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Efficient justice in the service of justiciable efficiency? Varieties of comprehensive judicial review in a modernised EU competition law enforcement context

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EU competition law decisions and enforcement structures at both the supranational and national levels have increasingly been subject to intensified judicial scrutiny by the Court of Justice of the European Union. As a result, different and comprehensive supranational judicial review standards, both guiding and structuring EU competition law, have simultaneously emerged across several enforcement levels. This paper identifies those different standards and relates their simultaneous emergence to modernisation debates in, and the developing more economic approach towards, EU competition law enforcement. In particular, the paper argues that differentiated comprehensive standards better allow the Court to construct the legal boundaries within which economic arguments can effectively be translated into justiciable claims as a matter of EU competition law.

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### 1. THE ‘COMPREHENSIVENESS’ (R)EVOLUTION IN EU COMPETITION LAW ENFORCEMENT

EU competition law enforcement structures have increasingly been subject to intensified judicial scrutiny at both the supranational and national levels. At the supranational level, the Court of Justice of the European Union (hereafter CJEU or the Court) case law highlighted the need for comprehensive judicial review over Commission infringement decisions. At the national level, the Court directly engaged upon a comprehensive review of national procedural choices underlying Member States’ enforcement systems.

Both ‘comprehensive judicial review’ varieties outlined here have traditionally been analysed in isolation from each other. This paper argues that those varieties can nevertheless both be related to more general tendencies underlying the ‘modernisation’ of EU competition law enforcement. In particular, it claims that both comprehensiveness varieties mentioned here serve to enable and facilitate a *more economic approach* to EU competition law and the *adversarial* judicial setting supported by that approach. From that point of view, both comprehensive review varieties contribute to facilitating judicial control over the translation of ‘economic claims’ into justiciable legal categories.

The paper develops this argument in four additional sections. Section two outlines the emergence of more comprehensive review standards against Commission infringement

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and fining decisions in the realms of EU antitrust and State aid law. Identifying a comprehensively tailored judicial review framework underlying the Court's recent case law, the section determines the scope and limits of such 'tailored' judicial review. Section three outlines different yet related comprehensive judicial review tendencies in relation to Member States' competition law enforcement structures. This section particularly highlights the Court's firm preference for a comprehensive review over national enforcement choices by relying on the volatile concepts of national procedural autonomy, equivalence and effectiveness. Section four links both comprehensive judicial review varieties and argues that they can be considered two sides of the same effective competition law enforcement coin. The section revisits modernisation debates in EU competition law and projects the effects of those debates on the judicial role in EU competition law enforcement. Comprehensive judicial review standards in that understanding enable the Court to maintain some control over the conditions within which economics-grounded arguments can be translated into justiciable claims in both supranational and national judicial settings. Section five concludes.

## 2. EU COMPETITION LAW BEFORE THE COURT OF JUSTICE: COMPREHENSIVELY TAILORED JUDICIAL REVIEW

It is well-known that the Court of Justice serves as an appellate *review* court against Commission infringement decisions in EU competition law. Whereas the General Court directly reviews those decisions, the latter does so under the supervision of the Court of Justice. The Court is thus able to impose a particular intensity of substantive review on the General Court (2.1). It is submitted that those review standards have recently become more outspoken and strengthened into comprehensive supranational review standards. In order to maintain a workable judicial machinery in the realm of EU competition law however, the Court seems to have accepted a system of 'comprehensively tailored' judicial review (2.2). That system of review is nevertheless frustrated in practice, where it appears very difficult to implement and to result in continued deference to Commission choices (2.3).

### 2.1. Comprehensive review standards at the supranational level

The Court of Justice can review EU competition law infringement decisions adopted by the European Commission. In accordance with Article 263 TFEU, addressees of such a decision as well as interested (third) parties can challenge the *legality* of a decision adopted by the European Commission, requesting the Court to annul that decision. In accordance with the Court's Statute, appeals brought by individuals or undertakings will be lodged before the General Court.

