TRANSFORMING SHIELDS INTO SWORDS: THE *VEBIC* JUDGMENT, ADEQUATE JUDICIAL PROTECTION STANDARDS AND THE EMERGENCE OF PROCEDURAL HETERONOMY IN EU LAW

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ABSTRACT

The Court of Justice's VEBIC judgment obliges national competition authorities to be involved in appellate judicial proceedings against a decision they adopted, even when these authorities act as first instance judges in adopting those decisions. The judgment significantly diminishes Member States' autonomy in the organization of competition law enforcement. It also affects the scope of the general principle of national procedural autonomy. Rather than simply relying on the classical procedural autonomy test, VEBIC demonstrates a preference for judicial protection standards aimed at assessing the adequateness of national procedural rules. These standards, at first sight, facilitate procedural law convergence, but their potentially unbridled application also enables the unaccountable widening of EU involvement in national procedural systems and ensuing critiques of judicial activism. This article therefore proposes a framework of understanding based on procedural heteronomy to structure the Court's adoption of procedural standards. Procedural heteronomy delineates the Court's potentially new stance in procedural law and structures it within a more general procedural ius commune framework that favours the coexistence of and interaction among EU and national standards of adequate procedure.

Keywords: effective judicial protection; *ius commune*; national procedural autonomy; procedural standards; *VEBIC* (C-439/08)

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§1. INTRODUCTION

It is well known that the judicial application of EU law largely remains the province of the Member States' procedural systems, and is supplemented by principles guaranteeing the application of EU law.[1] The scope of interaction between EU principles and national procedural law has traditionally been approached through the lenses of national procedural autonomy and the accompanying principle of effective judicial protection.

Evolution in recent case law questions, more profoundly than ever before, the viability of the national procedural autonomy approach as a framework for understanding EU national procedural relationships. This contribution explores the extent to which discussion of procedural autonomy cannot account for the developments in recent case law and proposes an alternative framework of understanding. It does so by analysing the CJEU's (Court of Justice of the European Union) *VEBIC* judgment[2] and its impact on the principles of national procedural autonomy and effective judicial protection.

Following a succinct analysis of the Advocate General's Opinion and the Court's judgment, it situates *VEBIC* within the body of case law on national procedural autonomy. *VEBIC* affects national procedural autonomy and effective judicial protection in two different but interrelated ways. On the one hand, it reduces the scope of Member States' freedom to organize their national competition authorities in the specific procedural context of decentralization of competition law. On the other hand, the Court's argument implicitly and potentially extends the scope of the principle of effective judicial protection, and as such, could provide the groundwork for a new approach towards assessing national procedural rules. That new approach – identified as an adequate judicial protection standards approach – would allow the Court to intervene more directly in national procedural settings and could provide an important trigger for developing a procedural *ius commune*.

At the same time, however, the adequate judicial protection standards approach potentially endangers the CJEU's legitimacy, as it invites more active – and therefore activist – approaches to judicial lawmaking at the expense of national procedural law frameworks in which judges have been educated. With a view to mitigating judicial activism concerns in adequate judicial protection standards case law, this article reconciles classical national procedural autonomy and post-*VEBIC* adequate judicial protection standards arguments into a procedural heteronomy framework. Procedural heteronomy continues to support the distinctive features of national procedural laws, but equally encapsulates the effectiveness of a common European judicial space, and the need for adequate national procedural rules as constituent elements of that space.

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1 J. Goyder, '"VEBIC": The Role of National Authorities in Appeals against their own Decisions', 2 *Journal of European Competition Law & Practice* 3 (2011), p. 238.

2 Case C-439/08 *VEBIC*, Judgment of the Court of 7 December 2010, not yet reported.

This contribution argues that the procedural heteronomy framework underlying *VEBIC* could provide a legitimate basis for the development of adequate judicial protection standards across the EU that support and alter national procedural rules. At the same time, that approach should be wary of its own limits. Uncovering these limits allows one to frame and avoid critiques of judicial activism otherwise attributed to the Court of Justice of the European Union.

§2. THE *VEBIC* JUDGMENT

A. FACTUAL BACKGROUND AND NATIONAL PROCEDURE

VEBIC addresses 'the extent to which national competition authorities may intervene before national courts where the latter are applying the competition law of the European Union'.[3] More generally, it questions the extent to which national first instance administrative judges should be parties to appellate proceedings against their own decisions, and how far the European Union can go in imposing particular institutional or procedural requirements on national procedural law systems.

The facts of the case can be summarized as follows. VEBIC[4] was (and still is) a Belgian non-profit association set up to represent the interests of bakers and artisanal confectioners. At the time of the dispute, its activities consisted mainly of compiling and distributing information about prices for artisanal bakery products. These products' prices were formerly regulated by law, but had been liberalized in 2004. VEBIC's price distribution activities did not, however, serve an exclusively informational purpose. In distributing a price index, VEBIC apparently monitored the extent to which its members (local associations to which bakers and artisanal confectioners could voluntarily subscribe) respected its own proposed price increases.

The Belgian competition investigative authority (College of Competition Prosecutors or *Auditoraat*), part of the national competition authority (the Belgian Competition Council), commenced an inquiry into VEBIC's activities and submitted a report to the Belgian Competition Council. The report claimed that the index schemes constituted price fixing decisions of an association of undertakings that infringed the 2006 Belgian Law on the Protection of Economic Competition (LPEC).[5] On the basis of national law, the *Auditoraat* proposed to fine VEBIC.[6] Having invited VEBIC to submit comments

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3 Opinion of Advocate General Mengozzi in Case C-439/08 *VEBIC*, delivered on 25 March 2010, not yet reported, para. 46.

4 VEBIC stands for 'Flemish Association of Bakers and Confectioners, Ice-Cream Makers and Chocolate Makers', see www.vebic.be (last visited 21 October 2011).

5 Loi sur la protection de la concurrence économique, coordonnée le 15 septembre 2006, *Belgian Official Journal* 29 September 2006, p. 50613.

6 Opinion of Advocate General Mengozzi in Case C-439/08 *VEBIC*, para. 18–23; Case C-439/08 *VEBIC*, para. 24–33.

on this report, the Council- the adjudicative body of the Belgian Competition Council- prohibited the indexing practices and imposed a fine on VEBIC.[7]

VEBIC initiated appellate proceedings against this decision.[8] In accordance with the LPEC, appeals against a decision of the Council have to be lodged before the Brussels Court of Appeal (hereinafter referred to as the Brussels Court). The Brussels Court has unlimited jurisdiction to review procedure and merits, to rule on alleged restrictive practices and to adjust imposed penalties.[9] It may take into account any developments that have occurred since the Council took its decision. The Brussels Court can also request the *Auditoraat* to carry out supplementary investigations. In addition, the competent Belgian minister may file written observations to the Brussels Court.[10] However, the LPEC does not seem to allow the Competition Council at large to be a party to the proceedings before the Brussels Court, as it remains silent on that matter.[11]

The appellate procedure is remarkable for two reasons. On the one hand, the Brussels Court, a general civil and criminal law court in the Belgian judicial system, is attributed the task of an administrative law appellate judge, a role traditionally assumed by the Belgian Council of State, the highest administrative court.[12] On the other, the appellate procedure does not necessarily involve the competition authority's participation. The procedure before the adjudicative Council takes place between the addressee of the decision and the 'government', represented by the independent prosecuting *Auditoraat*,[13] a part of the Belgian Competition Council. The competition authority thus fulfils both the roles of prosecutor and first instance administrative judge.[14]

Although the LPEC allows every party to the proceedings before the Council to lodge an appeal,[15] the appellate procedure does not directly mandate government intervention.

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7 Decision 2008-I/O-04 of 25 January 2008, Belgian Official Journal 19 February 2008, 10525. Case C-439/08 *VEBIC*, para. 33.

8 Case C-439/08 *VEBIC*, para. 34.

9 D. Gerard, 'EU cartel law and the shaking foundations of judicial review', in D. Gerard et al. (ed.), *Consacré à la concurrence: in honorem Bernard van de Walle de Ghelcke* (Maklu, Antwerp 2011), p. 11–23.

10 Case C-439/08 *VEBIC*, para. 23.

11 For a Belgian perspective, see B. Van de Walle de Ghelcke, 'De afwezigheid van de Raad voor de Mededinging bij hoger beroep tegen zijn beslissingen: is het Europese recht het probleem of de oplossing?', *Tijdschrift voor Belgische Mededinging – Revue de la Concurrence Belge* 4 (2008), p. 40.

12 This role is not however unique, see X. Taton, *Les recours juridictionnelles en matière de régulation: énergie, communications électroniques, audiovisuels, transports, finance et concurrence* (Larcier, Brussels 2010), p. 315.

13 According to the LPEC, the Belgian Competition Authority comprises the *Auditoraat*, the Council and the registry. Day-to-day inspections are carried out by civil servants of the Ministry of the Economy's competition service. See Articles 11 and 34 Belgian LPEC.

14 On the bifurcated role of the competition authority, see N. Petit, 'The judgment of the European Court of Justice in VEBIC: Filling a Gap in Regulation 1/2003', 2 *Journal of European Competition Law & Practice* 4 (2011), Online Advance Access Publication, p. 4 and references made therein. See also F. Rizzuto, 'The procedural implications of VEBIC', 32 *European Competition Law Review* 6 (2011), p. 287.

15 Article 76 § 2 first indent, first sentence LPEC.

The Minister of Economic Affairs can decide to initiate appellate proceedings, without being obliged to do so.[16] The Court could also request a report by the *Auditoraat*,[17] but it would not seem unrealistic for the *Auditoraat* to initiate proceedings itself. According to the Brussels Court however, the *Auditoraat* is perceived as an inherent part of the Competition Council. It, therefore, does not comprise an independent party to the proceedings as intended by the LPEC.[18]

In this particular setting, VEBIC found itself as the only party appearing before the Brussels Court to contest the Council's decision.[19] VEBIC did not object to this situation, but the Brussels Court decided to stay proceedings and refer the case to the Court of Justice, questioning the compatibility of this procedural setting with the provisions of Regulation 1/2003,[20] or more accurately, assessing whether Regulation 1/2003 should be interpreted to allow this kind of procedural setting.[21] It thus invited the Court of Justice to take a stand on national procedural autonomy with regard to the identity of parties to appellate proceedings.[22]

B. THE ADVOCATE GENERAL'S OPINION

In his opinion, Advocate General Mengozzi argued that the effectiveness of the system established by Regulation 1/2003[23] requires national competition authorities to be granted party status in appellate judicial proceedings against decisions they have adopted. Although EU law does not impose an obligation on behalf of the national authorities to participate in every single appellate case, their status as a party to the proceedings should be recognized.[24] The Advocate General based this conclusion on Articles 15 (3) and 35 of Regulation 1/2003 and the principle of effectiveness restraining national procedural autonomy.

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16 Article 76 § 2 first indent, second sentence LPEC.

17 Article 76 § 2 sixth indent LPEC.

18 This was at least the interpretation of the Brussels Court of Appeal in the case, see F. Louis, 'L'arrêt de la Cour de Justice dans l'affaire VEBIC: une opportunité de parfaire l'organisation de l'autorité belge de concurrence', *Tijdschrift voor Belgische Mededinging – Revue de la Concurrence Belge* 1 (2011), p. 14.

19 Case C-439/08 *VEBIC*, para. 37. See on these issues, F. Rizzuto, 'Competition Law Enforcement in Belgium: The System Remains Flawed and Uncertain Despite Recent Reform', 29 *European Competition Law Review* 6 (2008), p. 367–375.

