remedy and the principle of sincere co-operation as the two main constitutional principles enabling the creation of procedural standards by the European Court of Justice.

The fundamental right to an effective “remedy”

Article 19(2) TEU states that Member States shall provide remedies to ensure effective legal protection in the fields covered by Union law. At the same time, however, art.47 of the Charter states that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. More precisely:

"Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

This provision could provide a yardstick for the Court to develop a positive obligation approach to institutional organisation, the conduct of proceedings and the scope of legal aid granted to parties to the proceedings. The Court has indeed done so in the field of remedies, but art.47 is not strictly confined to the establishment of remedies as independent classes of action. [40] National procedural rules could equally fall within its scope. The ECHR, and more particularly art.6 of the Convention guaranteeing a fair trial, has indeed been interpreted as imposing positive obligations on the institutional organisation of national procedural systems. [41] The ECtHR *Vermeulen* judgment, imposing an opportunity for parties to respond to the Government--i.e. the *Procureur-Général*--in Belgian *Cour de Cassation* proceedings demonstrates ***96** particular similarities to *VEBIC.* [42] Article 13 ECHR requires an effective remedy before national authorities for violations of rights under the Convention and mainly concerns remedies to redress violations of fundamental rights to the extent that these rights have been established by the ECtHR. [43] Despite its reference to remedies, that provision has also been relied on to impose positive procedural obligations on national legal systems. [44]

It is well known that the Charter has the same legal value as the Treaties by virtue of art.6 TEU. [45] The Court has also acknowledged its now binding force, [46] having earlier been inspired by the Charter in its fundamental rights jurisprudence. [47] The Charter complements and also confirms the ECHR at EU level. Article 52(3) of the Charter clearly states that the meaning and scope of rights that correspond to ECHR rights shall be the same as their ECHR meaning. Even though art.6 TEU states that the Charter does not extend the Union's competences, art.52(3) of the Charter nevertheless allows the Union to develop a more stringent standard of protection than that of the ECHR, without neglecting the common constitutional traditions of Member States (art.52(4)).

By explicitly referring to rights recognised by the ECHR, the Court is thus invited to adopt a perspective on judicial protection and national procedural provisions on the basis of art.6 ECHR and its interpretations by the ECtHR. [48] As recognised by A.G. Mengozzi in *DEB,* the ECHR is,

"a source of primary importance for the legal order of the European Union and which, in the light of the EU's accession, will become officially legally binding for it on the basis of a binding international agreement." [49]

The Advocate General as well as the Court relied directly and extensively on ECtHR case law with a view to defining the scope of interpretation of national procedural provisions and the ensuing need for EU-wide procedural standards. Even though a similar route was not taken in *VEBIC,* the rationale of fundamental procedural rights enshrined in the Charter and the ECHR could also justify the approach taken in that case. At the same time, as confirmed by A.G. Cruz Villalón in *Samba Diouf,* the right to effective judicial protection has, through being recognised as part of EU law by virtue of art.47, acquired a separate identity and substance under that provision which are not the mere sum of arts 6 and 13 ECHR. [50] To the extent that a separate identity and substance could be read into art.47, it would be for the Court of Justice to outline its peculiar attributes. [51] The development of new procedural standards provides a particular way of outlining these attributes. In so doing, the Court would not merely clarify the scope of the right to effective judicial protection in EU law, it would also build upon the obligations already identified by the ***97** ECtHR regarding the right to a fair trial. The establishment of judge-made procedural standards at EU level would, therefore, place the Court on a more equal footing with the ECtHR as a standard-setter in procedural law matters. An interpretation of the right to an effective

remedy in art.47 of the Charter in light of both arts 6 and 13 ECHR would promote a more fully developed national procedural law framework that is specifically tailored to scrutinising the ability of national procedural provisions to support and structure claims based on EU law. In that regard, the Court in *DEB* rightly relied on a constitutional basis to develop procedural standards.

