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**THE COMPETITION LAW REVIEW**

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**Volume 8 Issue 3 pp 285-312****December 2012**

Institutional Assimilation in the Wake of EU Competition Law Decentralisation

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This contribution outlines and evaluates the emergence of judicially mandated ‘institutional assimilation’ in EU competition law. It argues that the European Court of Justice’s 2010 *Vebic* judgment reflects a new assimilation approach to national institutional autonomy in the realm of decentralised EU competition law enforcement. According to that approach, the Court considers itself directly competent to determine the institutional outlook of national competition authorities called upon to apply EU competition law. Whilst an institutional assimilation approach enhances the uniform application image of EU competition law across the Member States, it also incorporates important new legitimacy concerns that warrant resolution.

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**1. INTRODUCTION**

The decentralised enforcement of EU competition law has been a significant factor in stimulating gradual convergence among national competition law regimes in Europe.<sup>1</sup> The European Court of Justice<sup>2</sup> has been instrumental in turning convergence efforts into reality.<sup>3</sup> Recent case law moved beyond classical understandings of convergence by imposing specific institutional requirements on the operations of national competition law enforcement structures. In so doing, the Court directly envisaged the ‘institutional assimilation’ of national competition law enforcement structures to a supranationally attuned image.

This contribution analyses the Court’s ‘institutional assimilation’ approach and assesses its impact on the traditional convergence narrative. It proceeds in three consecutive parts. Section two outlines the scope of judicially mandated institutional assimilation. It argues that the Court of Justice directly required adaptations from national competition law enforcement structures in its 2010 *Vebic* judgment. This section subsequently hypothesises that the approach adopted in that judgment reflects a more general

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<sup>1</sup> See A. Gerbrandy, ‘Procedural Convergence in Competition Law. Towards a Spontaneous Ius Commune?’, (2009) 2(2) Review of European Administrative Law 105-134 for examples in the realm of competition procedure.

<sup>2</sup> Hereafter referred to as the Court or the Court of Justice.

<sup>3</sup> In the realm of procedural rights, see R. Nazzini, ‘Some Reflections on the Dynamics of Due Process Discourse in EC Competition Law’, (2005) 2(1) Competition Law Review 5-30.

institutional assimilation framework supporting the decentralised application of EU competition law. Section three substantiates that hypothesis. It sketches the traditional ‘due process’ convergence narrative and the ways in which institutional evolutions invite reconsideration of that narrative. It highlights recent Commission procedural reforms and connects these reforms to national institutional organisation equivalents to illustrate the assimilation argument. Section four evaluates the impact of a new ‘institutional assimilation’ narrative from a legitimacy point of view. Institutional assimilation on the one hand broadens the scope of legitimacy analysis in EU competition law enforcement, but on the other creates new legitimacy problems the Court should – and could – take seriously in order to proceed along its *Vebic* line of reasoning.

## 2. COURT-INDUCED INSTITUTIONAL ASSIMILATION

This section argues that the ‘brave new world’<sup>4</sup> of decentralised application of the prohibitions in Articles 101 and 102 TFEU provided the Court of Justice with an unprecedented opportunity to intervene in the organisation of national competition law enforcement structures. Not only did the Court read into the system of decentralisation as outlined in Regulation 1/2003 an invitation directly to assess concrete national institutional arrangements in the service of effective decentralised competition law enforcement, it additionally developed new institutional functioning principles that govern the organisation and operation of these national competition law arrangements. The 2010 *Vebic* judgment has been most significant in that regard.

### 2.1. Enabling assimilation: *Vebic* and the system of decentralisation

The present system of decentralised EU competition law enforcement completes two decades of proposals, notices and judgments enabling national competition authorities and private individuals directly to rely on EU competition law provisions.<sup>5</sup> Regulation 1/2003 reflects a culmination point in that respect, obliging national authorities and courts to apply EU competition law.<sup>6</sup> The application and incorporation of EU competition law in a national setting was said to promote a ‘spontaneous harmonisation’ or convergence among national regimes.<sup>7</sup> Three provisions in Regulation 1/2003 specifically nurture or facilitate spontaneous convergence. First, Article 3 mandates national competition authorities to apply EU competition law whenever they apply national law to agreements affecting interstate trade. In addition, the application of national law may not result in the prohibition of agreements that

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<sup>4</sup> J. Venit, ‘Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty’, (2003) 40(3) *Common Market Law Review* 545-580.

<sup>5</sup> For an overview, see S. Brammer, *Co-operation between national competition agencies in the enforcement of EC competition law*, Oxford, Hart, 2009, 13-30.

<sup>6</sup> 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] O.J. L 1/1.

<sup>7</sup> H. Vedder, ‘Spontaneous Harmonisation of (National) Competition Laws in the wake of the Modernisation of EC Competition Law’, (2004) 1(1) *Competition Law Review* 5-21.

would be permitted as a matter of EU competition law.<sup>8</sup> That provision requires the scope of prohibited restrictive practices to be similar and therefore converging at the EU and national levels.<sup>9</sup> Second, Article 11(6) allows the Commission to relieve a national competition authority of its powers to apply EU competition law by continuing the investigation or prosecution itself. As a result of that provision, the Commission not only establishes itself as a *primus super pares*,<sup>10</sup> but also presupposes national institutional structures that are capable of being relieved.<sup>11</sup> Third, Article 16(1) requires national courts to comply with Commission decisions and to assess whether or not to stay proceedings in cases where the Commission is about to adopt a decision. That provision envisages converging procedural mechanisms allowing national judges to stay proceedings as a matter of national law in order to comply with EU law obligations.

In its case law on the application of Regulation 1/2003, the Court refined or interpreted these and other provisions and confirmed the taste for convergence reflected therein. The Court recurrently highlights ‘the objective of a uniform application of Articles [101 TFEU] and [102 TFEU]’<sup>12</sup> and uses that benchmark as a starting point for convergence. The need for uniform EU competition law application allows both the Court of Justice and the General Court to refine the system of concurrent application of EU and national law and to engage national legal systems in the service of maintaining a supranationally established competition law system. As a result of that position, the Courts mandated national courts to allow Commission interventions in national procedures only remotely related to EU competition law,<sup>13</sup> allowed the Commission to conduct inspections even after a national authority had been called upon to deal with the case at hand,<sup>14</sup> imposed obligations on national courts to maintain a presumption of causality between specific types of behaviour and

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<sup>8</sup> One exception can be found in Article 3(2) final sentence, stating that Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

<sup>9</sup> See A. Gerbrandy, note 1, 107 for an example in that regard. According to I. Maher, national laws already aligned with EU competition law long before the establishment of Regulation 1/2003, see I. Maher, ‘Alignment of Competition Laws in the European Community’, (1996) 16 Yearbook of European Law 230-231; see also M. Drahos, *Convergence of competition laws and policies in the European Community: Germany, Austria and the Netherlands*, The Hague, Kluwer, 2001, 209-237.

<sup>10</sup> See P. Van Cleynenbreugel, ‘Transforming Shields into Swords. The Vebic Judgment, Adequate Judicial Protection Standards and the Emergence of Procedural Heteronomy in EU law’, (2011) 18(4) Maastricht Journal of European and Comparative Law 523.

<sup>11</sup> Article 35(4) Regulation 1/2003 specifically deals with that issue, requiring an authority or prosecuting body to withdraw a case from a judicial authority in instances where the Commission withdraws a case from a national authority.

<sup>12</sup> Opinion of Advocate General Kokott in 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*, [2009] ECR I-4529, para 85.

<sup>13</sup> Interpreting Article 15(3) Regulation 1/2003, see Case C-429/07, *X. BV*, [2009] ECR, I-4833, para 30. See K. Wright, ‘European Commission interventions as amicus curiae in national competition cases: the preliminary reference in X BV’, (2009) 30(7) European Competition Law Review 509-513.

<sup>14</sup> Case T-340/07, *Evropaïki Dynamiki v. Commission*, [2010] ECR II-16, para 129.

anticompetitive practices<sup>15</sup> and allowed national authorities to continue national proceedings only after the Commission concluded its own proceedings.<sup>16</sup> National authorities on the other hand were prohibited from adopting a general decision holding that a particular restrictive practice does not infringe EU law.<sup>17</sup>

A most significant ‘uniform application’ interpretation emerged in the *Veibic* judgment.<sup>18</sup> At stake in that case was the confusing organisation of the Belgian national competition authority. The authority comprises two parts, an administrative Competition Service attached to the Belgian Federal Public Service and an independent administrative court, the Competition Council. The Competition Council itself is composed of a general assembly of councillors, a college of competition prosecutors and a registry.<sup>19</sup> In practice, a member of the college of competition prosecutors instructs the members of the Competition Service to conduct inspections or assemble materials in order to compose a file that is to be brought before the Council’s general assembly.<sup>20</sup> The general assembly will subsequently hear both the competition prosecutor and the parties subject to the investigation before rendering an administrative judgment.<sup>21</sup> Appeals against the Council’s decision are organised before the Brussels Court of Appeal.<sup>22</sup> An appellate procedure can only be initiated by the parties involved in the decision or by the Federal Minister of Economic Affairs.<sup>23</sup> The Minister can also intervene in appellate proceedings initiated by the parties involved. Since the college of competition prosecutors comprises an inherent part of the judicial Council, it does not qualify as a party involved and could not possibly initiate or intervene in appellate proceedings.<sup>24</sup> If the Competition Council – even if represented by the college of competition prosecutors – were to intervene or appear in appellate proceedings, a first instance court would become a party to a dispute in which it already acted as a judge. Such a situation would run counter to the principle of unbiased decision-making (*nemo iudex in sua causa*).<sup>25</sup>

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<sup>15</sup> 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*, [2009] ECR I-4529, para 52.

<sup>16</sup> Case C-17/10, *Toshiba et al. v. Commission*, judgment of 14 February 2012, nyr, para 91.

<sup>17</sup> Case C-375/09, *Tele 2 Polska*, judgment of 3 May 2011, nyr, para 27.

<sup>18</sup> Case C-439/08, *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW*, judgment of 7 December 2010, nyr (hereinafter referred to as C-439/08, *Veibic*).

<sup>19</sup> See Article 1 §4 Belgian Law on the Protection of Economic Competition (LPEC), *Loi sur la protection de la concurrence économique*, coordonnée le 15 septembre 2006, Belgian Official Journal 29 September 2006, 50613.