20 Case C-439/08 *VEBIC*, para. 39.

21 According to the Treaty and the CJEU's case law, it cannot directly consider the validity of national law measures, but rather interprets EU law in order to obtain the same result. See K. Lenaerts et al., *Procedural Law of the European Union* (2nd edition, Sweet & Maxwell, London 2006), p. 189–191.

22 The Brussels Court included four questions in its reference, see Case C-439/08 *VEBIC*, para. 39.

23 Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1. Before Regulation 1/2003 entered into force, parallel application of EU and national competition law was already accepted by the CJEU in Case 14/68 *Wilhelm and Others* [1969] ECR 1, para. 3.

24 Opinion of Advocate General Mengozzi in Case C-439/08 *VEBIC*, para. 102.

Firstly, Article 15 (3) of Regulation 1/2003 allows national competition authorities to submit, on their own initiative, written observations to the courts of their Member States deciding on the application of Articles 101 or 102 TFEU. According to the second subparagraph, the Member State's authority may request the relevant court to transmit or ensure transmission of documents necessary for the assessment of the case. This applies in cases where a Member State's court adjudicates in a dispute between individuals or where such a court hears an appeal against a decision of the national competition authority applying Articles 101 or 102 TFEU, or where such a court intends to vary such a decision and apply either of those articles.[25] The European legislature started from the premise that each competition authority had the right to defend its own decisions before the courts of the Member States in whose territory it is established.[26] Therefore, Article 15 (3), the Advocate General maintains, only presents a supplementary mechanism, in cases where no other basis for access to the documents in the case before the national court would exist.[27] Article 15 (3) does not however settle the issue of intervention by national competition authorities in proceedings against the latter's decisions.[28] It merely provides a basis for national competition authorities to intervene in any case relating to the application of Articles 101 or 102 TFEU.[29]

The Belgian LPEC does not allow the Belgian Competition Council or its prosecuting *Auditoraat* to intervene as a *defendant or respondent* in court proceedings.[30] Moreover, the national competition authority does not have to be notified of the national court's intention to raise, of its own motion, the application of Articles 101 and 102 TFEU, even if a first instance case had only been decided on the basis of national competition law provisions. This constellation impedes the national authority from intervening effectively in appellate proceedings against its own decision.[31] The national authority is therefore actually deprived of the right to exercise the option to submit observations according to Article 15 (3).

Secondly, Article 35 of Regulation 1/2003 obliges Member States to designate the competition authority or authorities responsible for the application of Articles 101 and 102 TFEU in such a way that the provisions of the Regulation are effectively complied with. The *effectiveness* of the application of Articles 101 and 102 TFEU is at stake, to the extent that the national competition authority has not been granted the status of a party to the appellate proceedings *which concern the application of the competition rules of the European Union*.[32]

25 Ibid., para. 51.
26 Ibid., para. 54.
27 Ibid., para. 53.
28 Ibid., para. 55.
29 Ibid., para. 56.
30 Ibid., para. 60.
31 Ibid., para. 58.
32 Ibid., para. 62.

Thirdly, the Advocate General relies on the principle of national procedural autonomy and its accompanying requirements of equivalence and effectiveness. He argues that the principles of equivalence and effectiveness restrict the scope of Member States' institutional autonomy.[33] Moreover,

> [E]ach case which raises the question whether a national procedural provision renders the exercise of rights conferred by the Community legal order on individuals impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In that context, the Court considers it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings.[34]

More specifically, national procedural autonomy[35] does not imply that Member States are entirely free to regulate the involvement of national authorities in court proceedings themselves. This case demonstrates that 'specific obligations of national authorities under provisions of Regulation 1/2003 are rendered excessively difficult or in practice impossible'.[36] To the extent that the national competition authority was not a party to the proceedings, the effectiveness of Regulation 1/2003 would be significantly reduced, as a national competition authority would have no way of defending, before the national court hearing the case, the position it had adopted as a public enforcement agency, or of being heard by that court in respect of any issue which that court considered its duty to raise of its own motion.[37]

This is even more relevant considering that the Brussels Court had been granted unlimited jurisdiction, allowing it to be totally 'captive' to the pleas in law and arguments put forward by the appellant undertaking(s) in the appeal proceedings, without allowing the public enforcement agency to be a party to those proceedings.[38] That risk would be likely to compromise the effective enforcement of Articles 101 and 102 TFEU by national authorities[39] and leave the authority unable to challenge any possible incorrect interpretation of EU competition rules.[40] It would also deprive the authority from

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33 Ibid., para. 63.

34 Ibid., para. 65; references were made to Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, para. 33.

35 Opinion of Advocate General Mengozzi in Case C-439/08 *VEBIC*, para. 61. In Case C-60/92 *Otto* [1993] ECR I-5683, para. 14, the CJEU held that 'the application of Articles 85 and 86 of the Treaty by the national authorities is, in principle, governed by national procedural rules'.

36 Opinion of Advocate General Mengozzi in Case C-439/08 *VEBIC*, para. 68. The Competition Council argued that the principle of effectiveness only protects rights derived from EU law and not those from the application of national procedural law.

37 Ibid., para. 72.

38 Ibid., para. 74.

39 Ibid., para. 75, which is especially important since establishing competition law infringements involves complex legal and economic assessments.

40 Ibid., para. 77.

exercising other remedies, such as lodging an appeal on points of law against the Brussels Court's judgment.[41] Neither the voluntary intervention of the competent minister (not the competition authority) nor the request sent for information to the *Auditoraat* could remedy the structural limits imposed by the appellate system.

A particular problem was the court of law status of the Council. As a court of law, according to the Belgian LPEC, the Council's involvement as a party to appellate procedures would infringe the rights of defence of the appellant undertaking(s).[42] The Advocate General responded to this argument in a pragmatic manner, stating that the Belgian Competition Council was a hybrid authority.[43] Whereas the Council acts in a judicial capacity, the *Auditoraat* and the Registry mainly perform administrative duties. The Belgian Competition Council therefore reflects both administrative and judicial features. Its administrative features demonstrate the potential to become a party in full-fledged appellate judicial proceedings.

To the extent that a national competition authority should be considered a party to the appellate proceedings, it should also be granted fundamental rights of defence, such as the right to be heard and the right to be apprised of pleas in law raised by courts of their own motion.[44] As the Brussels Court can substitute its decision for one adopted by the Council, all parties to the first instance proceedings, including the competition authority, need to be heard.[45]

The Advocate General nuanced the potentially significant financial and organizational consequences of national authorities' obligation to participate in appellate proceedings. He argued that there was no requirement for national competition authorities to defend the legality of their decisions in all cases, without exception.[46] As long as they were able to obtain the status of a party to judicial proceedings, the principle of effectiveness would be safeguarded. There is only one small caveat. If a national competition authority were, almost as a matter of course, not to enter an appearance, the general principle of sincere cooperation and the effectiveness of Articles 101 or 102 TFEU would be jeopardized.[47]

This Opinion does not provide a clear-cut answer on what part of the national authority should represent the national competition authority before the Court of Appeal. The Advocate General merely restated the obvious, indicating that in the absence of EU rules, the Member States remain competent to designate a part of the body which functions as a competent authority under the provisions of Regulation 1/2003 and therefore has the power to be a party to judicial proceedings.[48] This construct allows a distinction

41 Ibid., para. 76.
42 Ibid., para. 61.
43 N. Petit, 2 *Journal of European Competition Law & Practice* 4 (2011), p. 4. See also F. Rizzuto, 32 *European Competition Law Review* 6 (2011), p. 287.
44 Opinion of Advocate General Mengozzi in Case C-439/08 *VEBIC*, para. 84.
45 Ibid., para. 86. F. Rizzuto, 32 *European Competition Law Review* 6 (2011), p. 294.
46 Opinion of Advocate General Mengozzi in Case C-439/08 *VEBIC*, para. 88.
47 Ibid., para. 89.
48 Ibid., para. 101.

between administrative and judicial functions within one national competition authority. The Court agreed with this argument, holding that Article 35 (1) of Regulation 1/2003 does leave it to the domestic legal order of each Member State to determine the detailed procedural rules for legal proceedings brought against decisions of competition authorities, but that it does not allow these rules to jeopardize the attainment of the objectives of the Regulation.[49]

With regard to the practical solution offered if the Court of Justice should find that the national competition authority be granted party status, the Advocate General stated that it would be probable that the national legislature would have to adapt the LPEC. The Brussels Court could therefore decide to stay proceedings until the new legislation entered into force, or it could interpret domestic law as far as possible in order to accommodate the Court of Justice's judgment, but without going as far as to impose a *contra legem* interpretation.[50]

C. THE COURT OF JUSTICE'S JUDGMENT

The Court of Justice's analysis is remarkably succinct.[51] At first sight, the judgment fully concurs with the Advocate General's analysis and outcome. The Court relies on the 'capture' argument and agrees that the authority should be entitled to participate as a defendant or respondent in proceedings before a national court which challenge a decision that the authority, or a part of it, has adopted.[52] Nevertheless, it remains for the national competition authorities to gauge the extent to which their intervention is necessary and useful considering the effective application of EU competition law.[53] However, if those authorities were not, almost as a matter of course, to enter an appearance, the effectiveness of Articles 101 and 102 TFEU would be jeopardized.[54] The *principle of procedural autonomy* therefore leaves it to the Member States to allocate enforcement competences and to designate the bodies of the national competition authority which may participate as a defendant or respondent against a decision taken by the authority itself, while at the same time ensuring that fundamental rights are observed and that EU competition law is fully effective.[55] *VEBIC* thus directly neglected the Belgian Competition Council's wish to be absolved from active involvement in appellate proceedings.[56] As for the practical

49 Case C-439/08 *VEBIC*, para. 57.
50 Opinion of Advocate General Mengozzi in Case C-439/08 *VEBIC*, para. 97–98.
51 The Court's considerations on the substance of the questions referred comprise only 13 paragraphs.
52 Case C-439/08 *VEBIC*, para. 59.
53 Ibid., para. 60.
54 Ibid., para. 61.
55 Ibid., para. 63.
56 VEBIC was deemed remarkable because a national competition authority itself asked to have less powers in a decentralized environment, see N. Petit, 2 *Journal of European Competition Law & Practice* 4 (2011), p. 2.

solutions that the Brussels Court should undertake to ensure party status for (part of) the Belgian competition authority, the Court of Justice remained silent.[57]

The Court's reasoning is still refreshing and potentially innovative because it does not explicitly engage the balancing or procedural rule of reason approach that requirements of effectiveness traditionally entail.[58] Indeed, the Advocate General referred to the Court's cases in claiming that a national provision that might render the application of EU law impossible, should be analysed by reference 'to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances'.[59]

VEBIC did not extensively address those features – relying solely on the captive argument, which did not amount to any assessment of national procedure at all – before concluding that effectiveness requires that 'the authority should be entitled to participate, as a defendant or respondent, in proceedings before a national court which challenges a decision that the authority itself has taken'.[60] In doing so, the Court of Justice appears to have developed a *per se* effectiveness standard[61] that superimposes national procedural rules. While previous *per se* violations of effectiveness have to some extent been recognized, they only amounted to the non-application of national procedural provisions.[62] In *VEBIC*, the Court did not merely order the non-application of national rules, but also imposed an alternative institutional solution national judges or legislators should adhere to.[63] *Per se* EU-wide standards could thus intrude on national procedural frameworks without conducting a detailed or even cursory balancing of interests that a principle of effectiveness analysis traditionally requires (see below, §3, C.4).

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57 N. Petit, 2 *Journal of European Competition Law & Practice* 4 (2011), p. 4–5.