Sincere co-operation from a Union perspective: guided deference

Although the right to an effective remedy--re-interpreted in the light of art.6 ECHR fair trial requirements--provides the Court with a basis to recognise the *existence* and *content* of a procedural standards shaping role, the *scope* of that role can best be captured by the principle of sincere co-operation set out in art.4(3) TEU. [52] That principle's role in justifying interference in national legal systems is hardly novel. According to Temple Lang, it provides the basis for the principles of equivalence and effectiveness in restraining national procedural autonomy. [53] Sincere co-operation entails both positive and negative obligations imposed on Member States. [54] Its scope of application is mostly considered from a Member State obligation perspective.

At the same time, it has also been acknowledged that the principle of sincere co-operation incorporates particular obligations for Union institutions, [55] such as the Commission's obligation to provide the necessary information to a national court if so required. [56] Sincere co-operation thus enforces and regulates mutual co-operation among supranational, national and infranational levels of governance. [57]

From that perspective, sincere co-operation recognises a particular role for supranational and national authorities in the development of remedies and procedural provisions. With a view to rendering EU law operational, Member States should abstain from adopting procedural provisions that impede the effective enforcement of these rules. Simultaneously, EU institutions should facilitate the structuring of these national regimes and should not therefore abstain from providing enforcement guidance in particular instances. Enforcement guidance could either be provided through sector-specific regulatory harmonisation of remedies and procedural rules [58] or through standards enabling convergence among legal orders but leaving some autonomy to Member States to implement these standards. One could refer to the latter situation as one of guided deference, i.e. a situation in which the Court of Justice, based on particular standards or principles, provides a blueprint or at least guidance for national courts to develop and structure particular procedural provisions in a coherent and unified framework. That approach requires national authorities to abide by EU-wide judicially imposed standards that enable co-operation with the EU level. ***98** These standards cannot, however, impair the existence of diversified structures or the roles that particular rules play, as long as these rules conform to judicially set adequacy standards. Sincere co-operation thus not only supports or requires the creation of standards in an increasingly fundamental rights-oriented framework; it also serves as a mutual buffer to restrict both national and EU initiatives.

The operation of sincere co-operation is also apparent from cases in which the EU legislature did harmonise particular procedural requirements. In the *Samba Diouf* judgment, the Court's Second Chamber framed procedural standards established in a Directive harmonising minimum procedural requirements in refugee status proceedings [59] in the light of the Charter of Fundamental Rights, but did not as such establish new standards on the basis of that Charter. It rather inquired whether the Directive at stake reflected the requirements of the Charter and, to the extent it did, remained deferential to the scope of autonomy left to the Member States under the Directive. [60] Sincere co-operation thus requires the Court to take harmonised legislation into account; but if such legislation does not exist, the principle invites the Court to develop particular standards that could guide national procedural systems in implementing the right to a fair trial under art.47 of the Charter.

Standards of national procedure and judicial interactions

The fundamental right to a fair trial/effective remedy and the principle of sincere co-operation are complementary from a procedural standards perspective. The right, interpreted in accordance with and to the extent required by art.6 ECHR, can best be operationalised through standards, as this allows sincere co-operation to remain flexible and adaptable within the EU constitutional framework. At the same time, combined reliance on the right to a fair trial and the principle of loyal co-operation demands a particular judicial dialectic that will be sketched in this section. This dialectic is, it is argued, apparent from both *VEBIC* and *DEB*.

In both of these cases, it had been the national judge who questioned the compatibility of a particular national procedural rule with some vaguely termed EU principles, mostly the principle of effectiveness. That structure differs fundamentally from the classical ECHR analysis in that national courts themselves--and not private parties directly--are invited to elicit particular judicial standards from the Court of Justice. In particular, national courts, in the formulation of their references for a preliminary ruling, can steer the Court towards developing guiding standards, based upon the interpretation of ECHR provisions by the ECtHR. As such, national courts continue to play a dominant role in standard setting. Even though standards of fair trial in national procedures are developed at EU level, national courts enable their coming into being and determine whether and to what extent the Court grants more protection to rights recognised under the ECHR.