<sup>20</sup> Article 11 §2 LPEC; see also Article 25 LPEC.

<sup>21</sup> Article 44 LPEC.

<sup>22</sup> Article 48 §3 LPEC.

<sup>23</sup> Article 75 LPEC.

<sup>24</sup> Article 76 §2 LPEC. Opinion of Advocate General Mengozzi in Case C-439/08, *Veibic*, para 25. That was at least the interpretation of the Brussels Court of Appeal in this 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’, (2011) 1 *Tijdschrift voor Belgische Mededinging – Revue de la Concurrence Belge* 14; F. Rizzuto, ‘The procedural implications of VEBIC’, (2011) 32(6) *European Competition Law Review* 287.

<sup>25</sup> Opinion of Advocate General Mengozzi in Case C-439/08, *Veibic*, para 61 and para 80-82.

This Belgian procedure resulted in a quirky institutional outcome in the *Vebic* case. Vebic, a Belgian bakery federation found itself the sole party in appellate proceedings against a Competition Council decision imposing a fine on it.<sup>26</sup> As the Minister had chosen not to intervene, no governmental representative acted as a defendant in the appellate procedure, leaving Vebic as the sole party to the appellate dispute. Although Vebic did not object to that situation, the Court of Appeal questioned the compatibility of the national regime with the requirements of EU law.<sup>27</sup>

In its December 2010 judgment, the Court of Justice held that this organisational system violated EU law. The Court reasoned that '[a]lthough Article 35(1) of the Regulation leaves it to the domestic legal order of each Member State to determine the detailed procedural rules for legal proceedings brought against decisions of the competition authorities designated thereunder, such rules must not jeopardise the attainment of the objective of the regulation, which is to ensure that Articles 101 TFEU and 102 TFEU are applied effectively by those authorities'.<sup>28</sup> In cases where a national competition authority would not be afforded rights as a party to proceedings, a risk remains that the court before which the proceedings have been brought might be wholly captive to the pleas in law and arguments put forward by the undertaking(s) bringing the proceedings.<sup>29</sup> Article 35 Regulation 1/2003 should therefore be read to preclude national rules which do not allow a national competition authority to participate, as a defendant or respondent, in judicial proceedings brought against a decision that the authority itself has taken.<sup>30</sup>

At the same time, the Court did not posit an absolute intervention obligation for national authorities. National competition authorities were to gauge the extent to which their intervention is truly necessary in a particular case. Should the authority systematically refuse to appear in appellate proceedings, the effectiveness of EU law would be brought in jeopardy.<sup>31</sup> The Court subsequently left it to the Member States to designate the body or bodies of the national competition authority which may participate, as a defendant or respondent, in proceedings brought before a national court against a decision which the authority itself has taken, while at the same time ensuring that fundamental rights are observed and that European Union competition law is fully effective.<sup>32</sup>

The Court's approach in *Vebic* is twofold. On the one hand, the Court directly mandates institutional overhaul of the Belgian competition law supervision system by

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<sup>26</sup> C-439/08, *Vebic*, para 37.

<sup>27</sup> C-439/08, *Vebic*, para 39.

<sup>28</sup> C-439/08, *Vebic*, para 57.

<sup>29</sup> C-439/08, *Vebic*, para 58. The Court subsequently stated that '[i]n a field such as that of establishing infringements of the competition rules and imposing fines, which involves complex legal and economic assessments, the very existence of such a risk is likely to compromise the exercise of the specific obligation on national competition authorities under the Regulation to ensure the effective application of Articles 101 TFEU and 102 TFEU'.

<sup>30</sup> C-439/08, *Vebic*, para 59.

<sup>31</sup> C-439/08, *Vebic*, para 60.

<sup>32</sup> C-439/08, *Vebic*, para 61.

requiring it to enable the Competition Council to intervene in appellate proceedings. Although the Court of Justice referred to Article 35 Regulation 1/2003 as the legal basis for its judgment, that provision merely obliges Member States to designate authorities and courts competent to apply EU competition law and enables them to allocate different powers and functions to national authorities and courts. The Court nevertheless read into Article 35 a mandate to organise the institutional operations of national competition authorities in compliance with the observance of fundamental rights.<sup>33</sup> More spectacularly even, the Court specifically required that an appellate procedure against a national competition authority's decision should always (potentially) allow for the participation of national competition authorities, even to the extent that a national authority is a court itself. This implies that national law limitations on a national authority's participation should be discarded and replaced with a more fitting institutional alternative reflective of the Court's ideal-typical image of competition law enforcement.<sup>34</sup>

On the other, the Court immediately limited the intervention of national competition authorities in appellate proceedings by allowing a national authority to gauge the necessity of an intervention and by merely prohibiting it from systematically refusing to appear as a defendant or respondent in those proceedings. At the same time, the Court did not directly address the scope of appellate review, nor did it mandate unlimited jurisdiction to be an EU standard of national appellate review.<sup>35</sup> In doing so, the Court seemed to retract from its bold statement that participative review is necessary in all instances as a matter of EU law. That retraction did not however save national institutional arrangements like the Belgian system, which did not at all accommodate participative judicial review as envisaged by the Court. The bottom-line of the judgment, i.e. the participation requested from national authorities in appellate procedures against their own decisions, has indeed firmly been posited.

## **2.2. Understanding *Vebic*: institutional assimilation through participative judicial review and functional segregation**

The *Vebic* judgment reflects a shift in the understanding of convergence identified in the wake of Regulation 1/2003. Despite reservations the Court makes in that judgment as to the extent of a national authority's participation in appellate procedures, it posits a national competition authority's participation in appellate review procedures as an institutional principle of EU competition law. In doing so, the Court of Justice takes convergence among national legal systems in the wake of Regulation 1/2003 to a new level. It presents itself as a supranational standard-setter determining the institutional organisation of national competition appellate procedures. More specifically, it imposes a particular institutional blueprint of a procedurally viable system on the Belgian, and by

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<sup>33</sup> C-439/08, *Vebic*, para 63 requires national authorities to provide procedural frameworks that enable respect for fundamental rights.

<sup>34</sup> See F. Rizzuto, note 24, 286.

<sup>35</sup> The Court only refers to this as a matter of fact, see C-439/08, *Vebic*, para 44.

extension all national,<sup>36</sup> legal order(s).<sup>37</sup> Rather than enabling spontaneous convergence among diverging national regimes, the Court directly mandates national legal orders to assimilate around principles of institutional organisation it determines necessary for the effective enforcement of EU competition law in a national setting. As a result, the Court provides national legal orders with ‘institutional guidance’ on how to implement and comply with an EU-proof system of decentralised competition law enforcement.

The scope of institutional guidance reflected in *Vebic* appears only to include the obligation for national authorities to participate in appellate proceedings against their own decisions. However, that obligation additionally and more fundamentally presupposes a particular institutional framework enabling such participation. Although the Court of Justice does not provide particular guidance on the best approach in that regard, its concrete application in the institutional realm of Belgian competition law hints at a preference for functionally segregated competition authorities at the national level. The Belgian competition council comprises an independent administrative court. The college of competition prosecutors, although now formally a part of the Competition Council administrative court structure, used to be an independent prosecuting department before its integration into the Council.<sup>38</sup> By integrating the college into the administrative court structure, it became an essential part of the Competition Council – a court – and was therefore unable to intervene in the appellate proceedings.<sup>39</sup> The equation between the college of competition prosecutors and the decision-making general assembly of the Competition Council in that respect nevertheless appears overrated. The college of competition prosecutors *de facto* remains independent from the general assembly. It brings the case to the assembly, makes its case to which the defendant undertakings respond before the assembly goes into recess to adopt a decision.<sup>40</sup> The competition prosecutor is not involved in that decision-making stage and will have to accept the outcome of that decision. The prosecution and decision-making departments of the Competition Council are therefore functionally segregated parts of a single institutional whole.

*Vebic* could therefore be read as requiring this segregation to be sanctioned by EU law. In his opinion to the *Vebic* judgment, the Advocate General indeed referred to functional segregation as a potential solution for the obligation imposed on the national court to allow ‘competition authority’ participation at the appellate stage. He argued

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<sup>36</sup> On the impact of the judgment on other legal orders, see N. Petit, ‘The Judgment of the European Court of Justice in VEBIC: Filling a Gap in Regulation 1/2003’, (2011) 2(4) *Journal of European Competition Law & Practice* 343 and F. Rizzuto, note 24, 286.

<sup>37</sup> In so doing, the Court acts as a catalyst in promoting new governance mechanisms at the national levels. For more examples of the judicial role in that regard, see J. Scott and S. Sturm, ‘Courts as Catalysts: Re-thinking the judicial role in new governance’, (2007) 13 *Columbia Journal of European Law* 565-594.

<sup>38</sup> See also F. Rizzuto, ‘Competition Law Enforcement in Belgium: The System Remains Flawed and Uncertain Despite Recent Reform’, (2008) 29(6) *European Competition Law Review* 367-375.

<sup>39</sup> That structure could be referred to as an integrated agency model, the ‘agency’ in this case being a national administrative court structure. See M. Trebilcock and E. Iacobucci, ‘Designing Competition Law Institutions: Values, Structure, and Mandate’, (2010) 41 *Loyola University of Chicago Law Journal* 459-464 for a classification attempt of public enforcement structures.