58 B. Van De Walle De Ghelcke, 'De betekenis en de draagwijdte van het arrest Vebic van het Hof van Justitie', *Tijdschrift voor Belgische Mededinging – Revue de la Concurrence Belge* 1 (2011), p. 6; P. Craig, *EU administrative law* (Oxford University Press, Oxford 2006), p. 803–806 referred to balancing; S. Prechal, 'Community law in national courts: The lessons from Van Schijndel', 35 *Common Market Law Review* 3 (1998), p. 690; P. Haapaniemi, 'Procedural Autonomy: A Misnomer?', in L. Ervo et al. (eds.), *The Europeanization of Procedural Law and New Challenges to a Fair Trial* (Europa Law Publishing, Groningen 2009), p. 97.

59 Opinion of Advocate General Mengozzi in Case C-439/08 *VEBIC*, para. 65. See also C-430/93 and C-431/93 *Van Schijndel* [1995] ECR I-4705.

60 Case C-439/08 *VEBIC*, para. 59.

61 In US antitrust law, *per se* violations of the Sherman Antitrust provisions permit the courts to dispense with lengthy (economic) investigations into challenged practices, see R. Joliet, *The Rule of Reason in Antitrust Law* (Liège, Martinus Nijhoff 1967), p. 43. Rule of reason analyses require more elaborate balancing.

62 A. Biondi, 'The Rule of Reason and National Procedural Limitations: Is it really reasonable?', in A. Schrauwen (ed.), *Rule of Reason. Rethinking another classic of European legal doctrine* (Europa Law Publishing, Groningen 2005), p. 133–134.

63 In similar cases, the non-application of particular national rules proved sufficient. See A. Biondi, in A. Schrauwen (ed.), *Rule of Reason. Rethinking another classic of European legal doctrine*, p. 134.

§3. NATIONAL PROCEDURAL AUTONOMY AND EFFECTIVE JUDICIAL PROTECTION AFTER *VEBIC*

A. TWO DIMENSIONS OF NATIONAL PROCEDURAL AUTONOMY

The outcome and approach in *VEBIC* affect national procedural autonomy case law in both evolutionary and revolutionary ways. Both methods nevertheless showcase difficulties in grasping the judgment's consequences within a traditional procedural autonomy framework. As the Court seems to have overstepped the boundaries of procedural autonomy more directly than before, the need for a new framework of understanding arises.

First, *VEBIC* alters the relationship between national competition authorities and the European Commission in competition law enforcement. In shaping the institutional design of national authorities, the Court limited the scope of national procedural autonomy in a decentralized enforcement system of EU law. This is remarkable, as competition law decentralization was not supposed to directly harmonize national procedural systems.[64] The Court's stance in *VEBIC* is, however, hardly peculiar in light of related cases on competition law decentralization. Building upon earlier case law and Opinions by Advocates General to justify the imposition of changes on the Belgian legal system, the Court balances the uniform application of EU competition law in differentiated national contexts. As such, the outcome in *VEBIC* goes beyond, but also confirms the evolutionary framework reflected in earlier competition law cases, by imposing additional institutional requirements at the national level. That framework will be further highlighted in §3, B.

Second, *VEBIC* promotes a shift from a principle of procedural autonomy towards a full-fledged principle of effective judicial protection superimposing procedural autonomy and triggering the development of directly applicable European procedural or institutional standards. In taking the idea of effective judicial protection further than before, the Court naturally progressed towards more intrusive EU procedural standards. Doing so subordinates the idea of national procedural autonomy to more encompassing revolutionary 'effective judicial protection' standards. From this perspective, the Court's reliance on national procedural autonomy does not present much autonomy at all. Instead, it transforms procedural autonomy into a justificatory metaphor for more intrusive or active interventions into national procedural regimes.[65] §3, C explores this

64 F. Rizzuto, 32 *European Competition Law Review* 6 (2011), p. 291–292.

65 M. Bobek, 'Why there is no principle of "procedural autonomy" of the Member States', in B. De Witte and H.-W. Micklitz (ed.), *The European Court of Justice and the Autonomy of the Member States* (Antwerp, Intersentia 2011), forthcoming and available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1614922 (last visited 10 August 2011); M. Claes, *The National Courts' Mandate in the European Constitution* (Hart, Oxford 2006), p. 120–148; P. Haapaniemi, in L. Ervo et al. (eds.), *The Europeanization of Procedural Law and New Challenges to a Fair Trial*, p. 114; C. Kakouris, 'Do the

revolutionary dimension and its potential ramifications outside the limited scope of competition law enforcement.

It could be argued that the Court's approach in *VEBIC* mainly presents old problems of judicial activism in a new 'procedural law' focused light. As §3, D will outline, *VEBIC* renders the Court vulnerable to the re-emergence of judicial activism critiques that could threaten its legitimacy in national legal systems. At the same time, the limits of national procedural autonomy and effective judicial protection lead the Court to almost naturally adopt a *VEBIC*-like outcome in particular cases, necessitating a new framework of understanding to grasp these evolutions.

B. EVOLUTION: MEMBER STATE AUTONOMY AND DECENTRALIZED APPLICATION OF EU COMPETITION LAW

1. Member State autonomy from an EU law perspective

VEBIC supplements a growing body of case law that aims to address concerns of uniform EU competition law enforcement in a decentralized environment. Regulation 1/2003 decentralized the application of EU competition law and institutionalized the obligatory parallel application of EU and national competition law by national authorities.[66] National competition authorities have thus gained prominence in the enforcement system of EU competition law, albeit guided by the European Commission. The Regulation's reference to a closer *association* of national competition authorities within the EU's enforcement system[67] reflects subordination or dependence of national competition authorities to the European Commission as the primary enforcer and overseer of EU competition rules. Member States' authorities are guided to facilitate and support the Commission's work, in addition to assuming some responsibilities of their own (applying and enforcing national competition law). The associational metaphor led scholars to predict that decentralized enforcement actually amounts to centralized enforcement in a different guise.[68] Others have contended that the system is asymmetrical, leaving the national competition authorities some discretion in their decision-making practice – they do not have to take Commission instructions on how to decide concrete cases – but still include

Member States Possess Judicial Procedural Autonomy?', 34 *Common Market Law Review* 6 (1997), p. 1389–1412.

66 Article 3(1) Regulation 1/2003. On decentralization prior to Regulation 1/2003, see R. Alford, 'Subsidiarity and Competition: Decentralized enforcement of EU Competition Laws', 27 *Cornell International Law Journal* 2 (1994), p. 271.

67 Recital 6 Regulation 1/2003.

68 Article 3(1) Regulation 1/2003. C. Lucey, 'Unforeseen consequences of Article 3 of EU Regulation 1/2003', 27 *European Competition Law Review* 10 (2006), p. 558–563. See also M. Senn, 'Decentralisation of Economic Law – An Oxymoron?', 5 *Journal of Corporate Law Studies* 2 (2005), p. 427–464; S. Wilks, 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?', 18 *Governance* 3 (2005), p. 431–452.

them as subparts of a more general Commission enforcement framework.[69] In both instances, the Commission therefore remains a *primus super pares*.

The Commission's central role affects the scope of national procedural autonomy in areas not explicitly regulated by Regulation 1/2003.[70] Despite the Regulation's emphasis on the role of national competition authorities and judges, the necessity of uniform application of EU competition rules has consistently been emphasized. In 2009, Advocate General Kokott stated that

> [I]t is of fundamental importance that the uniform application of competition rules in the Community be maintained. Not only the fundamental objective of equal conditions of competition for undertakings on the single market but also the concern for uniform protection of consumer interests in the entire Community would be undermined if in the enforcement of the competition rules of Articles [101 TFEU] and [102 TFEU] significant disparities occurred between the authorities and courts of the Member States. For that reason, the objective of a uniform application of Articles [101 TFEU] and [102 TFEU] is a central theme which runs throughout Regulation No 1/2003.[71]

The General Court equally confirmed the need for uniform application of EU (competition) law. In *France Télécom*, it held that

> [I]t must be observed that Regulation No 1/2003 puts an end to the previous centralised regime and, in accordance with the principle of subsidiarity, establishes a wider association of national competition authorities, authorising them to implement Community competition law for this purpose. However, the scheme of the regulation relies on the close cooperation to be built up between the Commission and the competition authorities of the Member States organised as a network, the Commission being given responsibility for determining the detailed rules for such cooperation.[72]
>
> The Commission in effect has very wide powers of investigation under Regulation No. 1/2003 and is in any event entitled to decide to initiate proceedings relating to an infringement, which entails removing the case from the Member States' competition authorities. The Commission thus retains a leading role in the investigation of infringements.[73]

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69 Coordination takes place in a European Competition Network, see S. Brammer, *Co-operation between national competition agencies in the enforcement of EC competition law* (Oxford, Hart 2009), p. 548. See recently, A. Mateus, 'Ensuring a more level playing field in competition enforcement throughout the European Union', 31 *European Competition Law Review* 12 (2010), p. 516; F. Rizzuto, 'Parallel Competence and the Power of the EC Commission under Regulation 1/2003 according to the Court of First Instance', 29 *European Competition Law Review* 5 (2008), p. 297. See also the Opinion of Advocate General Mazák in Case C-375/09, *Tele 2 Polska*, delivered on 7 December 2010, not yet reported, para. 44–45.

70 P. Oliver, 'Le Règlement 1/2003 et les principes d'efficacité et d'équivalence', *Cahiers de droit européen*. (2005), p. 351–394.

71 Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile* [2009] ECR I-4529, para. 85.

72 Case T-339/04 *France Télécom v. Commission* [2007] ECR II-521, para. 79.

73 Ibid., para. 79.

Therefore, the Commission was authorized to carry out an inspection even if a national authority was already dealing with the matter.[74] This also implies that it cannot be inferred from Regulation 1/2003 that the Commission would be immediately prevented from taking action in the case when a national competition authority had already commenced its own investigation.[75]

Recent case law of the Court of Justice that interprets Regulation 1/2003 also relies on uniform and effective EU law application to the detriment of national procedural autonomy.[76] In *X. BV*, the Court held that the European Commission could intervene in national proceedings that did not directly pertain to issues relating to the application of Article 101 or 102 TFEU.[77] The only requirement imposed was of the coherent application that Article 101 or 102 TFEU requires.[78] The European Commission would thus be allowed to submit, on its own initiative, written observations to a national court of a Member State in proceedings relating to the deductibility from taxable profits of the amount of a fine, or a part thereof, imposed by the Commission for infringement of Articles 101 and 102 TFEU.[79] In *T-Mobile*, the Court of Justice maintained that national courts were required to apply a presumption of causal connection between undertakings' behaviour and anti-competitive practices as developed in the Court of Justice's case law.[80] It considered these presumptions to be a part of substantive EU competition law and therefore imposed them on national courts.[81] These cases demonstrate the importance of uniform and effective application of EU competition rules.

In his Opinion in *Tele2 Polska*, Advocate General Mazák explicated that a national competition authority cannot take a decision stating that a practice does not restrict competition within the meaning of Article 102 TFEU in a case where it has been found, after conducting proceedings, that the undertaking did not engage in abusive behaviour.[82] Only the Commission can take a decision that there has been no infringement of Article

74 Ibid., para. 81. See P. Berghe and A. Dawes, '"Little Pig, little pig, let me come in": an evaluation of the European Commission's power of inspection in competition cases', 30 *European Competition Law Review* 9 (2009), p. 407–423.