The application of the Article 263 TFEU legality review framework to competition law confronts the intricate relationship between the application of the law, which falls in the mandate of judicial review, and the underlying factual and economic analysis, on which legal solutions necessarily have to be based.<sup>1</sup> Reliance on facts to establish the

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<sup>1</sup> See also P. Van Cleynenbreugel, 'Constitutionalizing comprehensively tailored judicial review in EU competition law', (2013) 18(4) *Columbia Journal of European Law* 528-533.

infringement of law allows particular leeway for appraisal to institutions called upon to supervise and enforce the legal framework.<sup>2</sup> In addition, it has been argued that, due to the expert nature of supervisory bodies, they should be granted a significant amount of discretion or at least a margin of appreciation over the appraisal of facts.<sup>3</sup>

A distinction between comprehensive and limited judicial review is consistently relied upon in this regard.<sup>4</sup> Comprehensive review entails an exhaustive review of both the Commission's substantive findings of fact and its legal appraisal of those facts.<sup>5</sup> It comprises the maximum extent to which the Union Courts could stretch their Article 263 TFEU jurisdiction.<sup>6</sup> Limited review on the other hand implies that the judge will confine its review to whether the lawfulness of the decision is vitiated by an error of law or fact, procedural impropriety, defective reasoning or a manifest error of assessment.<sup>7</sup> In that perspective, the Courts merely police the boundaries of appraisal by the Commission and leave the latter a significant margin of assessment. To the extent that a Commission assessment is so patently unreasonable that no reasonable decision could adopt the position under scrutiny, the measure will be considered to violate the Commission's margin of appraisal and result in annulment.<sup>8</sup> According to Bailey, the EU courts have always combined a comprehensive and a limited review approach when reviewing EU competition law decisions. To the extent that the establishment of facts and their classification into legal concepts are concerned, the Courts have been relying on a comprehensive approach. A more limited review position nevertheless seems to have taken place in cases where the Commission could rule on the application of those facts in differentiated or nuanced ways. In particular, when complex economic assessments have proven necessary to establish the scope of appraisal of particular facts presumably classified in a legal concept, the Courts have granted more deference to the Commission.<sup>9</sup> To the extent that pleas in law clearly

<sup>2</sup> F. Cengiz, 'Judicial Review and the Rule of Law in the EU Competition Law Regime after *Alrosa*', (2011) 7(1) *European Competition Journal* 128.

<sup>3</sup> On discretion in the overall regime of competition law enforcement, see W. Wils, 'Discretion and Prioritization in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement', (2011) 34(3) *World Competition* 354. On the perceived difference between discretion and a margin of appraisal encapsulating some elements of discretion, see D. Bailey, 'Scope of Judicial Review under Article 81 EC', (2004) 41(5) *Common Market Law Review* 1337-1338.

<sup>4</sup> The Court itself directly referred to its two stages of review in among others case 42/84, *Remia v Commission*, [1985] ECR 2545, para 34.

<sup>5</sup> D. Bailey, n 3, 1332-1333.

<sup>6</sup> B. Lasserre, 'The European Competition System in Context: Matching Old Constitutional Principles and New Policy Challenges' in C.D. Ehlermann and M. Marquis (eds), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases*, Oxford, Hart Publishing, 2011, 64. See also in the same volume J. Ratliff, 'Judicial Review in EC competition cases before the European Courts: Avoiding double renvoi', 455, linking limited and unlimited review together as 'thorough' review.

<sup>7</sup> D. Bailey, n 3, 1333.

<sup>8</sup> A. Meij, 'Judicial Review in the EC Courts: *Tetra Laval* and Beyond' in O. Essens, A. Gerbrandy and S. Lavrijsen (eds), *National Courts and the Standard of Review in Competition Law and Economic Regulation*, Groningen, Europa Law Publishing, 2009, 14. Ratliff refers to maximum control over the legality (and not the opportunity) of an act, see J. Ratliff, n 6, 455.