<sup>40</sup> Article 45 LPEC.

that as a matter of EU law, the participation of the prosecuting part of the competition authority would not be per se incompatible with the Belgian institutional framework.<sup>41</sup> A similar solution could also be read into Article 35(4) Regulation 1/2003, which states that when a national authority brings an action before a judicial authority that is separate and different from the prosecuting authority, the effects of the Commission withdrawing a case on the basis of Article 11(6) shall be limited to the authority prosecuting the case which shall withdraw its claim before the judicial authority. Although Regulation 1/2003 does not as such mandate a functional segregation between prosecution and decision-making stages whenever a national regime opts for a judicial authority adopting competition law infringement decisions, it most definitely envisages such segregation. That obligation would be justified by demands for compliance with the fundamental procedural rights supporting the application of EU competition law.<sup>42</sup> The organisational principle of segregated prosecution and decision-making functions in competition law procedures could thus be said to be reflected in the ‘system’ of Regulation 1/2003, which mandates its institutionalisation at the national level. As a result, national competition authorities preferentially have to operate as bifurcated enforcement structures.<sup>43</sup>

The Court subsequently extended the obligatory effects of functional segregation into the appellate review stage and confirmed the adversarial nature of appellate review procedures. The judgment could be read as presenting a two-stage argument in that respect. First, the system of decentralised competition law enforcement envisages national authorities to be either competent directly to adopt infringement decisions or to bring these decisions before a (specific) national court. Member States remain free to opt for one of these institutional solutions. Second, to the extent that the prosecuting and judicial authority constitute a single institutional whole – as the Belgian case demonstrates – the functional independence of both parts of that entity should be recognised, in order to allow the administrative-prosecuting part of the entity to intervene in appellate proceedings and to defend the national authority’s decision. In order for participative judicial review to be rendered meaningful, the authority involved in ‘prosecuting’ the case should also be able to participate in appellate proceedings against the final decision adopted by the judicial part of the authority. The prosecuting part of the authority is not obliged to defend its own position adopted prior to a judicial decision or to initiate an appeal against a judicial decision that did not follow its position. As a matter of EU law, it only has to be granted standing to defend the public interest in appellate review proceedings initiated by undertakings against the national authority’s judicial decision.

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<sup>41</sup> Opinion of Advocate General Mengozzi in C-439/08, *Vebic*, para 100.

<sup>42</sup> C-439/08, *Vebic*, para 63.

<sup>43</sup> These bifurcated enforcement structures could either be administrative agencies or courts, see M. Trebilcock and E. Iacobucci, note 39, 461-462. See also Chapter IX of the United Nations Conference on Trade and Development (UNCTAD) Model Law on Competition (2010), which distinguishes between bifurcated agency and bifurcated judicial models in addition to integrated agency structures such as the European Commission, see document TD/B/C.I/CLP/L.2 of 9 May 2011, available at [http://unctad.org/en/docs/ciclpL2\\_en.pdf](http://unctad.org/en/docs/ciclpL2_en.pdf) (last consulted 27 November 2012).



The effects of the *Vebic* judgment on national legal orders are both direct and futile. First, *Vebic* directly requires national legal systems to reflect a distinction between prosecution and decision-making functions to the extent that a single authority is not capable of intervening in appellate review procedures. Second, the distinction imposed nevertheless remains futile, as it should not necessarily materialise into two completely distinct enforcement bodies. Within the confines of the organisational principles of participative review and functional segregation, Member States remain free to determine the institutional organisation of their national competition authorities responsible for the application of EU law. National authorities can therefore continue to rely on an integrated administrative agency<sup>44</sup> to prosecute and adopt competition law infringement decisions. The prosecuting part of the authority should nevertheless be able to appear as a defendant or respondent in appellate review proceedings.

### 3. ASSIMILATION AS A FRAMEWORK OF UNDERSTANDING: FROM ‘DUE PROCESS’ TO ADVERSARIALISM

The Court of Justice did not recognise the requirements of participative judicial review and functional segregation in complete isolation from the existing EU competition law enforcement regime and from the operations of the European Commission as a competition enforcement agency. The projection of a functional segregation preference in the *Vebic* judgment has indeed also been consistently manifested in the European Commission’s initiatives to make its procedure compatible with the demands of fundamental procedural rights or due process requirements. This section outlines that classical ‘due process’ narrative as a basis for institutional assimilation and the ways in which the *Vebic* judgment invites refinement of that narrative. It will be argued that the Court’s assimilation powers should not be studied in isolation from these European Commission initiatives. A functional segregation preference at the supranational level equally provides a basis for understanding judicially imposed adaptations on national competition law enforcement structures.

#### 3.1. The classical narrative: institutionalising ‘due process’

The pervasive but frustratingly vague requirements that adherence to the ‘rule of law’<sup>45</sup> imposes on those acting within its purview resulted in the identification of (fundamental) ‘procedural rights’ capable of ensuring a fair administrative decision-making process.<sup>46</sup> Procedural rights not only matter in national law, but have also become the hallmark of supranational administrative governance.<sup>47</sup> In the EU context,

<sup>44</sup> M. Trebilcock and E. Iacobucci, note 39, 463-464.

<sup>45</sup> Article 2 TEU states that the Union is founded on the value of rule of law. Article 19(1) TEU additionally holds that the Court of Justice ensures that the law will be applied. Both provisions reflect a long-standing constitutional taste for judicial review and procedural rights, see K. Lenaerts, ‘The Rule of Law and the Coherence of the Judicial System of the European Union’, (2007) 44(6) *Common Market Law Review* 1625-1659; K. Lenaerts, ‘Federalism and the Rule of Law: Perspectives from the European Court of Justice’, (2010) 33 *Fordham International Law Journal* 1338-1387.

<sup>46</sup> See on that matter in general, T. Bingham, *The Rule of Law*, London, Penguin, 2011, 90-109.

<sup>47</sup> On procedural rights in an EU context, see P. Craig, *EU Administrative Law*, Oxford, Oxford University Press, 2012, 320-355; C. Harlow, ‘European Administrative Law and the Global Challenge’, *European*

the importance of fundamental procedural rights has long been recognised by the Court of Justice, especially in situations where ‘sanctions’ could be imposed on individuals or firms.<sup>48</sup> EU institutions, most notably the European Commission, had to ensure that these individuals or firms were granted an opportunity to have to express their views on the matter.<sup>49</sup> The field of EU competition law was no exception in that regard. Newly established procedural rights subsequently promoted institutional adaptations at the Commission level. These adaptations gradually implemented a structural segregation between prosecutorial and decision-making functions.

### 3.1.1. The first stage: finding procedural rights

Some procedural safeguards have always accompanied the European Commission’s sanctioning competences in the realm of competition law. The right to be heard and the accompanying right of access to parts of the Commission’s file present the most notable example in that regard. Procedural Regulation 17/62 incorporated a right to be heard, which was later confirmed and refined in Regulation 99/63.<sup>50</sup> The right to be heard was not however presented as a fundamental procedural entitlement. It rather included an opportunity for the undertaking concerned to respond in writing to the objections made by the European Commission.<sup>51</sup> Regulation 99/63 framed the opportunity to respond in writing and orally as an important ‘right of defence’, but did not enable a regulative framework set to guarantee that right overall. According to that Regulation, a fine or periodic penalty could only be imposed on an undertaking if objections made against its practices or behaviour were made known to it<sup>52</sup> and if the latter was granted an opportunity to respond to these objections. The opportunity to respond to these objections did not however bring along a full-fledged access to the Commission file, nor did it include an oral hearing per se.<sup>53</sup> Quite to the contrary, an oral hearing specifically had to be requested for in the written comment responding to

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University Institute RSC Working Paper, No 98/23, 1998, <http://www.eui.eu/DepartmentsAndCentres/RobertSchumanCentre/Publications/WorkingPapers/9823> (last accessed May 12, 2012); on the importance of due process in a competition law context, see A. Riley, ‘Editorial. Developing Due Process in EC Competition Law’, (2005) 2(1) *Competition Law Review* 1-3.

<sup>48</sup> Case 17/74, *Transocean Marine Paint v Commission*, [1974] ECR 1063, para 15 and Case 85/76, *Hoffmann La Roche v Commission*, [1979] ECR 461, para 9.

<sup>49</sup> See for an instructive overview K. Lenaerts and J. Vanhamme, ‘Procedural Rights of Private Parties in the Community Administrative Process’, (1997) 34(3) *Common Market Law Review* 531-569.

<sup>50</sup> Council Regulation 17 implementing Articles 85 and 86 of the Treaty, [1962] O.J. L 13/204 (English Special Edition, Chapter 1959-1962, 87); Regulation 99/63 of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17, [1963] O.J. L127/2268 (English Special Edition Series I Chapter 1963-1964, 47). Regulation 99/63 has later been replaced by Commission Regulation 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty, [1998] O.J. L 354/18.

<sup>51</sup> See J. Joshua, ‘The Right to be Heard in EEC Competition Procedures’, (1991-1992) 15 *Fordham International Law Journal* 17.

<sup>52</sup> Article 2(3) Regulation 99/63.

<sup>53</sup> This only gradually changed, see M. Levitt, *Access to the File: The Commission’s Administrative Procedures in Cases under Articles 85 and 86 EC*, (1997) 34(6) *Common Market Law Review* 1416; A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham, Edward Elgar, 2008, 63.

the objections<sup>54</sup> and the hearing would be conducted in a non-public setting by the persons appointed to do so by the Commission.<sup>55</sup> In reality, these persons were the Commission officials charged with the investigation.<sup>56</sup> The decision-making body itself, the College of Commissioners, was not involved in the actual hearing. The College did not therefore have an opportunity to hear different sides of a case like a judge would in an adversarial trial context.<sup>57</sup>

Focused attention to procedural rights only slowly and gradually emerged as a result of proclamations made by the European Court of Justice. In an important study on the emergence of European (procedural) rights, Francesca Bignami argued that the process of identifying and ‘constitutionalising’ these rights resulted from pressures imposed on the European Commission by the accession of the United Kingdom to the European Economic Community. It was feared that the UK’s insistence on principles of ‘natural justice’ operating in the administrative realm, as well as the judicial review of these principles before the English courts could have resulted in the refusal of English judges to honour or recognise Commission decisions that infringed these principles. As a result, the Court of Justice and the Commission were said to have no other choice but to enhance procedural rights.<sup>58</sup>

The recognition of fundamental procedural rights did not immediately transform the institutional functioning of the European Commission. It should be remembered that the European Commission is basically a political body functioning in many ways like an executive agency with independent regulatory decision-making powers at the national level.<sup>59</sup> Officials in the Directorate-General are responsible for the investigation and prosecution of a particular case. The actual decision-making is subsequently relegated to the politically accountable Commission Members, who adopt a collegiate and binding decision.<sup>60</sup> Since the Commission is not a tribunal<sup>61</sup>, its administrative decision-making procedure groups elements of investigation, prosecution and judgment.

<sup>54</sup> Article 7(1) Regulation 99/63.

<sup>55</sup> Article 9(1) Regulation 99/63.

<sup>56</sup> A. Andreangeli, note 53, 47; M. Albers and J. Jourdan, ‘The Role of Hearing Officers in EU Competition Proceedings: a Historical and Practical Perspective’, (2011) 2(3) *Journal of European Competition Law & Practice* 186.

<sup>57</sup> J. Joshua, note 51, 63.