75 Case T-340/07 *Evropaïki Dynamiki v. Commission* [2010] ECR II-16, para. 129.

76 It could be argued that Regulation 1/2003 constitutes a 'harmonized' set of EU procedural rules in relation to competition law enforcement, contrary to sectors of law that do not know any procedural harmonization at all, see M. Böse, 'Case Note Case C-45/08, Spector Photo Group NV, Chris Van Raemdonck v. Commissie voor het Bank-, Financie- en Assurantiewezen, Judgment of the European Court of Justice of 23 December 2009, nyr', 48 *Common Market Law Review* 1 (2011), p. 199.

77 Case C-429/07 *X. BV* [2009] ECR I-04833, para. 30. See K. Wright, 'European Commission interventions as amicus curiae in national competition cases: the preliminary reference in X BV', 30 *European Competition Law Review* 7 (2009), p. 509–513.

78 Case C-429/07 *X. BV*, para. 32.

79 Ibid., para. 16 and 40.

80 A. Gerbrandy, '*Case Note, Case C-8/08, T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV, Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit,* Judgment of the Court (Third Chamber) of 4 June 2009', 47 *Common Market Law Review* (2010), p. 1199–1220.

81 Case C-8/08 *T-Mobile* [2009] ECR I-4529, para. 52.

82 Opinion of Advocate General Mazák in Case C-375/09 *Tele2 Polska*, para. 52.

102 TFEU.[83] The Court of Justice confirmed that approach, emphasizing the European Commission's continued and specific role in clarifying the law and ensuring its consistent application throughout the EU.[84]

The aforementioned selections of judgments and opinions reflect a traditional perspective on national procedural autonomy. They deal with the locus of authority to investigate, proceed, conduct and terminate potential competition law infringements. Member States remain free to some extent to determine the composition, nature and enforcement capacities of their competition authorities, the procedural framework in which national and EU competition law are enforced, and the extent to which undertakings can remedy procedural shortcomings.[85] National institutional and procedural autonomy cannot however impede the full effectiveness of competition law enforcement. The ultimate responsibility therefore remains with the European Commission. Member States can be *obliged* to set aside the application of a procedural rule impeding effective realization and uniform application of EU competition law. In doing so, the aforementioned cases and opinions propose ever more intrusive EU intervention in national legal orders.

VEBIC adds to that perspective, requiring specific organizational modifications to national legal systems. According to Rizzuto, 'the absence in regulation 1/2003 of explicit provisions regarding appeal proceedings does not mean that national procedural rules in place in the Member States governing the effective application of the EU substantive competition rules are beyond the reach of the requirements of EU law'.[86] In addressing the procedural framework enabling substantive competition law enforcement, *VEBIC* not only confirms the national competition authorities' subordinate role to the European Commission, but also more fundamentally establishes the Member States' legal systems' obligations to organize their national procedural systems to accommodate for decentralized but almost uniform enforcement of EU competition law.

2. *Procedural autonomy from a national law perspective*

The transformative evolutionary impact of *VEBIC* in this respect can also be approached from a national law perspective. As a result of the outcome in *VEBIC*, the Brussels Court is now faced with different strategies and difficulties that could more easily be tackled through legislative adaptation.[87] The role of the Brussels Court in finding an appropriate solution does not present insurmountable difficulties, nor does it require legislative adaptations.

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83 Ibid., para. 47.

84 Case C-375/09 *Tele2 Polska*, Judgment of the Court of 3 May 2011, not yet reported, para. 29–30.

85 P. Berghe and A. Dawes, 30 *European Competition Law Review* 9 (2009), p. 410.

86 F. Rizzuto, 32 *European Competition Law Review* 6 (2011), p. 293.

87 E. De Lophem, 'L'arrêt *VEBIC* de la Cour de Justice et ses conséquences sur les règles procédurales en droit belge de la concurrence', *Journal des Tribunaux* (2011), p. 245.

The Court leaves it to the Member State to determine how that involvement should be organized, as long as the authority obtains defendant or respondent status. Whereas the Advocate General still considered the need for the authority to be a party, the Court limited its procedural approach to *defendant* or *respondent* status.[88] As such, the Court seems to have transplanted the European approach onto national legal systems to the disfavour of institutional alternatives, such as the Belgian bifurcated administrative-adjudicative system. Decisions adopted by the European Commission – not as such an administrative judge but rather an administrative enforcement agency – can be contested before the courts, where the Commission is the defendant.[89]

That system has also been replicated under Dutch,[90] German,[91] and English law.[92] In national systems where the competition authority operates as both an administrative and adjudicative body,[93] the European approach seems to require a first instance judge to become a party on appeal. This interpretation lacks nuance, as the administrative and adjudicative functions of bifurcated competition authorities are commonly separated and can operate somewhat independently from one another.[94] Representation by the administrative part of the authority would therefore not seem to pose particular problems. From the perspective of Belgian law, mandatory involvement of the *Auditoraat* would thus seem a feasible option. The *Auditoraat* would not be able to file or initiate appellate proceedings, but could be required to represent the Belgian Competition Council in appeals filed against the decisions of the latter's adjudicative body.[95]

This interpretation seems even more readily available from the wording of the Belgian LPEC. According to Article 76 of the LPEC, appellate proceedings can be initiated by all parties before the Council, by the Federal Minister and by all other interested persons. The

88 B. Van de Walle de Ghelcke, *Tijdschrift voor Belgische Mededinging – Revue de la Concurrence Belge* 1 (2011), p. 9.

89 W. Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis', 27 *World Competition* 2 (2004), p. 201–224.

90 See Article 93 of the Dutch Competition Act (Wet van 22 mei 1997 houdende nieuwe regels omtrent de economische mededinging), available at http://wetten.overheid.nl/BWBR0008691/geldigheidsdatum_10–08–2011 (last visited 10 August 2011).

91 The German *Bundeskartellamt's* decisions can be taken before the Court of Appeal (*Oberlandesgericht*) in Düsseldorf, see § 54 (3) and § 63 (2), Gesetz gegen Wettbewerbsbeschränkungen, *Bundesgesetzblatt* I 2005, p. 2114.

92 Competition Appeal Tribunal (CAT), has been created to oversee the application of competition law by diverse regulators, see Part 2 of the Enterprise Act 2002 c40, www.legislation.gov.uk/ukpga/2002/40/part/2 (last visited 10 October 2011).

93 The Belgian and French systems are examples of this approach. Article L464–8 of the French Code de Commerce allows the parties access to the proceedings and the Minister of Economic Affairs to introduce action for the annulment of decisions adopted by the *Autorité de la concurrence* before the Paris Court of Appeal, without referring to any role granted to the *Autorité* in these procedures, see www.legifrance.gouv.fr.

94 See also F. Louis, *Tijdschrift voor Belgische Mededinging – Revue de la Concurrence Belge* 1 (2011), p. 15.

95 F. Louis, *Tijdschrift voor Belgische Mededinging – Revue de la Concurrence Belge* 1 (2011), p. 15.

Auditoraat is not considered a party, as it is a part of the Council adopting the decision. The LPEC, nevertheless, does not deny the *Auditoraat* of party status. At the very least, the *Auditoraat* – a functionally independent investigative authority – could be deemed to be an interested person for the purpose of initiating an appeal. If that interpretation were to be adhered to by the Brussels Court, the *Auditoraat* would be enabled to initiate and act as a defendant in appellate proceedings. As such, the Brussels Court's statutory interpretation of the LPEC could easily comply with the *VEBIC* outcome. To the extent that this interpretation holds, no legislative adaptations would be necessary, as the *Auditoraat's* role could be inferred from the LPEC's current wording. The autonomy of the Member State to create a proper administrative and adjudicative system thus remains in place, but necessitates a particular interpretation of that system.

The requirements imposed by the Court of Justice only relate to EU law, whereas the LPEC provisions are applicable to both EU and national competition law proceedings. Extending the scope of interested persons or parties only to the *Auditoraat* in cases of EU law application means any legislative adaptation would introduce heterogeneity into Belgian law. The *Auditoraat* would be called upon to intervene in appellate proceedings involving EU law but not in those limited to national law analysis. A judicial interpretation of the LPEC as proposed above, on the other hand, avoids this problem, as the Brussels Court interprets procedural provisions applicable to both EU and national law, rather than allowing the legislator to include additional complexities into the Belgian legislation.

In adopting this perspective, the Brussels Court needs not engage in a *contra legem* interpretation of the LPEC, nor does it require the Belgian legislator to overthrow its bifurcated competition authority model. The scope of procedural autonomy is limited more subtly, as the statutory interpretation that the Brussels Court has to adopt has somehow been dictated by concerns of effective judicial protection at the EU level. These EU concerns limit the scope of procedural autonomy and steer it towards a particular Europeanized model of competition law enforcement. At the same time however, they leave some discretion to the Member States as to the mode of implementation of these newly established standards, and do not force a particular institutional model upon Member States.

The operationalization of procedural autonomy is therefore severely modified from a national law perspective.[96] From a norm creating autonomy, the remaining autonomy for Member States is limited to choices among different branches of government to implement EU procedural standards. Procedural autonomy could therefore be retranslated into 'governmental branch division' autonomy. As Advocate General Mengozzi argued, it would nevertheless seem more desirable for judges to implement the standards developed at the EU level, as judges are able to develop more flexible and

96 L. Parret, *Side effects of the modernization of EU competition law* (Wolf Legal Publishers, Nijmegen 2010), p. 148.

gradual solutions into national legal systems.[97] Inter-branch autonomy could therefore also be subject to future limitations.

C. REVOLUTION? ADEQUATE JUDICIAL PROTECTION STANDARDS IN *VEBIC*

VEBIC's revolutionary potential is reflected in both its reliance on and transformation of the concept of national procedural autonomy. Although the Court explicitly invokes the principle of national procedural autonomy in its judgment,[98] the reasoning is actually grounded in the concerns of adequate judicial protection. This section briefly explores the ways in which the Court scrutinizes national procedural standards from an effective, and subsequently, an 'adequate judicial protection' point of view. It will be maintained that in emphasizing effectiveness in national procedural standards, the Court has begun to develop specific adequateness standards with which national procedural systems have to comply. As such, it could operationalize the principle of effectiveness[99] into more concrete adequate protection standards.

1. From national procedural autonomy to effective judicial protection

The principle of national procedural autonomy has long determined the scope of enforcement of EU law based rights at the national level.[100] In the absence of EU rules on the subject, 'it is for the domestic legal system of each member state to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of rights citizens derive (…) from [EU] law'.[101] The concept expresses a constellation of *procedural competences*.[102] In that

97 Opinion of Advocate General Mengozzi in C-439/08 *VEBIC*, para. 100.

98 Case C-439/08 *VEBIC*, para. 63.

99 M. Accetto and S. Zleptnig, 'The Principle of Effectiveness: Rethinking its Role in Community Law', 11 *European Public Law* 3 (2005), p. 388–390.

100 On procedural autonomy, see (recently) A. Arnull, 'The principle of effective judicial protection: an unruly horse?', 36 *European Law Review* 1 (2011), p. 51–70; P. Haapaniemi, in L. Ervo et al. (eds.), *The Europeanization of Procedural Law and New Challenges to a Fair Trial*, p. 89–90. The Court only referred to a *principle* of procedural autonomy for the first time in C-201/02 *Wells* [2004] ECR I-723, para. 65. See also J. Temple Lang, 'Developments, issues and new remedies – The duties of national authorities and courts under Article 10 of the EC Treaty', 27 *Fordham International Law Journal* 6 (2004), p. 1908–1912.

101 Case 33/76 *Rewe* [1976] ECR 1989, para. 5; Case 45/76 *Comet* [1976] ECR 2043, para. 13; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para. 12; Case C-432/05 *Unibet* [2007] ECR I-2271, para. 39; and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, para. 28; Case C-268/06 *Impact* [2008] ECR I-2483, para. 44.