<sup>9</sup> D. Bailey, n 3, 1355.

focus on the way in which the Commission classified facts or applied the law, comprehensive review would be triggered. If pleas in law do not directly classify as either contesting the legal classification of facts or the misapplication of law, the Courts will more directly rely on the margin of appraisal vested in the Commission.

Even though the Courts can substitute their findings of law for the ones maintained by the Commission, the actual powers of the Courts in particular cases do not enable them to adopt new decisions and thus to become direct supervisory bodies in competition law matters in addition to and to the detriment of the Commission.<sup>10</sup> On the contrary, their substituting approach regarding the law only grants the Courts the opportunity to annul the final decision and in so doing, to provide directions as to the correct legal approach to the Commission.<sup>11</sup>

The Courts are equally competent to review fines imposed on undertakings by the Commission in antitrust infringement proceedings. In accordance with Article 261 TFEU, unlimited jurisdiction has in that instance been conferred upon the Courts.<sup>12</sup> Unlimited jurisdiction allows the Courts to determine and adapt the amount of a fine or to repeal it altogether.<sup>13</sup> The Courts can have a fresh look at the factual circumstances and remain at liberty to appraise the imposition and extent of a fine. Elements to be taken into account include the duration of the infringements and of all the factors capable of affecting the assessment of their gravity, such as the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the European Union.<sup>14</sup> The Courts can substitute their findings for those of the Commission.<sup>15</sup> Unlimited jurisdiction thus provides a supplementary supervisory mechanism to the Courts.<sup>16</sup> It empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to *substitute* their own appraisal for the

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<sup>10</sup> The Court considers that this framework does not infringe Article 6 ECHR, see Case C-501/11 P, *Schindler et al. v Commission*, [2013] ECR I-0000, para 33. See also already Opinion of AG Sharpston in Case C-272/09 P, *KME Germany*, [2011] ECR I-12860, para 67.

<sup>11</sup> These directions can however only be indicated by the operative grounds of the judgment and the grounds underlying the operative part, as the Court held on numerous occasions, see among others Joined Cases 97/86, 193/86, 99/86 and 215/86, *Asteris and others and Hellenic Republic v Commission*, [1988] ECR 2181, para 27: In order to comply with the judgment and to implement it fully, the institution is required to have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the precise provision held to be illegal and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the annulled measure.

<sup>12</sup> Article 31 Regulation 1/2003.

<sup>13</sup> See also J. Ratliff, n 6, 465.

<sup>14</sup> Case C-272/09 P, *KME Germany*, [2011] ECR I-12860, para 96; Case C-386/10 P, *Chalkor*, [2011] ECR I-13085, para 56; Case C-389/10 P, *KME Germany*, [2011] ECR I-13125, para 123.

<sup>15</sup> Case C-272/09 P, *KME Germany*, *ibid*, para 87; Case C-389/10 P, *KME Germany*, *ibid*, para 112.

<sup>16</sup> Case C-272/09 P, *KME Germany*, *ibid*, para 103; *Chalkor*, n 14, para 63; Case C-389/10 P, *KME Germany*, *ibid*, para 130.

Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed.<sup>17</sup>

The scope of review outlined here referred to the *first instance of review* and is further complicated at the appellate level. It should be remembered that the General Court acts as the review court against any decision of the European Commission in accordance with Article 256(1) TFEU.<sup>18</sup> The Court of Justice only intervenes as an appellate court. Appeals to the Court of Justice in those instances are limited to points of law only. This implies that the Court of Justice is capable of reviewing the legal characterization of facts established by the General Court and the legal conclusions it has drawn from them.<sup>19</sup> The Court of Justice on the other hand has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts.<sup>20</sup> Only where the clear sense of the evidence is distorted, that appraisal does not constitute a point of law which is subject as such to review.<sup>21</sup> As a result, the Court of Justice should leave additional margin of appreciation to the General Court to establish the relevant facts in a particular case and should more easily remain within the confines of limited judicial review. Only to the extent that these facts are distorted or classified erroneously should the Court of Justice intervene in these matters. It cannot reassess correctly established and classified facts. That does not however imply that the Court of Justice would be unable to determine the review standards the General Court needs to rely upon in that context, as the next subsection demonstrates.