<sup>58</sup> F. Bignami, ‘Creating European Rights: National Values and Supranational Interests’, (2004) 11 *Columbia Journal of European Law* 258-292. See more generally R. D. Kelemen, *Eurolegalism. The Transformation of Law and Regulation in the European Union*, Cambridge, Harvard University Press, 2011, 52-56, framing the rise of procedural rights in a broader movement of legal adversarialism that is permeating the EU legal architecture.

<sup>59</sup> Literature on this matter is voluminous, see for more references, J. Joshua, note 51, 65; W. Wils, ‘The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis’, (2004) 27(2) *World Competition* 201; see also I. Forrester, ‘Due process in EC competition cases: a distinguished institution with flawed procedures’, (2009) 34(6) *European Law Review* 817-843.

<sup>60</sup> Article 17(6)(b) TEU, stating that the Commission acts as a collegiate body when adopting decisions. In competition law, an advisory committee of Member States authorities should be consulted before adopting a decision, see Article 14 Regulation 1/2003.

<sup>61</sup> J. Joshua and C. Harding, *Regulating Cartels in Europe*, 2nd Edition, Oxford, Oxford University Press, 2010, 200-202. See already Joined Cases 56/64 and 58/64, *Consten and Grundig*, [1966] ECR 299 in which the Court

Over time however, the Commission procedure has been modified in response to these nationally-induced procedural rights challenges. The investigation and prosecution stages have become engrained with the need to ensure that complainants or whistle-blowers obtain particular rights of access or rights to be informed.<sup>62</sup> The Court of Justice also emphasised the importance of legal professional privilege and outlined a detailed and nuanced procedure for Commission decisions on how to proceed with potentially privileged information.<sup>63</sup> A Commission Notice on Best Practices in Commission infringement procedures confirmed the importance of procedural rights in that regard.<sup>64</sup>

### 3.1.2. The second stage: institutional adaptations towards adversarialism

Recognition of procedural rights did not in itself trigger institutional adaptations. The nature of these procedural rights as fundamental rights did nevertheless serve as a basis for institutional modifications at the Commission level. The most poignant example of that evolution is the movement towards a more ‘adversarial’ procedure in which prosecuting bodies and investigated undertakings engage in an interlocutory process before an infringement decision is adopted. At the Commission level, the incremental increase in powers of the Hearing Officer provide an important example of the Union’s institutional preference for adversarialism.

As a starting point, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) plays a particularly important background role in the movement towards adversarialism. Article 6 ECHR states that ‘[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’. The EU is currently not a party to the ECHR,<sup>65</sup>

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stated that the Commission was not a tribunal. See also Case 218/78 P, *van Landenyeck SARL v Commission*, [1980] ECR 3125, para 81; Cases 100-103/80, *Musique de Diffusion Française v Commission*, [1983] ECR 1825 para 7; Joined Cases T-109/02, 118/02, 122/02, 125/02, 126/02, 128/02, 129/02, 132/02 and 136/02, *Bolloré and others v Commission*, [2007] ECR II- 947, para 86; Case T-54/03, *Lafarge v Commission*, [2008] ECR II-120, para 47. For more background, see N. Zingales, ‘The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to be Heard?’, (2010) 7(1) *Competition Law Review* 130.

<sup>62</sup> See J. Flattery, ‘Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing’, (2010) 7(1) *Competition Law Review* 54-56.

<sup>63</sup> See Case 155/79, *AM&S Europe Limited v Commission*, [1982] ECR 1575, para 18 and Case C-550/07, *Akzo Nobel Chemicals and Akros Chemicals v Commission*, judgment of 14 September 2010, nyr. See also A. Andreangeli, ‘The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: one step forward, two steps back?’, (2005) 2(1) *Competition Law Review* 39.

<sup>64</sup> For the most recent version, see Commission notice on best practices in proceedings concerning articles 101 and 102 TFEU, [2011] O.J. C 308/6. For an overview of current procedural rights, see D. Anderson and R. Cuff, ‘Cartels in the EU: Procedural Fairness for Defendants and Claimants’ in B. Hawk (ed.), *International Antitrust Law & Policy. Annual Proceedings of the Fordham Competition Law Institute*, Huntington, Juris, 2011, 197-235.

<sup>65</sup> Although very concrete plans have recently materialised: Article 6 TEU mandates the European Union to accede to the ECHR and concrete steps have been taken in that regard, see T. Lock, ‘EU accession to the ECHR: implications for the judicial review in Strasbourg’, (2010) 35(6) *European Law Review* 777-798; See also T. Lock, ‘Walking on a tightrope: the draft ECHR accession agreement and the autonomy of the EU legal order’, (2011) 48(4) *Common Market Law Review* 1034.

but all its Member States are and their national (administrative) law regimes are shaped in compliance with ECHR interpretations. The European Court of Human Rights confirmed that national competition law fines could be captured by the ECHR's reference to criminal charges and should therefore be subject to all guarantees included in Article 6 and the adversarial institutional framework it projects.<sup>66</sup> As a result, competition law fines should be imposed by an independent and impartial tribunal in the meaning of Article 6 ECHR following a hearing in which both prosecution and defendants argue their case before an impartial decision-maker. However, given the particularities of national administrative decision-procedures and for reasons of administrative efficiency, the ECtHR has long accepted that the involvement of an impartial tribunal should not always occur at the actual decision-making or fining stage in areas not covered by 'hard core' or 'real' criminal law provisions.<sup>67</sup> These cases most notably involve administrative or disciplinary sanctions.<sup>68</sup> In those instances, it suffices that judicial review is available following the decision taken by a non-adjudicative body.<sup>69</sup> Ex post judicial review requires the reviewing court to have full jurisdiction to re-investigate the merits of the matter,<sup>70</sup> i.e. jurisdiction to consider whether the authority correctly classified the facts it opted to rely on, whether it did not transgress the margins of its discretion and whether it applied the law correctly.<sup>71</sup> Only in those cases would a national administrative law regime – such as a national competition authority able to impose fines – be compatible with the fundamental right to a fair trial.

The ECHR casts a shadow over the operations of the European Commission. Although it is commonly argued that the Commission's administrative sanctioning procedure could remain in existence as long as judicial review was open to those affected by its decisions,<sup>72</sup> the Commission responded to ECHR-induced national law

<sup>66</sup> ECtHR, *A. Menarini Diagnostics S.R.L. v Italy*, judgment of 27 September 2011, para 59. At the EU level, a similar proclamation has been made by Advocate General Sharpston in her Opinion to Case C-272/09 P, *KME Germany v Commission*, judgment of 7 December 2011, nyr, para 64.

<sup>67</sup> On the notion of hard core criminal sanctions, see ECtHR, *Jussila v Finland*, judgment of 23 November 2006, para 43. I. Forrester maintains that Commission fines are indeed hard core, see I. Forrester, 'A challenge for Europe's judges: the review of fines in competition cases', (2011) 36(2) *European Law Review* 202. Wils on the contrary argues the contrary in W. Wils, 'The Increased Level of Antitrust Fines, Judicial Review and the ECHR', (2010) 33(1) *World Competition* 5-29. Advocate General Sharpston accepts Wils' position in her Opinion to C-272/09 P, *KME Germany v Commission*, judgment of 7 December 2011, nyr, para 67. For alternative proposals in that regard, see J. Killick and P. Berghe, 'This is not the time to be tinkering with Regulation 1/2003 – It is time for fundamental reform – Europe should have change we can believe in', (2010) 6(2) *Competition Law Review* 259-285.

<sup>68</sup> See in the realm of non-criminal disciplinary sanctions, ECtHR, *Albert and Le Compte v Belgium*, judgment of 10 February 1983, para 29; in the realm of criminal sanctions, ECtHR, *Öztürk v Germany*, judgment of 21 February 1984, para 56.

<sup>69</sup> See D. Slater, S. Thomas and D. Waelbroeck, 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?', (2009) 5(1) *European Competition Journal* 125-126 for an overview in that regard.

<sup>70</sup> ECtHR, *Albert and Le Compte v Belgium*, para 29.

<sup>71</sup> ECtHR, *Menarini*, para 159.

<sup>72</sup> Speech by A. Italianer, Director-General of the Directorate-General for Competition at the OECD Competition Committee Meeting, Paris, 18 October 2011, 3, [http://ec.europa.eu/competition/speeches/text/sp2011\\_12\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2011_12_en.pdf).

concerns to improve attention for procedural rights and to implement the adversarial requirements of Article 6 ECHR already during the administrative stage. The establishment of a Hearing Officer constitutes the most notable example in that regard.<sup>73</sup> Following a critical 1982 House of Lords Report focusing on the monolithic decision-making structure of the Commission, the latter charged a specific Director in the Directorate-General for Competition with conducting the hearings. That director would serve as a more independent arbiter between the investigating and prosecuting officials and the investigated undertakings.<sup>74</sup> The role of the Hearing Officer was explicitly recognised in a 1994 Commission decision.<sup>75</sup> In 2001, the Hearing Officer was formally detached from the Directorate-General for Competition and transferred to an independent unit directly reporting to the Member of the Commission responsible for competition.<sup>76</sup> In that capacity, an even more independent Hearing Officer was responsible to organise the hearing and thus to enable an independent internal check on DG Competition officials. The Hearing Officer reported on the status of the hearing and procedural rights discussions to the College of Commission Members, who would then be able to make an informed decision.<sup>77</sup>

The October 2011 reform of the terms of reference of the Hearing Officer constituted the pinnacle of institutional translation of the right to be heard and more generally of an adversarial decision-making system in the EU competition law realm. Decision 2011/695/EU upgraded the Hearing Officer's mandate and extended his competences deep into the investigation stage.<sup>78</sup> From the perspective of Article 6 ECHR, the European Commission's extension of the Hearing Officer's mandate effectively translates its commitment to procedural rights into a particular institutional structure. The Hearing Officer enables a meaningful debate between the officials investigating a case and the undertakings subject to that investigation. Rather than just organising a hearing, the Hearing Officer guides and orbits the investigations from the outset until the ultimate decision and thus serves as a quasi-referee judge.<sup>79</sup> Doing so enables him to provide a review mechanism exclusively focused on procedural rights.

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<sup>73</sup> For an overview of the Hearing Officer's historical role before the enactment of the 2011 adaptations, see M. Albers and J. Jourdan, note 56, 185-200; J. Flattery, note 62, 60-71; N. Zingales, note 61, 137-156.