The upswing of the development of procedural standards in this way is that national judges are invited to reflect upon their national procedural systems from the vantage point of EU law and the ECHR. In provoking a guided deference approach through the Court's judgments, national judges could pinpoint deficiencies in their own system and subsequently rely on the European Court of Justice to enforce the positive obligations imposed on them by the ECtHR more directly. Since a national court will be bound by the Court's answer to the reference for a preliminary ruling when deciding on the concrete dispute before it, the ECJ's involvement in the case guarantees an authoritative ex-ante assessment of the scope and role of positive procedural obligations that need to be complied with in the case at hand. The Court's imposition of procedural obligations also potentially diminishes the uncertainties and delays involved in ***99** ECtHR scrutiny following a final domestic judgment. [61] At the same time, the guided deference approach grants the Court a particular role in identifying new positive obligations on the basis of art.6 ECHR and reflected in art.47 of the Charter.

From the ECJ's point of view, the European Union's accession to the ECHR [62] generates particular institutional problems and concerns about EU autonomy. [63] It has been argued that ECHR accession would place the ECtHR hierarchically above the Court within the realm of fundamental rights enforcement in the European Union. This situation nevertheless grants particular leeway to the Court. Since it is obliged to maintain "comparable standards" of fundamental rights protection, [64] the Court will be able through its standard-setting approach to shape and extend fair trial rights within the European Union and, in building upon ECtHR standards, refine these standards to a level more apt to recognise the role of the joint EU-Member State responsibility to ensure the application of fundamental rights. To that extent, it could even provide an exemplary role for future developments at the ECtHR level. In addition, ECJ judgments will potentially be more influential, precisely because of their capability directly to pierce national legal orders and to be directly enforced by the European Commission. [65] Contrary to ECtHR interventions that take place only after all domestic remedies have been exhausted, [66] the Court can directly intervene in and reshape pending national cases through the preliminary reference procedure.

The judicial dialectic perspective makes clear that the establishment of standards should not be considered as a mere usurpation of power by the Court. It rather presents a tool for the Court to position itself among the multitude of fundamental rights adjudicators in the European legal space. As such, the development of standards for national

procedures highlights a maturation of the EU legal order from a fundamental rights perspective. It also highlights the crucial role remaining with national courts, potentially to the detriment of national legislators. Emphasising judicial dialogue and co-operation among these courts and the ECJ thus becomes more crucial than ever before.

Conclusion

The Court's identified constitutional role [67] allows it to elucidate and ensure the division of powers apparent from the constitutional charter [68] that enables and restrains European integration. That role could include the establishment of standards for national procedures to the extent that the constitutional charter allows. This reflection outlined and framed the Court's standard-setting competences in its recent case law and ***100** observed the shrinking scope of national procedural competence in that regard. It argued that a combined reliance on the principle of sincere co-operation and the binding Charter of Fundamental Rights of the European Union is essential for the Court to legitimise its standard-setting approach to national procedural provisions. The interpretation of the ECHR in that respect remains instructive as a standard-setting basis.

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Footnotes

1 C. Kakouris, "Do the Member States Possess Judicial Procedural Autonomy?" (1997) 34 C.M.L. Rev. 1390.

2 W. van Gerven, "Of Rights, Remedies and Procedures" (2000) 37 C.M.L. Rev. 502.

3 See in general J. Delicostopoulos, "Towards European procedural primacy in national legal systems" (2003) 9 E.L.J. 606.

4 See in detail, M. Claes, *The National Courts' Mandate in the European Constitution* (Oxford: Hart, 2006), pp.120-148. Disapplication occurs in accordance with national law mechanisms establishing the scope of disapplication; see van Gerven, "Of Rights, Remedies and Procedures" (2000) 37 C.M.L. Rev. 502, 509. See also S. Prechal, "Judge-Made Harmonisation of National Procedural Rules: A Bridging Perspective" in J. Wouters, J. Stuyck and T. Kruger (eds), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune* (Antwerp: Intersentia, 2000), p.56.

5 Hereafter referred to as the Court or the ECJ.

6 In contrast with classical minimum negative standards; see M. Eliantonio, *Europeanisation of Administrative Justice? The Influence of the ECJ's Case Law in Italy, Germany and England* (Groningen: Europa Law Publishing, 2008), p.295.

7 On the obsoleteness of the autonomy concept, see M. Bobek, "Why there is no principle of 'procedural autonomy' of the Member States" in B. De Witte and H.-W. Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States* (Antwerp: Intersentia, 2012), forthcoming and available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1614922* [Accessed December 13, 2011].