## 2.2. Towards comprehensively tailored judicial review

The case law on the standards of review maintained in relation to Commission competition law infringement decisions projects a rather blurring line between comprehensive and limited review and basically leaves the scope of that review in the Court's power of decision to be decided on a case-by-case basis.<sup>22</sup> Overall, the standard of judicial review in the realm of competition law – including both antitrust and State

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<sup>17</sup> *Ibid*

<sup>18</sup> The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. Article 51 of the Statute of the Court of Justice reads that '[b]y way of derogation from the rule laid down in Article 256(1) of the Treaty on the Functioning of the European Union, jurisdiction shall be reserved to the Court of Justice in the actions referred to in Articles 263 and 265 of the Treaty on the Functioning of the European Union when they are brought by a Member State against: (a) an act of or failure to act by the European Parliament or the Council, or by those institutions acting jointly [...] or (b) against an act of or failure to act by the Commission under the first paragraph of Article 331 of the Treaty on the Functioning of the European Union. That provision does not capture Commission decisions in the field of competition law.

<sup>19</sup> Case C-90/09 P, *General Química and others v Commission*, [2011] ECR I-1, para 71. See also J. Ratliff, n 6, 471.

<sup>20</sup> Thus advocating a correctness review standard, see R. Nazzini, 'Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition law: a Comparative Contextual-Functionalist Perspective', (2012) 49(3) *Common Market Law Review* 996.

<sup>21</sup> Case C-90/09 P, *General Química*, [2011] ECR I-1, para 72.

<sup>22</sup> D. Bailey, n 3, 1356. See for a contemporary, similar perspective, N. Wahl, 'Standard of Review – Comprehensive or Limited?' in C.D. Ehlermann and M. Marquis (eds), n 6, 285-294.

aid law – has been said to be particularly ‘light’.<sup>23</sup> This is mainly due to the simultaneous application of both comprehensive and limited review categories to competition law cases. The *Tetra Laval* and *Alrosa* judgments particularly demonstrate this case-by-case approach. *Tetra Laval*<sup>24</sup> – a case focused on the EU concentration control regime<sup>25</sup> – on the one hand seemed to limit the scope for deferential judicial review by paying increasing attention to intensive review in the fact finding process underlying the investigation of concentrations.<sup>26</sup> The *Alrosa* judgment on the other hand has been read as a confirmation of the Court’s deferential stance towards Commission action in times when the latter gets ever more powers of appraisal.<sup>27</sup>

More recent case law equally develops along this case-by-case line. At the same time however, the Court of Justice emphasises the need for and the importance of more comprehensive judicial review as an EU judicial review standard. Both EU antitrust law (a.) and State aid law (b.) cases confirm that position.

### 2.2.a. EU antitrust law standards of review

In the realm of EU antitrust enforcement, *KME* and *Chalkor* exemplify the Court’s attention to more comprehensive review in this field of law. Both judgments confirmed that the Commission should carry out a thorough examination of the circumstances of the infringement.<sup>28</sup> The Court stated that the Union Courts must carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out such a review, the Courts cannot use the Commission’s margin of discretion as a basis for dispensing with the

<sup>23</sup> See I. Forrester, ‘A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review’ in C.D. Ehlermann and M. Marquis (eds), n 6, 407-452. Ratliff on the other hand states that judicial review has overall been thorough, see J. Ratliff, n 6, 455 and 462. For a similar perspective, see M. Jaeger, ‘The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?’, (2011) 2(4) *Journal of European Competition Law & Practice* 295-314.