<sup>74</sup> Twelfth Report on Competition Policy, 1983, para 36-37 and the (informal) mandate in annex at 273.

<sup>75</sup> Commission Decision 94/810/ECSC-EC of 12 December 1994 on the terms of reference of Hearing Officers in competition procedures before the Commission, [1994] O.J. L 330/67

<sup>76</sup> Article 2.2. of Commission Decision 2001/462/EC-ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, [2001] O.J. L 162/21.

<sup>77</sup> Article 15 Decision 2001/462/EC-ECSC.

<sup>78</sup> Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the Hearing Officer in certain competition proceedings, [2011] O.J. L 275/29. See W. Wils, 'The Role of the Hearing Officer in Competition Proceedings before the European Commission', (2012) 35(3) World Competition 431-456.

<sup>79</sup> This was not the case prior to the 2011 reforms, see L. Ortiz Blanco, *EC competition procedure*, Oxford, Clarendon, 1996, 199; on the 2011 reform, P. Van Cleynenbreugel, 'The Hearing Officer's extended mandate. Whose special friend in the conduct of EU competition proceedings?', (2012) 36(6) European Competition Law Review 286-293.

Any meaningful procedural control mechanism in the hands of a quasi-independent Hearing Officer would seem useless unless a segregation of functions could be detected between the investigating body called upon to rely on procedural rights and a decision-making body inferring consequences from the (dis)respect to these procedural rights. Although the Hearing Officer does not have particular competences to decide on substantive matters and merely draws up a report for the decision-making College of Commissioners, it effectively checks and balances the operations of DG Competition officials and aims to remedy any procedural defects before the case reaches the College of Commissioners. In so doing, the Hearing Officer provides a wedge between the political body adopting the actual decision and the Directorate-General Competition making a case and defending it with the Commission. Although that system does not provide a full-fledged separation of functions - these all constitute departments or parts of one EU institution, the Commission - a clear segregation can be detected between the investigation/prosecution stage in which particular procedural rights remain guaranteed by an impartial arbiter and a final decision-making stage building upon the provisional outcome of the earlier stage. That segregation can graphically be structured as follows:

| Institutional Segregation           | Segregated Responsibilities Attributed To | Overall Responsibility With                      |
|-------------------------------------|---|--|
| investigation/prosecution           | DG competition/Legal Service              | Competition Commissioner                         |
| interlocutory procedural safeguards | Hearing Officer                           | Hearing Officer reporting to European Commission |
| decision-making                     | College of Commissioners                  | European Commission                              |

### 3.2. The ‘convergence’ stage: spontaneous procedural harmonisation and institutional assimilation

Both the recognition of procedural rights and the institutional adaptations at the EU level are captured by a framework of understanding of responsive institutional translation. Responsive institutional translation argues<sup>80</sup> that particular national legal regimes spurred the development of a body of procedural rights at the EU level in order for the latter to maintain operational legitimacy. As a result of that approach, particular institutional adaptations were coined in order to adapt to newfound supranational rights. The institutional responses developed in that regard present institutional transformation as a one-way bottom-up process triggered by Member State

<sup>80</sup> And as such aligns with a historical-institutionalist perspective, see I. Maher, ‘Competition Law Modernization: An Evolutionary Tale?’ in P. Craig and G. De Búrca, *The Evolution of EU Law*, 2nd. Edition, Oxford, Oxford University Press, 2011, 722-723. For a similar perspective, see D. Gerber, ‘The Transformation of European Community Competition Law?’, (1994) 35(1) Harvard International Law Journal 97-148.

- EU interaction. That process eventually culminates into a supranational institutional regime reflective of national legal solutions that in itself projects a framework for convergence of national institutional solutions.<sup>81</sup> At the convergence or re-translation stage, procedural rights and institutional adaptations nevertheless appear to part ways.

The scope of convergence offered by a classical narrative focused on due process foresees a re-translation of procedural rights at the supranational level into national legal systems that did not adopt or spur these adaptations. As a result, the process of transplantation of particular elements or structures – in this case, emphasis on procedural rights as fundamental requirements of fair competition law supervision – is reported to generate a similar outlook among different national systems operating in the shadows of the supranational arrangements.<sup>82</sup> The retranslation phase, i.e. the scope of convergence envisaged in the classical narrative should not however be overestimated. Convergence in and of itself implies a gradual alignment of national legal regimes. At the same time, these gradual alignment evolutions do not take place in a top-down mandated structure, but are rather triggered by a watch, learn and adopt model based on mutual learning and networking as underlying governance approaches.<sup>83</sup> As a result, the mechanisms of convergence generated by responsive institutional translation present long term solutions and predictions about the actual scope of convergence remain highly uncertain.

Moving beyond the mere recognition and translation of procedural rights, the Court's judgment in *Vebic* proposes an important institutional reconsideration of that classical narrative. In directly identifying concrete mandatory principles of institutional organisation in national competition law enforcement, the underlying idea of national institutional autonomy<sup>84</sup> governing the convergence debate shifts into a more heteronomous successor. That heteronomous posture allows the Court to mandate direct adaptations of national legal systems. National legal systems are no longer autonomous, but see their choices limited in the light of institutional principles identified by the Court of Justice. As a result, a shift from classical 'inquisitorial' administrative regimes to more adversarial conceptions can be identified.<sup>85</sup> The principles of participative deliberative judicial review (administrative authority and undertaking appearing before a judge) and functional segregation of prosecution and decision-making functions (bifurcated enforcement structures) appear to be two alternative or cumulative choices to be taken into account in that regard. Any deviation from retaining policy room created by either principle in the organisation of national

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<sup>81</sup> See R. Nazzini, note 3, 30; J. Flattery, note 62, 79-80.

<sup>82</sup> I. Maher, note 9, 233-234; M. Drahos, note 9, 387-418 referring to supranational pushes and national pulls.

<sup>83</sup> For the institutional framework enabling that development, see M. De Visser, *Network-based Governance in EC Law. The example of EC Competition Law and EC Communications Law*, Nijmegen, Wolf Legal Publishers, 2009, 546 pp.

<sup>84</sup> See P. Girerd, 'Les principes d'équivalence et d'effectivité: encadrement ou désencadrement de l'autonomie procédurale des Etats membres?', (2002) 38 *Revue Trimestrielle de Droit Européen* 76 for an elaboration of that principle.

<sup>85</sup> M. Asimow and L. Dunlop, 'The Many Faces of Administrative Adjudication in the European Union', (2009) 61 *Administrative Law Review* 141.



competition law enforcement structures would amount to potential intervention by the Court of Justice holding that organisation contrary to the system of Regulation 1/2003 and the fundamental procedural rights underlying it, as also reflected in Article 6 ECHR.

From that perspective, institutional principles constitute a precondition for institutions reflecting due process concerns. Though related to ‘due process’ concerns, the institutional principle narrative should clearly be distinguished from a procedural rights alternative. The former actually demands the creation a new set of supranational institutional principles enabling due process at the EU and national levels rather than promoting gradual alignment of national laws. It could therefore aptly be termed responsive institutional assimilation. Assimilation implies a stronger connotation than ‘convergence’ but does not reflect a singular institutional model of national and EU competition law enforcement. It still projects a gradual, albeit mandated, movement towards similar institutional structures grounded in adversarialism.

### 3.3. Institutional assimilation in practice: institutionalising adversarialism

The Court in *Veibic* mandates the establishment of assimilated institutional structures at the national level within the principled boundaries established at the EU level. These structures either include a functionally segregated administrative authority adopting administrative decisions it will defend before a national court or an administrative authority adopting a prosecution decision that will be brought before an administrative tribunal which will subsequently hear both the authority and the undertakings concerned. In both instances, the institutional structure of national competition institutions should reflect the particular taste for adversarialism both in the decision-making and review stages. The major difference between both systems is that the latter posits a true separation of functions, whereas the former only requires these functions to be segregated. The following table graphically shows the institutional options available following the *Veibic* judgment. The institutional principles identified in *Veibic* allow concrete national and supranational institutional arrangements to vary along a multitude of options, as the table shows. In addition, they do not address the scope or intensity of review exercised by the national courts.<sup>86</sup> It could therefore be expected that future institutional refinements may come from the Court willing further to narrow

<sup>86</sup> The intensity of judicial review differs significantly across jurisdictions. In the United Kingdom, the Competition Appeal Tribunal (CAT) adheres to a full jurisdiction standard against OFT decisions, see for an overview and application to the CAT, see D. Rose and T. Richards, ‘Appeal and Review in the Competition Appeal Tribunal and High Court’, [www.blackstonechambers.com](http://www.blackstonechambers.com) (last consulted 27 November 2012), 15. On the full jurisdiction scope of the CAT, see Schedule 8, Section 3(2) Competition Act 1998. See also S. Wilks, ‘Institutional Reform and the Enforcement of Competition Policy in the UK’, (2011) 7(1) European Competition Journal, 1-23. German courts on the other hand only apply a judicial review standard except for fines, see §71(4) and §83 of the Gesetz gegen Wettbewerbsbeschränkungen of 15 July 2005 (amended by Article 1 of the Act of 20 April 2009), Bundesgesetzblatt 2005 I, 2114 (hereinafter referred to as GWB). The European Court of Human Rights only warrants ‘full jurisdiction’ for ‘criminal sanctions’. See on the scope of criminal law guarantees in the ECHR, P. Mahoney, ‘Right to a Fair Trial in Criminal Matters under Article 6 E.C.H.R.’, (2004) 4(2) Judicial Studies Institute Journal, 107-123. On the impact of Article 6 ECHR on the emergence of full jurisdiction in the review of fines, see T. Perroud, ‘The Impact of Article 6(1) ECHR on competition law enforcement: A comparison between France and the United Kingdom’, (2008) Global Antitrust Review, 56.

the institutional choices of national competition authorities in institutionalising a more adversarial procedural framework.