102 W. Van Gerven, 'Of Rights, Remedies and Procedures', 37 *Common Market Law Review* 3 (2000), p. 502; S. Prechal, 'Judge-Made Harmonisation of National Procedural Rules: A Bridging Perspective', in J. Wouters et al. (eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune* (Intersentia, Antwerp 2000), p. 56.

constellation, Member States remain competent to regulate and determine procedural rights and remedies, but the application of the *primacy of EU law* imposes modifications on national procedural systems.[103] The operationalization of primacy has transformed national procedure into an ancillary body of law, the function of which is to ensure the effective application of EU law.[104]

The autonomy of Member States to designate courts and procedural conditions is therefore constrained by requirements of equivalence and effectiveness:

> [T]he detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).[105]

Those requirements or principles[106] institute a dynamic relationship between EU and national procedural competences. Equivalence on the one hand allows deference to Member States' choices in designing procedural rules. Effectiveness on the other emboldens a more nuanced balance of EU and national arguments and facilitates judge-made harmonization of national procedural law.[107] Emphasis on either one of them has shifted the dependence on factual circumstances in different cases.[108] In recent years, effectiveness has become more prominent, incorporating national procedural autonomy into a more general *principle of effective judicial protection*.[109]

In *Johnston*, the Court famously declared that 'Member States must ensure that [Union] rights conferred may be effectively relied upon before the national courts by the persons concerned'.[110] To that extent, the principle of judicial control by national

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103 J. Delicostopoulos, 'Towards European procedural primacy in national legal systems', 9 *European Law Journal* 5 (2003), p. 606–613.

104 C. Kakouris, 34 *Common Market Law Review* 1 (1997), p. 1390.

105 Case C-432/05 *Unibet*, para. 43.

106 M. Ross, 'Effectiveness in the European legal order: beyond supremacy to constitutional proportionality?', 31 *European Law Review* 1 (2006), p. 380 argues in favour of a unitary principle of loyal cooperation.

107 V. Trstenjak and E. Beysen, 'European Consumer Protection law: *curia simper dabit remedium?*', 48 *Common Market Law Review* 1 (2011), p. 102.

108 C. Kilpatrick, 'Turning Remedies Around: A Sectoral Analysis of the Court of Justice', in G. De Búrca and J.H.H. Weiler (ed.), *The European Court of Justice* (Oxford University Press, Oxford 2001), p. 143–147; G. De Búrca, 'National procedural rules and remedies: the changing approach of the Court of Justice', in J. Lonbay and A. Biondi (ed.), *Remedies for the Breach of EC Law* (Wiley, Chicester 1996), p. 37–46. See also C. Himsworth, 'Things fall apart: the harmonisation of Community judicial procedural protection revisited', 22 *European Law Review* 4 (1997), p. 291–311.

109 T. Tridimas, *The General Principles of EU Law* (2nd edition, Oxford University Press, Oxford 2006), p. 418. M. Accetto and S. Zleptnig, 11 *European Public Law* 3 (2005), p. 388 argue that national procedural autonomy is just one particular manifestation of the principle of effectiveness.

110 Case 222/84 *Johnston* [1986] ECR 1651, para. 17; A. Arnull, 36 *European Law Review* 1 (2011), p. 51–70; P. Haapaniemi, in L. Ervo et al. (eds.), *The Europeanization of Procedural Law and New Challenges to a Fair Trial*, p. 102. See also X. Groussot, *General principles of Community Law* (Europa Law Publishing,

courts reflects 'a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the protection of human rights and fundamental freedoms of 4 November 1950'.[111] In *Heylens*, the Court elaborated on this principle, claiming that 'the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right'.[112] Effective judicial protection therefore requires both access to a national court and procedural tools to develop a claim based on EU law. Both aspects of judicial protection have recently been incorporated in the Treaty framework. Article 19 (1) TEU states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. Additionally, Article 47 of the Charter of Fundamental Rights claims a right to an effective remedy and a fair trial.[113] Both Articles are said formally to reflect the principle of effective judicial protection.[114]

It has been widely accepted that the principle of effective judicial protection enabled the Court of Justice to develop a common European *remedies* approach[115] and to set aside *national procedural rules* impeding the effective enforcement of EU law.[116] The extent to which the Court of Justice could directly *impose* institutional or procedural reform on national legal systems through judge-made *'Europeanized' procedural principles* remained unclear from this perspective.[117] It had been accepted that some positive obligations could be imposed on national legal systems to redesign their procedural rules in specific

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Groningen 2006), p. 235–242; K. Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union', 44 *Common Market Law Review* 6 (2007), p. 1625–1659.

111 Case 222/84 *Johnston*, para. 18.

112 Case 222/86 *Heylens* [1987] ECR 4097, para. 14.

113 Article 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 in compliance with the conditions laid down in this Article'.

114 See Case C-279/09 *Deutsche Energiehandels- und Beratungsgesellschaft*, Judgment of the Court of 22 December 2010, not yet reported, para. 29 and Case C-221/09 *AJD Tuna*, Judgment of the Court of 17 March 2011, not yet reported, para. 54. References to effective judicial protection tend to replace the language of national procedural autonomy in the Court's cases, according to P. Haapaniemi, in L. Ervo et al. (eds.), *The Europeanization of Procedural Law and New Challenges to a Fair Trial*, p. 113.

115 W. Van Gerven, 'Bridging the Gap between Community and National Laws: Towards a Principle of Homogeneity in the field of Legal Remedies', 32 *Common Market Law Review* 3 (1995), p. 679–702; M. Ruffert, 'Rights and remedies in European Community Law: A Comparative View', 34 *Common Market Law Review* 2 (1997), p. 306–337; 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* (1st edition, Oxford University Press, Oxford 1999), p. 287–320; W. Van Gerven, 37 *Common Market Law Review* 3 (2000), p. 501–536 and T. Eilmansberger, 'The relationship between rights and remedies in EC law: in search for the missing link', 41 *Common Market Law Review* 4 (2004), p. 1199–1246; G. Anagnostaras, 'The incomplete state of Community harmonisation in the provision of interim protection by the national courts', 33 *European Law Review* 4 (2008), p. 586–597.

116 S. Prechal, *Directives in EC law* (2nd edition, Oxford University Press, Oxford 2005), p. 172.

117 S. Prechal, in J. Wouters et al. (eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune*, p. 43.

circumstances, but the Court of Justice did not develop a framework determining the scope of positive obligations in general.[118] The traditional position is reflected by Caranta's claim that effective judicial protection *'works like a shield, not like a sword: it only forbids the application of an existing domestic provision, but does not dictate a new rule'*.[119]

VEBIC explicitly rebuts that claim and attributes a peculiar *sword* function to effective judicial protection.[120] It extends the realm of positive obligations to organizational aspects of national legal systems and adopts a particular approach towards intruding national legal systems, seemingly applying *per se* procedural standards. The Court of Justice's apparent reliance on, or hospitability towards EU-wide standards in *VEBIC* significantly widens the scope of effective judicial protection, as it subsumes national procedural laws to new standards of adequate judicial organization. In doing so, it builds upon the Court of Justice's judgments in *Unibet* and *Impact,* which addressed the scope of effective judicial protection.

2. *From effective to adequate judicial protection: Re-reading Unibet and Impact*

The Court in *VEBIC* neither recognized new Union rights nor required the creation of EU-wide remedies. It did however compel the adaptation of national procedural frameworks in a very concrete and directed manner. The particular approach that the Court of Justice took in balancing effective judicial protection and national procedural autonomy is both remarkable and innovative. National procedural rules do not have to be 'merely effective' but should be 'adequate' to accommodate both EU rights and remedies. To understand that position, it is useful to briefly restate the distinction between rights, remedies and national procedural provisions.

Union rights reflect a legal position or entitlement a person can enforce against another person or legally defined authority.[121] Both remedies and procedural rules enable those entitlements. Remedies comprise 'classes of action, intended to make good the rights concerned in accordance with procedures governing the exercise of such classes of action'.[122] These classes include claims for damages, interim relief proceedings, declaratory relief proceedings and so forth.[123] National procedural rules mainly support

118 Ibid., p. 43.

119 R. Caranta, 'Judicial Protection against Member States: a New jus commune takes shape', 32 *Common Market Law Review* 3 (1995), p. 706.

120 It could be argued that the CJEU has already adopted a similar approach in its 1991 *Emmott* judgment. In this case, the Court determined that the starting point of time limits cannot begin to run before the transposition time frame elapsed, Case C-208/90 *Emmott* [1991] ECR I-4269, para. 23. Here the Court could rely on extensive interpretation of existing national rules to solve the issue.

121 W. Van Gerven, 37 *Common Market Law Review* 3 (2000), p. 503. On difficulties determining the extent of EU rights, T.A. Downes and C. Hilson, 'Making sense of rights: Community rights in E.C. law', 24 *European Law Review* (1999), p. 121–138.

122 W. Van Gerven, 37 *Common Market Law Review* 3 (2000), p. 503.

123 For an overview, see M. Accetto and S. Zleptnig, 11 *European Public Law* 3 (2005), p. 399.

the enforcement of rights through remedies. They determine the national institutional framework for judges and determine standing, (who can claim his rights, by means of what remedy and when?) the role of parties, judges and a potential *amicus curiae,* standards of review, the scope of *res iudicata* and so on. The hierarchy between remedies (enabling rights) and procedural rules (supporting enabling rights) at first sight justifies different evaluative standards to assess their conformity with principles of EU law. According to Van Gerven, remedies have to be *adequate* to accommodate for EU rights enforcement. Adequateness implies being commensurate with the degree of interference with those individuals' rights.[124]

In contrast, procedural rules would merely have to respect minimum effectiveness conditions in ensuring the adequate application of remedies, but do not have to conform to similar adequateness standards. Effectiveness mainly functions as an instrument to quash national rules that impede the adequate realization of remedies. As such, positive obligations on national legal orders to adapt national procedural rules would not seem justified, unless those obligations would contribute to the adequate application of remedies.[125]

A rigorous distinction between adequate remedies and 'merely effective' procedural rules is difficult to maintain in practice.[126] Both remedies and national procedural rules determine the conditions to enforce EU rights and the application of different standards is difficult to justify.[127] National procedural rules often provide more than just a supporting function. They basically enable individuals to assert their rights and to establish claims within the given framework of remedies. From that perspective, the effectiveness of national rules has to be determined in light of their role in facilitating remedies. Recently however, the Court seems to have deferred the creation of remedies to national legal systems, placing new trust in national procedural provisions, while at the same time subjugating the latter to new adequateness standards. *Unibet* is a landmark case in that respect.

Unibet centred around the access to court of an online gambling services provider after being refused the opportunity to advertise its products in Sweden. The provider claimed that it could not rely on a particular remedy to gain access to a court to challenge

124 W. Van Gerven, 37 *Common Market Law Review* 3 (2000), p. 503.

125 The extent of which remains the scope of case-by-case analysis, S. Prechal, in J. Wouters et al. (eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune*, p. 43.

126 Effectiveness obviously presents an adequateness standard in itself, see M. Accetto and S. Zleptnig, 11 *European Public Law* 3 (2005), p. 389. By referring to adequateness in this contribution, I refer to standards more stringent and demanding than effectiveness.

127 S. Prechal, 'National Courts in EU Judicial Structures', 25 *Yearbook of European Law* (2006), p. 430 does not distinguish between adequate remedies and merely effective national procedural rules.