<sup>24</sup> Case C-12/03, *Commission v Tetra Laval*, [2005] ECR I-987.

<sup>25</sup> On the specifics of the scope of review in that respect, see D. Bailey, ‘Standard of Proof in EC Merger Proceedings: A Common Law Perspective’, (2003) 40(4) *Common Market Law Review* 845-888; B. Vesterdorf, ‘Standard of proof in merger cases: reflections in the light of recent case law of the Community courts’, (2005) 1(1) *European Competition Journal* 3-33; M. Nicholson, S. Cardell and B. McKenna, ‘The Scope of Review of Merger Decisions under Community Law’, (2005)1(1) *European Competition Journal* 123-152.

<sup>26</sup> A. Meij, n 8, 19.

<sup>27</sup> Case C-441/07 P, *European Commission v Alrosa Company Ltd.*, [2010] ECR I-5949. See F. Cengiz, n 2, 150.

<sup>28</sup> Case C-272/09 P, *KME Germany, KME France SAS and KME Italy SpA v Commission*, [2011] ECR I-12860, para 94; Case C-386/10 P, *Chalkor AE Epexergasias Metallon v Commission*, [2011] ECR I-13085, para 54; Case C-389/10 P, *KME Germany, KME France SAS and KME Italy SpA v Commission*, [2011] ECR I-13125, para 125. The cases presented a first, as the Court considered the constitutionality of the General Court’s review procedures in the light of Article 47 of the Charter rather than Article 6 ECHR, see A.-L. Sibony, ‘Annotation of Case C-272/09 P, *KME Germany, KME France SAS and KME Italy SpA v Commission*, judgment of 8 December 2011, nyr’, (2012) 49(6) *Common Market Law Review* 1990. See also U. Soltesz, ‘Due process and judicial review - mixed signals from Luxembourg in cartel cases’, (2012) 33(5) *European Competition Law Review* 241-247; I. Nikolic, ‘Full judicial review of antitrust cases after KME: a new formula of review?’, (2012) 33(12) *European Competition Law Review* 583-588. See also A. Sanchez Graells, ‘The EU’s Accession to the ECHR and Due Process Rights in EU Competition Law Matters: Nothing New under the Sun?’, SSRN Working Paper, available at <http://ssrn.com/abstract=2156904>.

conduct of an in-depth review of the law and of the facts.<sup>29</sup> The margin of appraisal justifying judicial deference therefore only relates to a limited part of Commission decision making. The Court even went on to hold that ‘although the General Court repeatedly refers to the ‘discretion’, the ‘substantial margin of discretion’ or the ‘wide discretion’ of the Commission, such references should not prevent the General Court from carrying out the full and unrestricted review, in law and in fact, required of it’.<sup>30</sup>

Rhetoric does not match results in this area of the law. Despite the Court proclaiming that more comprehensive review is necessary, the Court did not go as far as to actually annul General Court judgments for lack of comprehensive review. *KME Germany* and *Chalkor* could therefore rather be understood to add a particular and additional consideration to the need for more intensified judicial review. In order for the Court to be able to conduct meaningful review, appellants should develop nuanced and detailed claims in their review applications.<sup>31</sup> As the Court held, ‘it is for the applicant to formulate his pleas in law and not for the General Court to review of its own motion the weighting of the factors taken into account by the Commission in order to determine the amount of the fine’.<sup>32</sup> The way in which these pleas in law will be formulated determines the extent to which the Court will be obliged to respond to them. More detailed pleas arguing that the Commission transgressed its margin of appreciation in particular circumstances would enable the Court more directly to review these arguments and to dig deeper into the factors that actually contributed to the Commission’s position in that particular instance. Appealing parties are therefore able partially to guide and steer the thoroughness of legality review. As such, they need to ‘tailor’ the review entertained by the Court. *KME Germany* and *Chalkor* could therefore be read as advocating a ‘comprehensively tailored judicial review’ approach at the supranational level.