The following table frames existing national and supranational competition law enforcement structures within the institutional organisation formats read into *Vebic*. It identifies the two institutional formats currently adhered to and a future design format promoted by the supranational ‘due process’ innovations outlined in the previous section. The ‘current choices’ column classifies existing national and supranational choices. The ‘institutional preference’ column reflects preferential organisational models of competition law supervision that are being considered at the national and supranational levels in the wake of *Vebic*.

| Institutional Format:<br>bifurcated adversarialism   | Current Choices   | Institutional Preference                 |
|--|---|--|
| segregated agency + agency participative appellate review <sup>87</sup>  | majority model:<br>Commission; Germany;<br>Greece; the Netherlands;<br>Poland; UK | France? Belgium?                         |
| separated or segregated prosecution and judicial decision-making   | UK (criminal), Ireland,<br>Austria, Finland                                       |  |
| segregated prosecution and quasi-judicial <sup>88</sup> decision-making and prosecutorial participative appellate review |   | Commission? future national adaptations? |

The first institutional format comprises the majority model of national competition law structures operating in the realm of EU law: a functionally segregated single agency that participates in judicial review against its own decisions. The European Commission, Germany,<sup>89</sup> Greece,<sup>90</sup> Italy,<sup>91</sup> the Netherlands,<sup>92</sup> Poland<sup>93</sup> and the United Kingdom

<sup>87</sup> The presence of judicial review mechanisms should be distinguished from the standards of intensity with which judges approach cases (judicial review v. full jurisdiction). It should be clear that *Vebic* does not directly address this issue. The ECtHR’s *Menarini* judgment, note 66, is important in that regard, see also M. Bronckers and A. Vallery, ‘Fair and effective competition policy in the EU: which role for Authorities and which role for the courts after *Menarini*?’ (2012) 8(2) European Competition Journal, 283-299.

<sup>88</sup> By quasi-judicial, I refer judge-like bodies that are not formally a part of a national legal systems civil, criminal or administrative judiciary. They can best be compared to US administrative law judges, who are specialised civil servants hearing claims before a classical judicial body will entertain the case, see M. Asimow and L. Dunlop, note 85, 142 and M. Trebilcock and E. Iacobucci, note 39, 463 refer to an integrated agency model in that respect.

<sup>89</sup> See §48 GWB. See also H. Schweitzer, ‘The European Competition Law Enforcement System and the Evolution of Judicial Review’ in C.D. Ehlermann and M. Marquis (ed.), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases*, Oxford, Hart, 2011, 111.

(except for criminal law cartel procedures)<sup>94</sup> are but a few examples of this framework. Although the national competition authority is designed as a single integrated authority, its functioning is segregated and oftentimes specialised chambers have been created within the authority to decide upon a case. These authorities do not function as courts, but serve as administrative authorities and adopt administrative decisions. Judicial review is typically conducted against the authority, which can defend itself in court. Following from *Veibic*, this adversarial appellate review stance is obligatory for each authority applying EU law. The French Autorité de la Concurrence is an administrative agency and operates in a functionally segregated way.<sup>95</sup> According to French law however, the Autorité could not act as a defendant in appellate proceedings. It was upon the Minister of Economic Affairs to represent the ‘public interest’ as a defendant in appellate review cases.<sup>96</sup> A few weeks after *Veibic* however, the Paris Court of Appeal has been willing – despite legislative provisions proclaiming the contrary – to recognise the administrative Autorité de la Concurrence as a sole defendant in appellate proceedings against its decisions.<sup>97</sup> In so doing, it has made the French institutional framework more adversarial and *Veibic*-proof.

A second institutional format presents a separated or segregated prosecution and decision-making body. In that ‘bifurcated’<sup>98</sup> constellation, a prosecuting body adopts a preliminary position, which will subsequently be confirmed or adapted into a binding judicial or quasi-judicial decision. The Irish system<sup>99</sup> and the UK’s criminal cartel procedure<sup>100</sup> are cases in point in that regard. The Belgian system also reflects that approach. Appeals taken against these judicial decisions will typically include the

<sup>90</sup> See Case C-53/03, *Syfait*, [2005] ECR I-4609, para 29-37; para 33 states that in so far as there is an operational link between the Epitropi Antagonismou [the Greek Competition Authority], a decision-making body, and its secretariat, a fact-finding body on the basis of whose proposal it adopts decisions, the Epitropi Antagonismou is not a clearly distinct third party in relation to the State body which, by virtue of its role, may be akin to a party in the course of competition proceedings. At the same time however, the administrative nature of the body was not called into question.

<sup>91</sup> As apparent from ECtHR, *Menarini*, para 12.

<sup>92</sup> See Article 2(3) Wet van 22 mei 1997, houdende nieuwe regels omtrent de economische mededinging (Dutch Competition Act), available at [www.wetten.overheid.nl](http://www.wetten.overheid.nl), referring to the Dutch Competition Authority as an independent administrative organ.

<sup>93</sup> Case C-375/09, *Tele 2 Polska*, para 11-13.

<sup>94</sup> See Section 1 Enterprise Act 2002; see H. Schweitzer, note 89, 121 for more background. See also C. Graham, ‘The Enterprise Act 2002 and Competition Law’, (2004) 67(2) *Modern Law Review* 273-288.

<sup>95</sup> Article L 461-1 French Commercial Code, available at [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr).

<sup>96</sup> Article R 464-11 French Commercial Code.

<sup>97</sup> See Paris Cour d’Appel, SCP Fisselier Chiloux Boulay, judgment of 27 January 2011, available at [http://www.autoritedelaconcurrence.fr/user/standard.php?id\\_rub=138](http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=138) (last consulted 27 November 2012); see also N. Petit, note 36, 344.

<sup>98</sup> M. Trebilcock and E. Iacobucci, note 39, 461; N. Petit, note 36, 343; F. Rizzuto, note 24, 286.

<sup>99</sup> See Sections 4 and 5 Irish Competition Act 2002, the infringement of which constitute criminal offences that will be brought by the Competition Authority before the District Court or the Central Criminal Court. F. Rizzuto, note 24, 286 also refers to Austria and Finland as examples of this model of enforcement, without direct reference to the criminal law nature of competition law in these systems. The Belgian model predating the 2006 legislative reform was captured by this format as well.

<sup>100</sup> See Section 190 2002 Enterprise Act. See also J. Joshua and C. Harding, note 61, 347.

prosecuting (part of the) authority and the undertakings concerned, yet this should not be the case. In accordance with the *Vebic* principles, it would suffice if either the prosecution or the decision-making authority would be able to participate in appellate proceedings. Following *Vebic*, the simplest adaptation for Belgian law is to recognise the prosecuting part of the Competition Council's role in appellate proceedings. Although the Council would formally take part in the appellate proceedings, the prosecuting part would be responsible. A system of Chinese walls between the prosecution and decision-making bodies currently in place in the internal operations of the Council would as a result be extended to the external appellate action stages. A recent Belgian proposal nevertheless envisions the establishment of a new administrative competition authority in accordance with the first institutional format.<sup>101</sup>

A third institutional format combines the previous two and could be said to underlie both *Vebic* and the recent Commission procedural reforms. That format follows the *Vebic* reasoning to its fullest and would require the scope of adversarial judicial review to be institutionalised as prosecutorial participative judicial review. Prosecutorial review implies that the adversarial scope of judicial review should always take place between a prosecuting body and the undertakings concerned. If that conclusion is taken to its fullest extent, the organisation of national competition authorities should seriously be reorganised to strictly separate prosecution and decision-making bodies. Only the former bodies would then be able to participate in appellate proceedings, whereas the latter would serve as quasi-judges who could not intervene in appeals against their own decisions. Although no conclusive evidence for that evolution can be found in the Court's case law itself, the continuing wedge between the prosecution and decision-making stages at the Commission level, coupled with the imposition of national institutional segregation in *Vebic* at the very least hint at such a future approach. This is all the more confirmed at the Commission level. The Commission Legal Service, another segregated unit within the Commission, will not only represent the latter before the Courts, adopting its position on the case file assembled by the prosecuting director and on the basis of the decision adopted by the Commission,<sup>102</sup> but will also continuously be involved in the prosecution and preparatory stages of decision-making.<sup>103</sup> The Legal Service is therefore uniquely positioned to defend the position adopted by the Commission as such, but also reflective of the prosecutorial points of view adopted. A system of prosecutorial participative judicial review would precisely imply this: a prosecutorial body that also defends the position of the authority's final decision before the review court. In that constellation, the prosecutorial body only defends its own case file before the decision-making authority, but would be called

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<sup>101</sup> See Article IV.16 *Projet de Loi* of 27 December 2012 portant insertion du Livre IV "Protection de la concurrence" et du Livre V "La concurrence et les évolutions de prix" dans le Code de droit économique et portant insertion des définitions propres au livre IV et au livre V et des dispositions d'application de la loi propres au livre IV et au livre V, dans les livres I et XV du Code de droit économique, available at <http://www.dekamer.be/FLWB/PDF/53/2592/53K2592001.pdf> (last consulted 5 March 2013).

<sup>102</sup> At this stage however, the Legal Service only expresses opinions that do not bind the Commission. As such, they cannot be invoked as evidence of the Commission adhering to a specific position when that position is not reflected in the final decision, see Case C-445/00, *Austria v Council*, [2003] ECR I-8549, para 28.

<sup>103</sup> M. Asimow and L. Dunlop, note 85, 157-158. See also W. Wils, note 59, 203.

upon to defend that authority's take on appeals lodged by disgruntled investigated undertakings. Segregation between the prosecutorial and adjudicative 'departments' would in that understanding not only be necessary to ensure EU-compatible first instance decision-making, but also to enable meaningful appellate review systems. This setting differs from the first institutional format. In that format, no formal distinction is made between the prosecutorial and adjudicative parts of the authority for the purposes of appellate review. The aggrieved undertaking will face the agency that adopted an infringement decision as its interlocutor before an appellate review body.

Since *Vebic* did not explicitly recognise a right to initiate appeals for a prosecutorial body, it would appear that a preference for a passive prosecutorial participative appellate review underlies the judgment. The Court did not however make explicit whether a system of passive prosecutorial appellate review underlying the third format should always be preferred over the first institutional format as a matter of EU law.<sup>104</sup> In that understanding, national authorities operating in accordance with the first format would be mandated to segregate prosecutorial and decision-making functions not only in relation to agency decision-making procedures, but also in the realm of appellate review against these decisions. As a result, the responsible prosecuting officer (e.g. the Senior Responsible Officer within the OFT)<sup>105</sup> would not only be called upon to prosecute cases prior to the adoption of infringement decisions, but would also be obliged to defend the authority's position in appellate cases (e.g. before the CAT) as a matter of EU law. The imposition of this third format on national authorities would therefore seriously curtail their national institutional autonomy. It remains questionable whether the Court would really prefer this format to emerge across the Member States.