Swedish administrative decisions related to that refusal.[128] In the dicta to this case, the Court held that the Treaties

> were not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law.
>
> It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law.
>
> While it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection (…) It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right.[129]

Scholars mainly focused on the extent to which the Court of Justice might impose a new remedy on national legal systems, in this case an independent action for declaratory relief in cases where national regulations violate EU law. As different commentators have noted, *Unibet* reflects a scission from the 'no new remedies' principle, because the Court explicitly contemplated the creation of new remedies based on national law in cases where national procedure did not allow individuals to claim a violation of EU law.[130] In *Unibet*, the Court of Justice nevertheless stated that the existence of an action for damages as it existed would appear sufficient to provide for an effective remedy.[131]

Unibet also referred to the autonomy of *national procedural rules*. The Court of Justice at first sight confirmed its previous case law on national procedural autonomy and the principles of equivalence and effectiveness.[132] It nevertheless construed the scope of national procedural provisions extensively so as to allow the effective enforcement of EU rights (and application of EU or Europeanized remedies).[133] In combination with its

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128 Case C-432/05 *Unibet*, para. 17–29; M. Taborowski, 'Case C-432/05 Unibet – Some Practical Remarks on Effective Judicial Protection', 14 *Columbia Journal of European Law* (2007–2008), p. 621–647; A. Arnull, 'C-432/05, Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanselrn, judgment of the Grand Chamber of 13 March 2007', 44 *Common Market Law Review* 6 (2007), p. 1763–1780; X. Groussot and H. Wenander, 'Self-standing actions for judicial review and the Swedish Factortame', 26 *Civil Justice Quarterly* 1 (2007), p. 376–388; G. Anagnostaras, 'The quest for an effective remedy and the measure of judicial protection afforded to putative Community law rights', 32 *European Law Review* 5 (2007), p. 727–739; K. Lenaerts, 44 *Common Market Law Review* 6 (2007), p. 1646.

129 Case C-432/05 *Unibet*, para. 40–42. However, this does not mean that national legal systems would have to provide for interim relief options as self-standing judicial protection mechanisms in any case, see para. 73.

130 G. Anagnostaras, 32 *European Law Review* (2007), p. 733; X. Groussot and H. Wenander, 26 *Civil Justice Quarterly* (2007), p. 377–378; M. Taborowski, 14 *Columbia Journal of European Law* (2007–2008), p. 630–633.

131 Case C-432/05 *Unibet*, para. 56.

132 Ibid., para. 43.

133 Ibid., para. 44.

limited stance on creating new remedies, the extensive interpretation could be read to include a more thorough assessment of the way in which national procedural rules have been designed or structured to accommodate claims based on EU rights.

Unibet thus created a potential shift from merely effective to *adequate* national procedural law. The *Impact* judgment confirmed that shift with regard to rules on the organization of national judicial systems in particular.[134] Ireland transposed an EU directive implementing an EU framework agreement with a two year delay.[135] A civil servants' labour union (Impact) relied on (transposed) provisions of that directive against Irish government departments to claim particular pay and pension benefits for fixed term contract servants.[136] Since the period in which the benefits were claimed also covered the time period in which the directive should have been, but was not transposed, Impact based its claim both directly on the directive[137] and on national law. Claims based on transposed national law were to be lodged before a specialized national tribunal; those based on the directive were not subject to that specific procedure, but had to be submitted to the ordinary courts.[138] The referring Irish judge inquired whether the specialized court was required by EU law to directly apply the directive's provisions, even if national law did not explicitly grant it permission to do so.[139]

The Court of Justice maintained that specialized 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. This would occur if it is established that the applicant's obligation to bring a separate claim at the same time, based directly on the directive before an ordinary court, would involve procedural disadvantages liable to render the exercise of the rights conferred on him by EU law excessively difficult.[140]

More specifically, the Court in *Impact* claimed that 'the requirements of equivalence and effectiveness, which embody the general obligation on the Member States to ensure judicial protection of an individual's rights under Community law, apply equally to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on Community law'.[141] Even though the Court applied similar language long before, it could be argued that *Impact* reflects a different conception of procedural autonomy by specifically introducing a new concept. The Court introduced the concept

134 Parret argues that both judgments are in conflict with one another, see L. Parret, *Side effects of the modernisation of EU competition law,* p. 142.
135 Case C-268/06 *Impact*, para. 4 and 10.
136 Ibid., para. 18–20.
137 For an overview on the invocability of directives, S. Prechal, *Directives in EC law*, p. 216–270 and P. Craig, 'The legal effects of directives: policy, rules and exceptions', 34 *European Law Review* 3 (2009), p. 349–377.
138 Case C-268/06 *Impact*, para. 15–16.
139 Ibid., para. 36. See Arnull, 36 *European Law Review* 1 (2011), p. 57–60.
140 Ibid., para. 55.
141 Ibid., para. 47.

of *procedural disadvantages* to justify a widening of the scope of review by specialized national courts.[142] It considered a particular set of elements to be disadvantageous, should individuals file claims based on Union law in a different court: duration, cost, and rules of representation. These disadvantages would impede the effective application of national procedural provisions to accommodate claims based on EU law.

The concept of procedural disadvantages introduces 'adequate judicial protection' concerns. They provide for procedural 'rule of reason' effectiveness criteria, and also break new ground in providing the Court with a yardstick to develop standards assessing national procedural adequateness. Procedural disadvantages allow the Court to directly scrutinize national procedural provisions according to what the Court perceives as advantageous procedural standards. With reference to procedural disadvantages, the Court thus creates its own opportunities to translate adequate judicial protection standards into adequateness benchmarks regarding the organizational requirements and procedures applied by those courts. The *Impact* judgment did not go this far, emphasizing that Member States remain free to create and organize specialized courts. *Impact* nevertheless reflects a willingness to scrutinize the organizational and procedural conditions in which national courts operate. As a result, *Impact* could potentially be read to incorporate preferences for EU-wide adequate judicial protection standards. In creating one particular standard, *VEBIC* implicitly endorsed those preferences.

3. *VEBIC: national rules in a 'Europeanized' institutional and procedural context*

VEBIC introduces a formidable application of an emerging 'adequate standards' jurisprudence. Whereas *Unibet* and *Impact* implied that national procedural rules should be judged according to more specific standards, *VEBIC* elaborates on what kind of rules actually represent adequate procedural regimes. Building on the effective application of EU law, the Court of Justice claims that national authorities, even administrative judges, should be able to act as a party to appellate competition proceedings as a matter of 'Europeanized' national procedural law. As such, adversarial procedures could be guaranteed at all review stages. The theoretical possibility of a national authority acting in a 'party to appellate proceedings' capacity thus reflects a minimum requirement that should *per se* be accommodated for, before one could even consider the effective application of EU law. As long as the principle of 'competition authority as party to the proceedings' is complied with, the Court of Justice allows national competition authorities to make a reasonable case-by-case assessment on whether or not to assert its status as a party to the proceedings.[143]

142 Ibid., para. 51.
143 Case C-439/08 *VEBIC*, para. 60–61.

VEBIC as such presents a double claim. On the one hand, Member States can be dictated a particular principle (a national [competition] authority shall be a party to the appellate proceedings).[144] This principle does not directly aim to protect the subjective interests of litigants, but rather the concrete application of EU law as a whole.[145] On the other hand, the effective application of EU law does not require mandatory application of this principle in every appellate case. Instead, a procedural rule of reason analysis will be applied to assess whether or not national competition authorities do indeed effectuate their party status in light of the particularities of the national legal system.[146]

The following table presents the evolution in case law from *Unibet* to *VEBIC*. Whereas the scope of EU intervention in relation to rights and remedies has remained stable in general,[147] the scope of judicial review of national procedural rules encountered significant modifications. Since *VEBIC* specifically addressed the way in which national appellate procedures should be organized, a distinction between organizational and procedural aspects of national legal systems seems appropriate. Organizational aspects determine the status of courts and parties to the proceedings, including standing. Procedural aspects really delve into the practicalities of procedural operations: rules on time limits, *res iudicata* and scope of review are the leading examples.[148]*VEBIC* has been instrumental in establishing a *per se* principle of 'national competition authority party status'.

In laying out a potential *per se* approach towards organizational aspects of national procedure, the Court may have chosen to adopt a clearer perspective on accepting distinct, positive standards to guide the organization and procedural requirements of national legal systems. Although the classical procedural 'rule of reason' analysis allowed the Court of Justice to balance EU principles and national law requirements to assess the tenability of national rules, *per se* requirements allow the Court of Justice to directly impose procedural standards on national judges. The extent or development of *per se* procedural standards that require Member States to take positive action provides an additional regulatory tool for the Court of Justice to endorse adequate judicial protection in national courts.

144 Contrary to R. Caranta, 32 *Common Market Law Review* 3 (1995), p. 706.

145 However, in doing so, it indirectly contributes to individual judicial protection. See B. Van de Walle de Ghelcke, *Tijdschrift voor Belgische Mededinging – Revue de la Concurrence Belge* 1 (2011), p. 7.

146 The Court does not explicitly make this argument. Nevertheless, para. 60 allows the national competition authority to consider the extent to which their intervention is necessary and useful with regard to the effective application of EU competition law.

147 The Court's approach in *Unibet* could therefore inaugurate a new era of judicial restraint, see A. Arnull, 36 *European Law Review* 1 (2011), p. 54.

148 P. Haapaniemi, in L. Ervo et al. (eds.), *The Europeanization of Procedural Law and New Challenges to a Fair Trial*, p. 95. See also P. Girerd, 'Les principes d'équivalence et d'effectivité: encadrement ou désencadrement de l'autonomie procédurale des Etats membres?', 38 *Revue Trimestrielle de Droit Européen* (2002), p. 76.

	Rights	Remedies	Procedural aspects	Organizational aspects
Unibet (C-432/05)	EU	National or EU	National, potentially Europeanized	National, potentially 'Europeanized'
Impact (C-268/06)	EU	National or EU	National (Rule of reason, preferably Europeanized)	'Preferably' Europeanized (procedural disadvantages)
VEBIC (C-439/08)	EU	National or EU	National; *Per se* sword principles? Rule of reason	Europeanized *per se* sword principles
				Rule of reason shield

4. *Reconstructing the Court's approach in VEBIC: bridging effectiveness and adequateness*

VEBIC integrates concerns of effective judicial protection into a framework of adequate procedural standards. Procedural standards determine how national procedural systems should operate in order to accommodate EU rights and remedies. The recognition of *per se* procedural principles allows the Court of Justice to immediately strike down a national provision that does not guarantee those adequateness standards.[149] The non-application of inadequate national provisions does not, however, present a major innovation. The *Simmenthal* case law firmly established that kind of direct, *per se* EU intervention.[150] Additionally, *VEBIC's per se* intervention allows the Court to impose mandatory requirements of adequate protection on national legal systems. Rules on who should be a party and other types of organizational or procedural rules can thus be imposed for the sake of adequate judicial protection.

Alternatively, *per se* rules impose particular institutional requirements that do require adaptations of national procedural systems, but they do not as such regulate day-to-day procedural operations. The 'rule of reason' balancing test continues to determine the extent to which the Court and national legislators or judges investigate the proper context and application of national procedural rules.[151] In the particular context of *VEBIC*, balancing implies that national authorities need not be a party to concrete appellate

149 See A. Biondi, in A. Schrauwen (ed.), *Rule of Reason. Rethinking another classic of European legal doctrine*, p. 133–134.

150 Case 106/77 *Simmenthal* [1978] ECR 629. See also C. Himsworth, 22 *European Law Review* 4 (1997), p. 298.

151 S. Prechal, in J. Wouters et al. (eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune*, p. 44.

proceedings, yet should always have a possibility to act in that capacity, and should not as a matter of course neglect that role. As such, in addition to recognizing adequate law in the books, the Court in *VEBIC* imposes minimum effectiveness requirements on the law in action. Combined, *per se* standards and procedural 'rule of reason' analysis shape an ever more 'Europeanized' procedural setting for national courts to consider.