A similarly tailored approach appears to have been guiding in relation to the unlimited review of fines or periodic penalty payments imposed in antitrust infringement decisions. In relation to fines, the Commission adopted a non-binding notice containing fining guidelines.<sup>33</sup> The guidelines merely express the Commission’s position on the matter and do not provide formal binding legal rules. In practice however, they establish legitimate expectations in the eyes of undertakings that the Commission will base its calculation and determination of the fine on the basis of their provisions.<sup>34</sup> The

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<sup>29</sup> Case C-272/09 P, *KME Germany*, *ibid*, para 102; *Chalkor*, *ibid*, para 62; Case C-389/10 P, *KME Germany*, *ibid*, para 129.

<sup>30</sup> Case C-272/09 P, *KME Germany*, *ibid*, para 109; *Chalkor*, *ibid*, para 82; Case C-389/10 P, *KME Germany*, *ibid*, para 136.

<sup>31</sup> See for that argument, P. Van Cleynenbreugel, n 1, 540.

<sup>32</sup> Case C-272/09 P, *KME Germany*, n 28, para 56; *Chalkor*, n 28, para 49; Case C-389/10 P, *KME Germany*, n 28, para 63.

<sup>33</sup> See Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003, [2006] O.J. C210/2. These guidelines replace the 1998 Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty fines, [1998] O.J. C9/3.

<sup>34</sup> See para 37 2006 Fining Guidelines: Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may

Court recognized the quasi-binding force of formally non-binding guidelines from a legitimate expectations point of view.<sup>35</sup> In so recognizing however, the Court implicitly confined its ‘unlimited’ review to whether or not the Commission has indeed complied with the guidelines in the determination of the fine or periodic penalty.<sup>36</sup> According to the General Court, it should in that respect be noted that the Court of Justice has confirmed the validity, first, of the very principle of the Guidelines, and, secondly, the method which is indicated there.<sup>37</sup> Although unlimited jurisdiction allows the Court to vary fines in accordance with its own position and rules on the matter, the availability of particular guidelines invited the Courts to withdraw from adopting a different and specific legal framework.<sup>38</sup> In doing so however, the Court basically adopts a legality review approach of fines.<sup>39</sup> The varying of the amount of fines additionally does not present a matter of public policy. The Courts cannot vary the amount of fines on their own motion, but will have to assess the matter on the basis of pleas made by the parties involved.<sup>40</sup> As such, it seems that parties bear an equal responsibility to tailor their pleas concerning the review of fining decisions.<sup>41</sup>

In the wake of *KME* and *Chalkor*, the Court nevertheless struggled with the exact scope of application of comprehensively tailored judicial review standards. In practice, the Court did not clarify in what ways and to which extent parties to the proceedings should actually tailor their pleas to ensure pleas were comprehensively reviewed. The *Kone* judgment most readily exemplifies those practical difficulties. In that judgment, the

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justify departing from such methodology. According to the Court, guidelines ensure certainty to parties involved, see Case C-266/06 P *Eronik Degussa v Commission and Council*, [2008] ECR I-81, para 53.

<sup>35</sup> Among others Case C-561/06, *Archer Midland Daniels Co v Commission*, [2009] ECR I-1843, para 60 and Case C-501/11 P, *Schindler*, [2013] ECR I-0000, para 67. See also Opinion of Advocate General Sharpston to Case C-272/09 P, *KME Germany*, para 33. For an analysis of this standard as ‘unlimited within borders’, see M. Jaeger, ‘Standard of Review in Competition Cases: Can the General Court Increase Coherence in the European Union Judicial System?’ in T. Baumé, E. Oude Elferink, P. Phoa and D. Thiaville (eds), *Today’s Multi-Layered Legal Order: Current Issues And Perspectives*, Zutphen, Paris, 2011, 119-130.