8 For an overview, see C. Himsworth, "Things fall apart: the harmonisation of Community judicial procedural protection revisited" (1997) 22 E.L. Rev. 291; R. Craufurd Smith, "Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection" in P. Craig and G. De Búrca, *The Evolution of EU Law* (Oxford: Oxford University Press, 1999), pp.304-316; van Gerven, "Of Rights, Remedies and Procedures" (2000) 37 C.M.L. Rev. 502, 506-521; and M. Dougan, "The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts" in P. Craig and G. De Búrca (eds), *The Evolution of EU Law,* 2nd edn (Oxford: Oxford University Press, 2011), pp.407-438.

9 Confirmed in many instances, see among others *Unibet (London) Ltd v Justitie Kanslern* (C-432/05) [2007] E.C.R. I-2271; [2007] 2 C.M.L.R. 30 at [40]. See also T. Tridimas, *The General Principles of EU Law,* 2nd edn (Oxford: Oxford University Press, 2006), p.419.

10 Recently, however, the Court appears to have introduced a new period of restraint in that regard, see A. Arnull, "The principle of effective judicial protection: an unruly horse?" (2011) 36 E.L. Rev. 54.

11 P. Haapaniemi, "Procedural Autonomy: A Misnomer?" in L. Ervo et al. (eds), *The Europeanization of Procedural Law and New Challenges to a Fair Trial* (Groningen: Europa Law Publishing, 2009), p.93.

12 In accordance with the principles of equivalence and effectiveness, see *Rewe Zentralfinanz eG v Landwirtschaftskammer für das Saarland* (33/76) [1976] E.C.R. 1989; [1977] 1 C.M.L.R. 533 at [5]; *Comet BV v Produktschap voor Siergewassen* (45/76) [1976] E.C.R. 2043 at [13].

13 See *Van Schijndel and Van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* (C-430/93 and C-431/93) [1995] E.C.R. I-4705; [1996] 1 C.M.L.R. 801 at [19]. See also S. Prechal, "Community law in national courts: The lessons from Van Schijndel" (1998) 35 C.M.L. Rev. 690.

14 EU law precludes these norms; see *Pontin v T-Comalux* (C-63/08) [2009] E.C.R. I-10467; [2010] 2 C.M.L.R. 2 at [44] for a recent example.

15 The Court continues to rely on this model in its recent case law. See *Pontin* (C-63/08) [2009] E.C.R. I-10467 at [76]; *Alassini* (C-317/08, C-318/08, C-319/08 and C-320/08) [2010] 3 C.M.L.R. 17 at [67]; and *Samba Diouf* (C-69/10) July 28, 2011 at [70].

16 *Impact v Minister for Agriculture and Food* (C-268/06) [2008] E.C.R. I-2483; [2008] 2 C.M.L.R. 47 at [36]. For discussion of the different issues arising in this case, see Arnull, "The principle of effective judicial protection: an unruly horse?" (2011) 36 E.L. Rev. 54, 57-60. *Impact* equally addresses the extent to which individuals can rely on directives before national judges. The Court appears to have taken a strict stance in that regard.

17 *Impact* (C-268/06) [2008] E.C.R. I-2483 at [55].

18 *VEBIC v Raad voor de Mededinging* (C-439/08) [2011] 4 C.M.L.R. 12; M. Frese, "Case Note Case C-439/08, Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC); Judgment of the European Court of Justice (Grand Chamber) December 7, 2010" (2011) 48 C.M.L. Rev. 893.

19 Regulation 1/2003 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty [2003] OJ L1/1.

20 See, for an overview of arguments, *VEBIC* (C-439/08) [2011] 4 C.M.L.R. 12 at [36]-[38].

21 In compliance with the general principle that no one should be judge in his own cause (*nemo iudex in causa sua*).

22 *VEBIC* (C-439/08) [2011] 4 C.M.L.R. 12 at [58].

23 *VEBIC* (C-439/08) at [64]; see also Opinion of A.G. Mengozzi at [68].

24 *VEBIC* (C-439/08) at [59].

25 *VEBIC* (C-439/08) at [57]-[58].