The path to procedural *per se* principles is likely to provoke additional discussions in at least three respects. Firstly, the relationship between adequate procedural rules and minimally effective procedural operations is at best unclear. *Per se* rules seem to justify the general interest of the European Union,[152] but the general interest appears to be confined to what the Court declares it to be. That would also imply that the Court faces almost no theoretical boundaries to create *per se* procedural principles. Unfettered extension of *per se* standards would impose the Court of Justice's view on adequate protection on Member States' legal orders, without clear justifications in doing so. Reflections on the boundaries of the EU general interest are therefore most welcome. In §4, a framework that facilitates this exercise is outlined.

Secondly, the scope of application of positive obligations attached to *per se* rules is uncertain, as the Court in *VEBIC* merely applied this analysis to organizational aspects or institutional rules of national procedural systems. Specific procedural rules, such as on time limits and *res iudicata* could also be affected by the Court's reasoning. So far, the Court has not attached any significant difference to organizational and procedural aspects of national systems.[153] Although *VEBIC* only addresses 'organizational' aspects, the Court has not offered any justification for the difference in treatment among categories of rules that used to be treated equally and are inherently difficult to distinguish.[154] Therefore, the Court's argument does not explicitly foreclose a similar *per se* approach towards other procedural rules.[155] *VEBIC* could potentially provide a basis for an ever more intrusive scrutiny of national procedural rules beyond the traditional shield function of effective judicial protection.

Thirdly, *VEBIC* further complicates the divide between the classical procedural autonomy/effectiveness test and more directly interventionist *Simmenthal* effectiveness standards.[156] Scholars have long recognized two strands of effectiveness limitations on national procedural autonomy. The classical effectiveness standard would allow for a procedural 'rule of reason' balancing approach, emphasizing the roles of procedural

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152 Case C-439/08 *VEBIC*, para. 56. Article 5 TEU also reflects the general interest requirements, see J. Temple Lang, 27 *Fordham International Law Journal* 6 (2004), p. 1906.

153 P. Haapaniemi, in L. Ervo et al. (eds.), *The Europeanization of Procedural Law and New Challenges to a Fair Trial*, p. 94–96.

154 P. Girerd, 38 *Revue Trimestrielle de Droit Européen* (2002), p. 76–77.

155 The *DEB* judgment seems to have confirmed this point, see Case C-279/09 *Deutsche Energiehandels- und Beratungsgesellschaft*, para. 29. See §4.

156 On this divide, see G. De Búrca, 'National procedural rules and remedies: the changing approach of the Court of Justice', in J. Lonbay and A. Biondi (ed.), *Remedies for the Breach of EC Law*, p. 45.

provisions in their particular national context.[157] The *Simmenthal* case seemed to reflect a more aggressive, unbalanced approach, engendering a more direct non-application of national law contravening EU rules.[158]

While both approaches reflect some kind of balance between EU and national law provisions,[159] the appropriate divide among them is unclear and different explanations have been provided in this respect. Most fundamentally, it could be argued that the principle of effectiveness protects the objective application of EU law (*recours objectif*) and not the interests of private parties based on EU law (*recours subjectif*). To the extent however, that private parties cannot directly rely on EU law from which they might benefit, the objective application of EU law is further jeopardized, thus justifying more intense interventions in national legal systems.[160] *VEBIC* at first sight presents a *Simmenthal* situation of jeopardized objective application of EU law, as it was the Brussels Court that invoked the non-party status of the national competition authority and not the (private) parties to the appellate proceedings. Indeed, these parties could benefit from capturing the national court without facing contradictory arguments from the competition authority that adopted the decision.[161] At the same time however, *VEBIC* goes beyond both classical and *Simmenthal* by appropriating a sword function to effective judicial protection. It cannot be subdivided into either the classical or *Simmenthal* categories, but rather seems to propose a categorization distinct from and superimposed to the shield functions effectiveness concerns both approaches reflect.[162]

D. ADEQUATE JUDICIAL PROTECTION STANDARDS AND THE EMPOWERMENT OF JUDICIAL ACTIVISM?

The judicial development of procedural *per se* standards as an additional category of procedural intervention raises obvious questions about the legitimacy of the Court's policy-making role.[163] Standards created by a Court that escape classical avenues of political accountability not only seem problematic from a democratic legitimacy point of

157 S. Prechal, 35 *Common Market Law Review* 3 (1998), p. 690.

158 See Case 106/77 *Simmenthal*. See also W.W. Geursen, 'Handhaving van het objectieve gemeenschapsrecht via het effectiviteitsbeginsel vs. subjectieve rechtsbescherming via het nationaalrechtelijke verbod op reformatio in peius', *Nederlands Tijdschrift voor Europees Recht* (2009), p. 131–139.

159 F. Jacobs, 'Enforcing Community rights and obligations in national courts: striking the balance', in J. Lonbay and A. Biondi (ed.), *Remedies for the Breach of EC Law*, p. 32.

160 W.W. Geursen, *Nederlands Tijdschrift voor Europees Recht* (2009), p. 138.

161 See Case C-439/08 *VEBIC*, para. 58 for that argument.

162 This distinction relates to one made in relation to the direct effect between *invocabilité d'exclusion* and *invocabilité de substitution*, M. Claes, *The National Courts' Mandate in the European Constitution*, p. 80–81; B. De Witte, 'Direct Effect, Primacy and the Nature of the Legal Order', in P. Craig and G. De Búrca (ed.), *The Evolution of EU Law* (2nd edition, Oxford University Press, Oxford 2011), p. 329–340.

163 See among others M. Cappelletti, 'Is the European Court of Justice Running Wild?', 12 *European Law Review* 1 (1987), p. 3–17 and T. Tridimas, 'The European Court of Justice and Judicial Activism', 21 *European Law Review* 3 (1996), p. 199–210; H. de Waele, 'The Role of the European Court of Justice

view, they also express concerns on what institution should engage in transformative norm creation.[164] Claims about the Court of Justice being activist therefore loom large. Judicial activism mostly connotes a negative appraisal for a Court overstepping the boundaries of its mandate.[165] The creation of standards that tend to replace or significantly modify the institutional and procedural framework of Member States' procedural contexts could indeed be considered activist and therefore detrimental to the legitimacy of the Court of Justice, as they allow the Court to continue along this path. The wording and structure of *VEBIC* do not as such incorporate any limits to the Court's standard setting approach. Indeed, no particular clues are offered with a view to understanding the scope of procedural standards and the restraints to that approach. Taken in the abstract, the Court could indeed develop new procedural standards at will under its approach adopted in *VEBIC*, which would qualify this evolution as a bad tendency towards the further encroachment of Member State sovereignty.

On the other hand, a carefully designed set of judge-made standards could bring more certainty to national legal orders and provide policymakers with tools to develop a common procedural law framework.[166] As such, standard setting by the Court of Justice provides new input for developing an ever closer Union of converging legal orders. To attain such a goal, however, it would be advisable to consider a framework in which limits to unfettered activism could at least be imagined. The following section outlines the basics of a possible approach in that regard.

§4. PROCEDURAL HETERONOMY AS AN ALTERNATIVE FRAMEWORK OF UNDERSTANDING

The foregoing analysis elucidates a remarkable contradiction in the concept of national procedural autonomy. Originally conceived to avoid the creation of Europeanized procedural rules and to stretch the extent of national procedural rules as an ancillary framework for enforcing EU rights (and remedies), *VEBIC* now engages procedural autonomy language to justify the creation of EU-based principles. Though, in doing so, the Court fundamentally oversteps the boundaries of the procedural autonomy

in the Integration Process: A Contemporary and Normative Assessment', 6 *Hanse Law Review* 1 (2010), p. 3–26.

164 J. Weiler, 'The Least-Dangerous Branch: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration', in J. Weiler (ed.), *The Constitution for Europe* (Oxford University Press, Oxford 1997), p. 188.

165 On difficulties of delineating activism, see F. Easterbrook, 'Do Liberals and Conservatives Differ in Judicial Activism?', 73 *University of Colorado Law Review* 4 (2002), p. 1401.

166 M. Accetto and S. Zleptnig, 11 *European Public Law 3* (2005), p. 398; M. Tulibacka, 'Europeanization of civil procedures: in search of a coherent approach', 46 *Common Market Law Review* 5 (2009), p. 1536; J. McKendrick, 'Modifying Procedural Autonomy: Better Protection for Community Rights', 4 *European Review of Private Law* 4 (2000), p. 586.

framework that existed up until now. It therefore seems appropriate to reframe arguments on national procedural autonomy in a more general framework, based on a different conception of procedural interactions. It is therefore argued that procedural *heteronomy* better captures the Court's approach to national procedural standards. That framework not only allows for a better understanding of the Court's approach, it also invites reflection on the limits of that approach with a view to overcome judicial activism critiques.

A. PROCEDURAL HETERONOMY AS A FRAMEWORK OF UNDERSTANDING

Kelsen referred to heteronomy as 'a general norm by which an individual is obligated without [or] even against his will'.[167] Heteronomy thus presupposes some kind of direct, top-down obligation that constrains a national system's autonomy. The development of a *ius commune europaeum* in procedural law can be better understood through the lens of heteronomy. This subsection assesses the *concept* of national procedural heteronomy and its role as a *principle* guiding judicial practice before national courts operating in an EU context.

Procedural heteronomy does not exclude or replace the concept of national procedural autonomy, but reconsiders the boundaries and limits of national procedural intervention. It adds a different, supplementary layer to national and EU interactions regarding procedural law. The 'heteronomy' *concept* captures at least three dimensions: subordination, empowerment and cooperative federalism.

Firstly, procedural heteronomy captures national law's subordination to, or at least dependence on, EU rules and principles. This would hardly be surprising, as it is exactly what national procedural autonomy scholarship has been proclaiming for years. Within the scope of application of EU law,[168] national procedural law remains an ancillary body of law to the enforcement of EU rights.[169] To some extent, this would imply that national procedural rules were already *obligated* to comply with EU requirements, but those requirements only entailed negative obligations (obligations to set aside contrary national provisions) or semi-positive obligations (obligations to extend the scope or range of a particular procedural provision to accommodate claims based on EU rights or to ensure the effective application of EU law and EU remedies). This dimension resembles the current state of 'national procedural competence' and is aligned with the Court's approach in *Unibet*.[170] It does not as such require national procedural rules to be

167 H. Kelsen, *General Theory of Law and State* (translated by A. Wedberg), (Harvard University Press, Cambridge 1945), p. 205.

168 For particular problems in this regard, see Editorial, 'The scope of application of the general principles of Union law: An ever expanding Union?', 47 *Common Market Law Review* 1 (2010), p. 1589–1596.

169 C. Kakouris, 34 *Common Market Law Review* 5 (1997), p. 1390.

170 Case C-432/05 *Unibet*, para. 44.

designed beyond the extension of existing rules to accommodate EU claims, even though it may require the provision of new EU remedies.

Secondly, procedural heteronomy integrates the classical procedural conception within a framework of 'institutional heteronomy'.[171] *VEBIC* imposes a direct positive (*per se*) obligation on the national legal order to redesign its appellate procedure so as to allow the competition authority to be a party to the proceedings. A standard granting party status in appellate actions against administrative (or administrative-judicial) decisions, even if taken by an administrative authority that acts as a judge according to national law, cannot just be implemented by relying on the non-application or extended application of national procedural rules. It requires the creation of new procedural rules or principles that often – especially in civil law legal orders – significantly transcend the scope of direct judicial intervention. National judges are obliged, against their will but based on the expertise they have developed, to provide inroads for legislative or judicial reform of national procedural rules or principles.