#### **4. INSTITUTIONAL ASSIMILATION AS JUDICIALLY-INDUCED ENGINEERED 'ARCHITECTURE': TAILORING LEGITIMATE COMPETITION LAW ENFORCEMENT?**

The approach adopted by the Court of Justice in developing assimilation principles to the image of supranational institutional evolutions directly challenges traditional understandings of legitimate competition law enforcement. Since the Court of Justice considers itself capable directly to intervene in the institutional organisation of national competition law enforcement structures, it could be argued that the acceptance of such intervention powers reflects a reconsideration of traditional proxies of legitimate competition law enforcement. This section investigates these proxies and the ways in which they require adaptation in the light of the Court's new assimilation framework.

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<sup>104</sup> This also means that active prosecutorial participative review should not per se be excluded at the national level as a matter of EU law.

<sup>105</sup> The Senior Responsible Officer would in that image be supported by the General Counsel's staff. On the system of OFT decision-making and on the responsibilities of a Senior Responsible Officer, see OFT Guidance, 'A guide to the OFT's investigation procedures in competition cases', October 2012, available at [http://www.offt.gov.uk/shared\\_offt/policy/OFT1263rev](http://www.offt.gov.uk/shared_offt/policy/OFT1263rev) (last consulted 27 November 2012). The OFT also inaugurated a Procedural Adjudicator to the image of the Commission's Hearing Officer. This might indicate that the movement towards convergence is more directly affecting the institutional realm of EU competition law enforcement. Future judicial proclamations in that regard could transform these convergence modes into necessary principles of adequate national institutional organisation mandated by EU law.

Starting from adapted legitimacy proxies, this section outlines a basic ‘constitutional’ approach the Court could follow in order fully to incorporate the adapted proxies in its future case law.

#### **4.1. Efficiency and justice: classical proxies of legitimate competition law enforcement**

The judicial ‘institutionalisation’ of the assimilation principles identified in the previous sections first and foremost reflects a richer understanding of legitimacy in competition law enforcement. Discussions on what legitimate competition law enforcement entails largely focus on balancing efficiency and justice.<sup>106</sup> In order to maintain an operational and effective competition law regime, both elements should be present. Principles governing the institutional architecture of an enforcement system only concern a secondary issue in that regard.

The notion of efficiency refers to the emergence or maintenance of a system that most effectively contributes to the realisation of substantive (economic or political) goals. It is well-known that over time, these goals have shifted in EU competition law from market integration<sup>107</sup> and competitor protection<sup>108</sup> towards consumer protection translated into a specific combination of market integration and consumer welfare.<sup>109</sup> Increased attention to ‘consumer welfare’ equally underlies the ‘more economic approach’ in EU competition law discourse.<sup>110</sup> From an efficiency perspective, EU competition law enforcement would be legitimate once concrete national and EU decisions support the idea of consumer welfare and incorporate that idea in the application of legal rules and principles. The legitimacy of competition law enforcement as a result depends on the substantive output of competition law enforcement agencies.

It has long been accepted that mere efficiency output cannot alone justify an enforcement system that is capable of imposing particularly severe sanctions on individuals.<sup>111</sup> These individuals also demand a ‘just’ environment in which their claims on whether or not practices threaten substantive goals, could be heard and discussed. As a result, the output of a legitimate enforcement system requires a complementary input set of ‘justice’ or ‘due process’ standards.<sup>112</sup> As section three of this contribution

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<sup>106</sup> W. Wils, *Efficiency and Justice in European Antitrust Enforcement*, Oxford, Hart, 2008, v; See also J. Flattery, note 62, 53; M. Trebilcock and E. Iacobucci, note 39, 458.

<sup>107</sup> See R. D. Kelemen, note 58, 153; D. Gerber, *Law and Competition in Twentieth Century Europe. Protecting Prometheus*, Oxford, Oxford University Press, 1998, 343.

<sup>108</sup> J. Joshua and C. Harding, note 61, 117-118 pinpoint the early competitor protection dynamic in the earliest cartel decisions.

<sup>109</sup> See P. Akman, ‘Consumer Welfare and Article 82 EC: Practice and Rhetoric’, (2009) 32(1) *World Competition* 71-90.

<sup>110</sup> G. Monti, ‘Article 81 EC and Public Policy’, (2002) 39(5) *Common Market Law Review* 1057-1099.

<sup>111</sup> On the need for a more justice-oriented public enforcement scheme as a corollary to ever increasing sanctioning practices, see R. Nazzini, note 3, 6.

<sup>112</sup> The distinction between output as efficiency and input as justice is not entirely aligned to recent legitimacy studies that distinguish input, process and output within a wide variety of legitimacy discourses, see C. Lord and P. Magnette, ‘*E Pluribus Unum?* Creative Disagreement about Legitimacy in the EU’, (2004) 32(1) *Journal of Common Market Studies* 183-202; the three-layered legitimacy framework even entered the realm of

demonstrated, the demand for justice standards in EU competition law resulted in the recognition of supranational procedural rights and the crystallisation of these rights into a particular institutional framework that in itself provided an example for national enforcement systems. Due process thus constituted an antidote for potential negative externalities reflected in a purely efficiency oriented system of enforcement. Competition law enforcement, it was argued, could only be legitimate to the extent that justice standards complemented the very ideas shaping efficiency.

Attention to balancing efficiency and justice also presented a framework of understanding for the institutional adaptations summarised above. As a general perception, institutional transformations are mainly resulting from a different balance between efficiency and justice struck at a particular time in a particular policy context. In this classical perception, the institutional architecture of competition law enforcement is not considered an independent proxy of legitimate competition law enforcement. It provides a mere facilitating mechanism in order to guarantee a legitimately balanced input/output structure, but no direct proxy to assess the legitimacy of a particular competition law framework.

#### **4.2. Challenging the status-quo: engineered institutional architecture as an independent proxy of legitimate competition enforcement**

Institutional architecture is nevertheless essential in its own right to legitimate a particular legal framework. Architecture is a kind of law: it determines what people can and cannot do.<sup>113</sup> The architectural design of a legal system is a tool to ensure the structural integrity of law as an operating system.<sup>114</sup> It provides the primary assessment structure to determine that integrity. According to Colin Scott, design choices comprise important and non-notorious elements of control. In designing particular technological features (e.g. requiring an access code or key to enter a particular premise or file), a self-executing regime imposing an absolute constraint is imposed on those subject to its rules.<sup>115</sup> By directly controlling the operations as a matter of design, those regulated are faced with no other choice but to comply with the system's design. As a result, the designed system itself becomes the bearer of a legitimate structure since other structures have been excluded from it.

Although design arguments have mainly been relied on as justification markers for direct operating systems in technology<sup>116</sup>, they can also be transposed into law and legal

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judicial decision-making, as it supported Advocate General Sharpston's Opinion in Joined Cases C-128/09, C-129/09, C-130/09, C-131/09, C-134/09 and C-135/09, *Boxus and Others*, nyr, judgment of 18 October 2011, para 84. For the purposes of this contribution, the notion of process forms part of the concept of input, complementing the necessity of effective competition law enforcement (output).

<sup>113</sup> L. Lessig, *Code and other laws of Cyberspace*, New York, Basic Books, 1999, 59.

<sup>114</sup> D. Crane, *The Institutional Structure of Antitrust Enforcement*, Oxford, Oxford University Press 2011, xiii.

<sup>115</sup> C. Scott, 'The Governance of the European Union: The Potential for Multi-Level Control', (2002) 8(1) *European Law Journal* 65.

<sup>116</sup> Scott refers to a system of designing cars so that a car would be immobilised when weight is detected but no seatbelt applies, see C. Scott, note 115, 66. For a general argument, see L. Lessig, note 113, 6 referring to a constitutional framework as a building process.

design itself. A legal system can theoretically foreclose the application of alternative legal positions and – at the same time – could also structure or enhance the legitimacy of existing operations by designing institutions that best match the substantive values the system inhabits.<sup>117</sup> As a result of that position, the legitimacy of an institutional system could be framed in terms of its operational functioning as a means to enable particular substantive values.<sup>118</sup> Values and institutional arrangements operate along a moving continuum, requiring institutional arrangements to provide for a legitimate enforcement context of substantive values and vice versa. From that perspective, it could be argued that in order to legitimate particular values such as efficiency and justice as enforcement tools, the institutional setup is important in itself. The institutional framework and its operations therefore function as an instrument to establish a legitimate substantive legal framework.<sup>119</sup> In so doing, institutional architecture also functions as an independent marker of legitimacy.

The *Vebic* judgment directly considers and evaluates the institutional architecture of national competition law enforcement structures. It also confirms the essential ‘engineering’ role that is reflected into institutional architecture as an additional tool to ensure legitimacy. By identifying particular principles of institutional organisation, the Court is able to require national and supranational innovations to adhere to a set of principles that in themselves promote justice and enable an efficient competition law enforcement regime. Principles of institutional organisation are not however merely static elements reflecting the current balance of efficiency and justice considerations. As flexible and judicially refined standards of good institutional practice, they allow for the institutional architectural framework to be engineered towards desirable policy goals just like efficiency and justice concerns do. In order to be perceived legitimate, particular principles of institutional organisation have been engineered into the architectural system. Following *Vebic*, these principles include participative judicial review and functional segregation.

From that perspective, competition law enforcement should no longer be assessed solely from the vantage points of efficiency and justice, it should also reflect an inherent set of engineering principles that shape and reshape the institutional architecture as an end in itself. Engineered institutional architecture thus complements both output and input and becomes a self-standing value framework in order to justify and legitimise particular choices made in the realm of competition law enforcement. The following graph appears in that respect.

It is clear from the figure that engineering is still considered to contribute to both efficiency and justice. At the same time, engineering in itself presents a dynamic process that facilitates the interaction between efficiency and justice. It joins both aims around a

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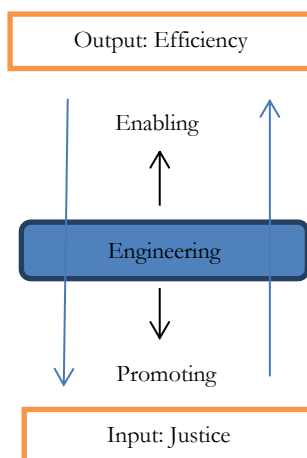
<sup>117</sup> C. Scott, note 115, 65.