26 *VEBIC* (C-439/08) at [62]-[63]. In so doing, the Court goes beyond *Impact,* in which it only required national courts to extend jurisdiction.

27 As the establishment of EU-wide remedies demonstrates; see W. van Gerven, "Toward a coherent constitutional system within the European Union" (1996) 2 *European Public Law* 96. It could be argued that the ECJ already adopted a similar approach in its 1991 *Emmott* judgment. In that case, the Court determined the starting point of time-limits, stating that "until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time" (*Emmott v Minister for Social Welfare* (C-208/90) [1991] E.C.R. I-4269; [1991] 3 C.M.L.R. 894 at [23]). In that case, however, the Court did not directly develop institutional standards, but could achieve similar results through reliance on or extensive interpretation of existing national rules.

28 On the reserved domain status of national rules of civil procedure, see Craufurd Smith, "Remedies for Breaches of EU Law in National Courts" in *The Evolution of EU Law* (Oxford: Oxford University Press, 1999), p.292.

29 *Deutsche Energiehandels- und Beratungsgesellschaft mbH (DEB) v Germany* (C-279/09) [2011] 2 C.M.L.R. 21 at [16]-[19].

30 *DEB* (C-279/09) [2011] 2 C.M.L.R. 21 at [20].

31 *DEB* (C-279/09) at [26].

32 The Charter states that legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice. See art.47(3) Charter of Fundamental Rights of the European Union, March 30, 2010 [2010] OJ C83/02, 389.

33 *DEB* (C-279/09) at [33].

34 *DEB* (C-279/09) at [59].

35 Craufurd-Smith, "Remedies for Breaches of EU Law in National Courts" in *The Evolution of EU Law* (Oxford: Oxford University Press, 1999), p.296.

36 J.H.H. Weiler, "The Least-Dangerous Branch: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration" in The Constitution of Europe (Cambridge: Cambridge University Press, 1999), p.188.

37 T. Tridimas, "The European Court of Justice and Judicial Activism" (1996) 21 E.L. Rev. 199. More recently, see H. de Waele, "The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment" (2010) 6 *Hanse Law Review* 3.

38 See with regard to remedies, van Gerven, "Toward a coherent constitutional system within the European Union" (1996) 2 *European Public Law* 96.

39 K. Lenaerts, "The Rule of Law and the Coherence of the Judicial System of the European Union" (2007) 44 C.M.L. Rev. 1625.

40 As defined by van Gerven, "Of Rights, Remedies and Procedures" (2000) 37 C.M.L. Rev. 502.

41 See for an overview, A. Mowbray, *The Development of Positive Obligations under the European Convention of Human Rights by the European Court of Human Rights* (Oxford: Hart, 2004), pp.97-125.

42 *Vermeulen v Belgium* (19075/91) (2001) 32 E.H.R.R. 15 ECtHR.

43 K. Pabel, "The Right to an Effective Remedy Pursuant to Article II-107 para 1 of the Constitutional Treaty" (2005) 6 *German Law Journal* 1603.

44 See for an overview, Mowbray, *The Development of Positive Obligations under the European Convention of Human Rights* (Oxford: Hart Publishing, 2004), pp.205-220.

45 See also M. Dougan, "The Treaty of Lisbon 2007: Winning Minds, not Hearts" (2008) 44 C.M.L. Rev. 662; P. Syrpis, "The Lisbon Treaty: Much Ado … But About What?" (2008) 37 *Industrial Law Journal* 231.

46 The first case in which the Court did so was *Seda Kücükdeveci* (C-555/07) [2010] 2 C.M.L.R. 33 at [22].

47 See *European Parliament v Council* (C-540/03) [2006] E.C.R. I-5769; [2006] 3 C.M.L.R. 28 at [38]; *Unibet* (C-432/05) [2007] E.C.R. I-2271 at [37]; *Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet* (C-341/05) [2007] E.C.R. 1-11767; [2008] 2 C.M.L.R. 9 at [90]-[91].

48 On the contribution of the Charter to positive obligations, see O. De Schutter, "The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination", Jean Monnet Working Paper 07/04, p.20, *http://centers.law.nyu.edu/jeanmonnet/papers/04/040701.pdf* [Accessed December 13, 2011].