In the particular circumstances of *VEBIC*, reform implied developing alternative routes to allow national authorities to be a *defending or responding party* to the appellate proceedings.[172] On a more general level, procedural heteronomy promotes judge-made institutional standards or rules that are imposed on national legal orders *per se*: these rules are deemed essential to guarantee EU-wide adequate judicial protection and therefore have to be incorporated in national procedural regimes. These rules or principles apply on top of classical national rules and have to be respected before the Court of Justice engages in a full-fledged 'rule of reason' analysis with regard to national procedural rules that do not counteract the procedural *per se* rules. These rules therefore restrain national legal orders in their liberty to design a judicial system that accommodates EU law claims.

Thirdly, procedural heteronomy theoretically presents limitless opportunities for judge-made 'Europeanized' procedural standards. So far, it remains unclear whether and to what extent the Court would be willing or comfortable to develop procedural standards. Similar concerns about the limitlessness of the Court of Justice's intervention have already been voiced, regarding the Court's application of the principle of effectiveness through procedural rule of reason. While this argument justifies the limits on the Court's unfettered expansionism in developing *per se* rules, the very concept of procedural heteronomy incorporates limits itself. The concept of procedural heteronomy indeed reflects a particular approach towards cooperative *federalism:*[173] National legal

171 Institutional heteronomy is based on the concept of institutional autonomy. Institutional autonomy is argued to constitute an umbrella principle retaining Member States' sovereignty regarding their own institutional organization. See P. Haapaniemi, in L. Ervo et al. (eds.), *The Europeanization of Procedural Law and New Challenges to a Fair Trial*, p. 90.

172 Case C-439/08 *VEBIC*, para. 59.

173 R. Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law* (Oxford University Press, Oxford 2009), p. 391.

orders do not only function as ancillary enforcement institutions in the establishment of EU law, they equally share responsibility and constitute parts of a level playing field between different EU and national actors.

From that perspective, the Court of Justice will only intervene *per se* in situations that cannot otherwise be adapted to the requirements of EU integration and (quasi-) uniform application of EU law. Cooperative federalism imposes on the Court of Justice requirements of subsidiarity and proportionality traditionally linked to EU legislative policy in non-exclusive competences. Member States, on the other hand, bear a special responsibility in providing adequate national procedural rules that conform both to *per se* rules and those that can withstand 'rule of reason' scrutiny. To limit the scope of *per se* rules or principles, Member States can equally engage the EU's legislative process to provide for partial harmonization of particular elements of institutional or procedural organization.[174]

The conceptual dimensions can be translated into a dynamic principle of judicial practice. As a *principle*, procedural heteronomy involves a two-tier analysis, the extent and content of which is largely determined by the Court of Justice, the EU-lawmaking process and the specific national procedural rules at stake. The first step is that the Court of Justice takes the procedural rule of reason as applied by the principle of effectiveness as a basis for evaluating the adequateness of national procedural and institutional rules. The Court's evaluation nevertheless occurs within a more elaborated framework of adequate judicial protection. *VEBIC* presented a first step in providing the boundaries of that framework. The second step is that the Court guards those boundaries through a limited set of *per se* rules or principles, such as the one demonstrated in *VEBIC*. Only in cases where those principles have been respected will the Court commence its 'rule of reason' analysis, according to its well-known case law. As such, procedural heteronomy compels the Court of Justice and the national legal orders to develop a mindset of cooperative awareness that allows supranational judges to directly interfere with national institutional and procedural settings when national procedural regimes do not provide adequate judicial protection.

Both as a concept and as a principle of judicial practice, national procedural heteronomy presents a way forward that provides specific, cooperative federalism-based checks and balances to counteract unfettered judicial creation of EU procedural rules or the uneasy continuing reliance of national legal orders on an outdated conception of national procedural autonomy. Procedural heteronomy does not represent a radical break from past conceptual practice. Instead, it provides an adapted framework to understand EU and national procedural interactions. The analysis above could be recaptured in a negative dimension and a positive dimension of procedural heteronomy. The negative

174 See J. Jans, 'Harmonization of National Procedural Law via the Back Door? Preliminary Comments on the ECJ's Judgment in *Janecek* in a Comparative Context', in M. Bulterman et al. (eds.), *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot* (Kluwer, Alphen a/d Rijn 2009), p. 267–275.

dimension presents the shield of effective judicial protection and allows for the non-application of national procedural rules. The positive dimension justifies more direct, top-down intervention and therefore provides a sword function. A combination of both dimensions guides, shapes and circumscribes procedural discourse, as the following table shows:

Procedural Heteronomy	**Concept**	**Principle**
Negative Dimension	National rules, mitigated by equivalence/effectiveness	Procedural rule of reason or *per se* 'shield'
Positive Dimension	Judge-made Europeanized rules	Core *per se* 'sword' principles

The Court's judgment could indeed be captured within this framework, which would also explain why the Court only relies on the creation of procedural principles in limited circumstances. At the same time however, the procedural heteronomy framework imposes particular limits on the scope of judge-made procedural principles. Even though these principles supposedly reflect the core standards of adequate procedure, a procedural heteronomy framework requires that particular values and principles that allow the Court to develop standards in particular circumstances are being worked out, primarily by policy makers and scholars. These principles will help the Court in determining the scope of *per se* procedural standards.

In case law on national procedural autonomy post-dating *VEBIC*, the Court appears to have continued its preference for standards in at least one additional case. In *DEB*, the Court declared that the principle of effective judicial protection 'must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, *inter alia*, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer'.[175] The Court established the principal accessibility of national legal aid regimes for legal persons in all circumstances. The effectiveness of the application of that principle nevertheless remains to be assessed by the national courts:

> In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts.[176]

175 Case C-279/09 *Deutsche Energiehandels- und Beratungsgesellschaft*, para. 59.
176 Ibid., para. 61.

Similarly to *VEBIC*, the Court distinguishes between the existence of an effective judicial protection standard and its application in a particular case setting.[177] The Court thus continues to rely on an adequate judicial protection standards approach – in this case the extension of legal aid to particular corporate legal forms – as explicated within a procedural heteronomy framework. Again, the requirements of adequate national procedure seem to impose on the creation of a new standard – legal aid for corporations as a matter of EU law – without justifying why this choice was made. Procedural heteronomy nevertheless presupposes the existence of that set of principles.

B. PROCEDURAL HETERONOMY AND *IUS COMMUNE*

The analysis above makes it clear that the development of standards is a positive evolution. Procedural standards would significantly foster the creation of a European procedural *ius commune*. Based upon the standards developed by the Court of Justice and the interaction of these standards with national procedural systems, national procedural laws could gradually converge towards a common European procedural framework. An understanding of procedural heteronomy would indeed limit the scope of standard setting by the Court of Justice to those cases in which these standards are necessary to make the procedural heteronomy framework work, and whenever these standards are necessary to promote the EU's general interest.

Somewhat paradoxically, the EU's general interest should be determined in light of national procedural laws. Diverse national procedural laws provide a set of principles[178] that constitute the inspiration for EU-wide procedural standards. The imposition of particular procedural standards on Member States' legal orders could thus be legitimated by their grounding in particular national legal systems and the necessities of adapting these systems to accomplish more perfect integration. As was demonstrated with respect to the *VEBIC* judgment, the Brussels Court could leave the institutional operations of the system in place by proposing a different statutory interpretation of the LPEC (see §3, B.2). The values underlying a more perfect integration should be developed by the Court of Justice on a case-by-case basis, respecting the limits the heteronomy framework entails.

The adequate procedural standards approach thus relies on and enables the development of a European procedural *ius commune*[179] in three respects. The first is that

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177 *DEB* differs from Case C-208/90 *Emmott*, in that it will take more than just a stretched interpretation of national procedural rules to accommodate the CJEU's requirements. National procedural regimes will have to be redesigned to ensure that legal persons can obtain legal aid in particular circumstances.

178 M. Tulibacka, 46 *Common Market Law Review* 5 (2009), p. 1536; M. Accetto and S. Zleptnig, 11 *European Public Law* (2005), p. 382.

179 See on procedural *ius commune*, C.H. Van Rhee, 'Civil Procedure: a European *Ius Commune*?', 4 *European Review of Private Law* 4 (2000), p. 589–611; E. Storskrubb, *Civil Procedure and EU Law. A Policy Area Uncovered* (Oxford University Press, Oxford 2008), p. 350; E. Storskrubb, 'Civil Justice – A Newcomer and an Unstoppable Wave?', in P. Craig and G. De Búrca (ed.), *The Evolution of EU Law*, p. 299–321.

it presupposes a common procedural framework to be a feasible enterprise, as it imposes or integrates EU-wide standards in seemingly diverging legal systems. Those standards promote convergence of legal orders and mirror them to a European common framework. The second is the adoption of standards in a procedural heteronomy framework which only seems warranted to the extent that national procedural law systems do not converge themselves outside the realm of the Court of Justice's influence. As such, and with a view to avoid the imposition of EU wide standards, the Court's approach could stimulate national procedural law specialists to convene and explore mechanisms or tools for convergence or harmonization.[180] The third respect is that the Court's approach could also stimulate more intense legislative harmonization efforts at the EU level, as standards allow EU-wide influences to more gradually grow familiar in national systems.[181]

§5. CONCLUSION

This contribution asserted that the traditional framework of national procedural autonomy cannot account for the evolution in recent case law. It explored the limits of procedural autonomy understandings and framed the *VEBIC* judgment in a new conceptual framework of procedural heteronomy. In doing so, it assessed whether the interactive system of national procedure and EU law leaves room to develop EU-wide procedural standards and the tools to mitigate the potential dangers of this approach. It considered the creation of standards not to pose a threat, but as an opportunity to refine and reconsider the foundational principles underlying adequate procedures at the national levels.

VEBIC represents more than just another case on limited procedural autonomy in competition law enforcement. The Court provides a jurisprudential basis for developing future *per se* institutional or procedural obligations on national judges and legislators, thus adding an additional layer to interventions by the Court of Justice in the procedural systems of Member States. By virtue of this, the Court has responded to scholarly recommendations to expand its scope in setting adequate judicial protection standards.[182]

National procedural autonomy arguments and the adoption of adequate judicial protection standards in *VEBIC* outline a more general procedural heteronomy framework. Procedural heteronomy represents the transformation of the EU into a more federal structure that incorporates Member States' legal orders in a cooperative multilayered setting. National procedural autonomy arguments, however limited, remain at the core of EU-Member State interaction. However, a well-defined set of EU-wide procedural standards supplements, coordinates and constrains unfettered national autonomy, thus

180 W. Van Gerven, 'The Open Method of Convergence', 14 *Juridica International* 1 (2008), p. 32–41.
181 M. Tulibacka, 46 *Common Market Law Review* 5 (2009), p. 1557–1564.
182 S. Prechal, *Directives in EC law*, p. 178.

providing for additional EU tools to countenance differential procedural developments. In the current institutional setting, as *VEBIC* seems to highlight, the Court of Justice itself would or should be responsible for generating these standards.

The framework of understanding offered by procedural heteronomy does, however, impose a self-identified limit on the Court of Justice's freedom to develop procedural standards at will. These standards have to operate within the boundaries of cooperative federalism, making national courts contribute to the adequateness of such an order. At present times however, thorough reflection on the organizational values supporting that order is absent. Reflection on these adequateness standards should not only take place at the EU level, but be generated from a bottom-up conversation among national and EU officials, judges and scholars. To the extent that the Court steers its standards approach to support these initiatives, it could significantly contribute to the realization of a procedural *ius commune*.