<sup>118</sup> D. Crane, note 114, xiii. For a more general institutional design perspective, see V. Power, ‘The Relative Merits of Courts and Agencies in Competition Law – Institutional Design: Administrative Models; Judicial Models; And Mixed Models’, (2010) 6(1) *European Competition Journal* 91-127.

<sup>119</sup> See for an argument from a network management perspective, F. Cengiz, ‘Management of Networks between the Competition Authorities in the EC and the US: different politics, different designs’, (2007) 3(2) *European Competition Journal* 413-436.



particular ‘engineered’ institutional structure that is deemed to be legitimate in and of itself on the basis of particular principles of institutional organisation.



### 4.3. Institutional engineering and judicial legitimacy: envisioning a ‘constitutional’ perspective

The reliance in *Vebic* on and recognition of engineered architectural principles as a proxy of legitimate competition enforcement substantially alters the scope of traditional legitimacy analyses in EU competition law. In order to assess the legitimacy of a competition law enforcement system grounded in a decentralised application of supranational law, evaluation of output and input no longer offers a sufficient perspective. The extent to which particular engineered architecture principles have been implemented becomes a marker of legitimate competition enforcement in its own right.

The direct implications of an extended legitimacy framework combining input, output and engineering are twofold. First and most generally, the scope of balancing competing policy goals grows more complicated. The long-standing debate between efficiency and justice now transforms into a debate about efficient and just institutions complementing those legitimacy prongs. As a result, institution building serves as a guiding device to operationalise both efficiency and justice and therefore invites in-depth reflection on the underlying legal principles these catchwords incorporate. At the same time, legitimacy directly relates to institutional design. Debates on efficiency and justice as a result become encapsulated into institutional design arguments. Choices that do not fit the institutional design could as a result no longer be considered, even though they are thought to strike a more adequate balance between efficiency and justice. Since institutional principles precede efficiency and justice concerns, they basically become the first and foremost criteria to assess the compatibility of a national competition law enforcement system with the requirements of decentralised EU law enforcement. Second and more specifically, the creation of new legitimacy standards itself should be perceived as legitimate. Institutional engineering principles serve as judge-made ‘constitutional’ conflict standards for navigating multi-layered legal orders acting in close conjunction with one another. The Court is thus able directly to shape the institutional and procedural environment of legitimate competition law

enforcement.<sup>120</sup> In so doing, it firmly establishes itself as an interlocutor with technocratic/economic policymakers shaping competition law output and individuals and firms demanding procedural input.<sup>121</sup> Whilst the Court was already called upon to ensure or confirm a balance between efficiency and justice,<sup>122</sup> engineered institutional architecture principles directly allow it to establish a framework that best reflects that balance and to control the future engineering of that process. In so doing, the Court posits itself at the standard-setter of both the content and the institutional structure of decentralised EU competition law enforcement.

*Vebic* therefore firmly establishes the Court as a provider of legitimacy in relation to institutional arrangements in EU competition law. The Court's newfound competences render the interaction between EU and national competition law structures more streamlined and legitimate changes in national legal orders by referring to the necessities of a decentralised application and enforcement system. Unjustified expansion of Court-induced institutional principles nevertheless generates new legitimacy problems of a constitutional sort. The Court's active stance in that regard resuscitates evergreen questions as to whether or not the Court of Justice should directly make law,<sup>123</sup> whether or not it is activist,<sup>124</sup> whether or not it should be regarded as hostile or friendly towards Member States' institutional, procedural and political interests<sup>125</sup> and the extent to which it has the ultimate competence to determine EU law's mandate in the national legal order.<sup>126</sup> These matters remain the object of more general legitimacy discussions in EU law and require political choices on the distribution of authority in EU competition law to be laid bare.<sup>127</sup>

The succinctness of the Court's reasoning in *Vebic* is essentially problematic in that regard. In its judgment, the Court only refers to Article 35 of Regulation 1/2003 as a basis for requiring national institutional adaptations incorporating more adversarialism. As mentioned in section two, that provision does not however include such obligation

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<sup>120</sup> For an analysis of the *Vebic* judgment's impact on the idea of national procedural autonomy in that respect, see P. Van Cleynebreugel, note 10, 540-546.

<sup>121</sup> On the Court's role as an interlocutor in the European integration enterprise, see G. F. Mancini, 'The Making of a Constitution for Europe', (1989) 26(4) *Common Market Law Review* 595-614. See also J. H. H. Weiler, 'The Least-Dangerous Branch: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration', in J.H.H. Weiler, *The Constitution of Europe*, Cambridge, Cambridge University Press, 1999, 188.

<sup>122</sup> See Case C-301/04 P, *Commission v SGL Carbon*, [2006] ECR I-5915, para 49 for an example of that balance.

<sup>123</sup> On the Court's law-making role in that regard, see U. Everling, 'On the Judge Made Law of the European Community's Courts' in D. O'Keefe and A. Bavasso (eds.), *Judicial Review in the European Union. Liber Amicorum in Honour of Lord Slynn of Hadley*, The Hague, Kluwer Law International, 2000, 29-44.

<sup>124</sup> T. Tridimas, 'The European Court of Justice and Judicial Activism', (1996) 21(3) *European Law Review* 199-210. More recently, see H. de Waele, 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment', (2010) 6(1) *Hanse Law Review* 3-26.

<sup>125</sup> On that point, see S. Prechal, 'Community law in national courts: The lessons from Van Schijndel', (1998) 35(3) *Common Market Law Review* 681-706.

<sup>126</sup> M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', (2005) 11(3) *European Law Journal* 262-307.

<sup>127</sup> See H. Rasmussen, 'Between Self-Restraint and Activism: A Judicial Policy for the European Court', (1988) 13(1) *European Law Review* 28-38.

and could not therefore in itself serve to legitimise the Court's ability to impose principles of institutional engineering on national legal orders. From that position, it could be inferred that the Court is illegitimately extending its competences into areas not directly covered by EU law.

At the same time however, the Court has recently ventured into the institutional organisation of national law regimes in different fields of law as well. In cases related to civil procedure<sup>128</sup> and asylum proceedings<sup>129</sup>, the Court equally considered particular national institutional arrangements operating in the shadow of a harmonised EU legal instrument comparable to Regulation 1/2003. In those cases, the Court equally derived procedural or institutional obligations applicable to Member States. In justifying the existence of these obligations however, the Court referred to both the harmonised legal instrument at stake and to the binding Charter of Fundamental Rights of the European Union and even the soon-to-be-binding ECHR.<sup>130</sup> Advocates General equally and even more directly referred to these provisions.<sup>131</sup> By invoking the constitutionally mandated nature of adversarialism as reflected in these charters, the Court would be able to impose institutional principles as a matter of fundamental rights. In doing so, the Court would also build on the essential fundamental rights as due process narrative underlying institutional adaptations at the Commission level. Since fundamental rights reflected in the ECHR and in the Charter have been interpreted as requiring specific adversarial demands in order to guarantee a fair trial, dedicated attention to these fundamental rights would allow the Court to tailor these adversarial requirements in the multifarious and sector-specific contexts of EU regulation.

From that perspective, the Court's legitimacy lays in the necessary operationalisation of fundamental rights requirements into principles of institutional organisation.<sup>132</sup> In order to justify its role in that regard, the Court should refer to these fundamental rights as a basis for its institutional assimilation approach. Contrary to the Court's approach in *Vebic*, a framework of institutional assimilation would therefore benefit from direct references to the fair trial vernacular in which assimilation operates. Only in that way will *Vebic* style judgments be grounded in a legitimate framework of judicial policymaking reflected in the EU's constitutional charter.<sup>133</sup>

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<sup>128</sup> Case C-279/09, *Deutsche Energiehandels- und Beratungsgesellschaft mbH (DEB)*, nyr, judgment of 22 December 2010, para 54.

<sup>129</sup> Case C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, nyr, Judgment of 28 July 2011, para 47-49.

<sup>130</sup> Charter of Fundamental Rights of the European Union, March 30, 2010, [2010] O.J. C 83/02, 389.; see Article 6 TEU for the mandatory accession to the ECHR system.

<sup>131</sup> Opinion of Advocate General Mengozzi in C-279/09, *DEB*, para 64 and 69; Opinion of Advocate General Cruz Villalón in C-69/10, *Samba Diouf*, para 32.

<sup>132</sup> See on the importance of redesigning legal orders from that perspective, see M. Lasser, *Judicial Transformations. The Rights Revolution in the Courts of Europe*, Oxford, Oxford University Press, 2009, 341 pp. Lasser specifically argues that the emergence of fundamental rights results in the establishment of a more adversarial institutional framework.

<sup>133</sup> For references to the Treaties as a constitutional charter, see among others Case 294/83, *Parti écologiste Les Verts v European Parliament*, [1986] ECR 1339, para 23; Case C-2/88, *Zwartveld*, [1990] ECR I-3365, para 16;

## 5. CONCLUSION

The Court of Justice identified principles of institutional organisation in its interpretation of Regulation 1/2003. These principles directly enable and impose the institutional assimilation of diverging national competition law enforcement institutions into a coordinated, adversarial framework grounded in functional segregation and participative judicial review. Judicially-induced institutional assimilation initiatives complement and challenge the classical responsive ‘due process’ translation at the EU level and are supported by supranational institutional initiatives. The 2011 Hearing Officer reforms directly point towards the preference in the Commission’s institutional organisation for a segregated, adversarial decision-making process. In imposing similar principles onto the Belgian legal order in *Vebic*, the Court implicitly questions the continuing existence of integrated national agency or judicial structures that do not as such incorporate segregated decision-making. The Court’s approach aims to bridge the diversity gap between EU and national competition law enforcement structures, but at the same time triggers profound novel questions on what actor is or should be responsible for legitimising competition law enforcement in the European Union. In order to be perceived as legitimate, competition law itself requires principles of institutional organisation that enable efficiency and justice to be balanced in a constitutionally coherent fashion. As long as the Court does not directly refer to that ‘constitutional necessity’, its ability to impose and further its assimilation position might well be in jeopardy before it truly develops into a new proxy of legitimate competition enforcement.

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*Opinion 1/91*, [1991] ECR I-6079, para 1; Case C-314/91, *Beate Weber v European Parliament*, [1993] ECR I-1093, para 8.