49 Opinion of A.G. Mengozzi in *DEB* (C-279/09) [2011] 2 C.M.L.R. 21 at [63].

50 Opinion of A.G. Cruz Villalón in *Samba Diouf* (C-69/10) March 1, 2011 at [39].

51 The Court relied on the Charter to establish positive obligations by finding a constitutional basis for the general principle of equal treatment, see *Seda Kücükdeveci* (C-555/07) [2010] 2 C.M.L.R. 33 at [22].

52 On the principle in general, see A. Hatje, *Loyalität als Rechtsprinzip in der Europäischen Union* (Baden-Baden: Nomos, 2001), p.118.

53 J. Temple Lang, "Developments, issues and new remedies -- the duties of national authorities and courts under Article 10 of the EC Treaty" (2004) 27 *Fordham International Law Journal* 1908.

54 On that dual role, see J. Temple Lang, "The duties of cooperation of national authorities and courts under Article 10 EC: two more reflections" (2001) 26 E.L. Rev. 85.

55 As confirmed by art.13(2) TEU, stating that the Union institutions should operate in sincere mutual co-operation.

56 See Temple Lang, "Developments, issues and new remedies" (2004) 27 *Fordham International Law Journal* 1918 for case law references.

57 On the importance of loyal co-operation in the international field, see recently G. De Baere, "'O, Where is Faith? O, Where is Loyalty?' Some Thoughts on the Duty of Loyal Co-operation and the Union's External Environmental Competences in light of the *PFOS* Case" (2011) 36 E.L. Rev. 405.

58 On that issue, see K. Kerameus, "Procedural harmonization in Europe" (1995) 43 *American Journal of Comparative Law* 401. See also M. Tulibacka, "Europeanization of civil procedures: in search of a coherent approach" (2009) 46 C.M.L. Rev. 1557.

59 Directive 2005/85 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13; *Samba Diouf* (C-69/10) July 28, 2011 at [46].

60 *Samba Diouf* (C-69/10) July 28, 2011 at [54]-[55].

61 According to art.35(1) ECHR, an action lodged before the ECtHR is only admissible once all domestic remedies have been exhausted.

62 Article 6(2) TEU poses this as an obligation; see J. P. Jacqué, "The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms" (2011) 48 C.M.L. Rev. 995.

63 T. Lock, "Walking on a tightrope: the draft ECHR accession agreement and the autonomy of the EU legal order" (2011) 48 C.M.L. Rev. 1034.

64 As the ECtHR clarified in its *Bosphorus* line of case law, establishing a rebuttable presumption of sufficient fundamental rights protection; see *Bosphorus v Ireland* (45036/98) (2006) 42 E.H.R.R. 1 ECtHR. On the tenability of that presumption in light of ECHR accession, T. Lock, "EU accession to the ECHR: implications for the judicial review in Strasbourg" (2010) 35 E.L. Rev. 797. See on those issues in detail, T. Corthaut and F. Vanneste, "Waves between Strasbourg and Luxembourg: the Right of Access to a Court to Contest the Validity of Legislative and Administrative Measures" (2006) Y.E.L. 475.

65 Albeit through the infringement procedure of arts 258-260 TFEU; see for more details D. Chalmers et al., *European Union Law: Cases and Materials,* 2nd edn (Cambridge: Cambridge University Press, 2010), pp.315-349.

66 See Article 35 ECHR.

67 See A. Hinarejos, *Judicial Control in the European Union* (Oxford: Oxford University Press, 2009), pp.4-6.

68 For references to the Treaties as a constitutional charter, see among others *Parti écologiste Les Verts v European Parliament* (294/83) [1986] E.C.R. 1339; [1987] 2 C.M.L.R. 343 at [23]; *Re Zwartveld* (C-2/88) [1990] E.C.R. I-3365; [1990] 3 C.M.L.R. 457 at [16]; Opinion 1/91 [1991] E.C.R. I-6079; [1992] 1 C.M.L.R. 245 at [1]; *Beate Weber v European Parliament* (C-314/91) [1993] E.C.R. I-1093 at [8].

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