<sup>36</sup> See D. Gerard, ‘Breaking the EU antitrust enforcement deadlock: re-empowering the courts?’, (2011) 36(4) *European Law Review* 461-462. For a critique in that regard, I. Forrester, ‘A challenge for Europe’s judges: the review of fines in competition cases’, (2011) 36(2) *European Law Review* 192-197.

<sup>37</sup> Case T-127/04, *KME Germany AG, KME France SAS and KME Italy SpA v Commission*, [2009] ECR II-1167, para 34.

<sup>38</sup> For an argument that this position might shift in the wake of *KME* and *Chalkor*, see Case C-89/11 P, *E.ON Rubrgas AG, E.ON AG v European Commission*, [2012] ECR I-0000 and A. Wiesbrock, ‘E.ON/GDF: Revisiting the Standard of Judicial Review for Fines in Competition Cases’, (2013) 4(1) *Journal of European Competition Law & Practice* 58-60.

<sup>39</sup> D. Gerard, n 36, 461. In *E.ON*, the Court of Justice additionally clarified its role as an appellate review body. It explicitly declared that it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of European Union law, see Case C-89/11 P, *E.ON Energie AG v. European Commission*, [2012] ECR I-0000, para 125.

<sup>40</sup> Opinion of Advocate General Sharpston Case C-272/09 P, *KME Germany*, [2011] ECR I-0000, para 74.

<sup>41</sup> The Court in Case C-89/11 P, *E.ON*, [2012] ECR I-12860, para 78, admits that parties will have to adduce pleas and evidence for the Court of Justice in order to rebut particular presumptions relied on in EU competition law. In so arguing, the Court admits that parties bear a responsibility to have their pleas tailored to what they want the (General) Court to review.



Court maintained that – despite its attention to comprehensively tailored judicial review<sup>42</sup> – ‘the analysis by the European Union judicature of the pleas in law raised in an action for annulment has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure’.<sup>43</sup> As a result, ‘when it falls to the European Union judicature to review the legality of Commission decisions imposing fines for infringements of the EU competition rules, it cannot encroach upon the discretion available to the Commission in the administrative proceedings by substituting its own assessment of complex economic circumstances for that of the Commission, but, where relevant, must demonstrate that the way in which the Commission reached its conclusions was not justified in law’.<sup>44</sup> The Court at this stage referred to the *Alrosa* judgment, where it adopted a more deferential stance than in *KME*.<sup>45</sup> As a result, it could be argued that the Court in *Kone* appears to qualify the implications of *KME Germany* into a more deferential review framework. Although the Court does not renounce from the comprehensively tailored judicial review approach reflected in the latter judgment, it does not appear to be willing to provide additional guidance as to how such tailoring should be reconciled with the inherent discretion of the Commission in this field.<sup>46</sup>

## 2.2.b. EU State aid law standards of review

In the realm of State aid law, the Court also does not seem to have explicitly abandoned a more deferential review framework.<sup>47</sup> In the 2010 *Scott* judgment however, the Court held that ‘although in the area of State aid, the Commission enjoys a broad discretion the exercise of which involves economic assessments which must be made in a European Union context, that does not imply that the European Union judicature must refrain from reviewing the Commission’s interpretation of economic data’.<sup>48</sup> The judgment subsequently referred to the *Tetra Laval* standards of review to structure its reasoning.<sup>49</sup> At the same time however, the Court acknowledged that the ‘review by the European Union judicature of the complex economic assessments made by the Commission is necessarily limited and confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers’.<sup>50</sup> That stance does not however detract from the identified ‘comprehensively tailored’ approach witnessed in EU antitrust review, as the

<sup>42</sup> Case C-510/11 P, *Kone Oyj et al. v Commission*, [2013] ECR I-0000, para 24-25.

<sup>43</sup> *Ibid*, para 26.

<sup>44</sup> *Ibid*, para 27.

<sup>45</sup> *Ibid*, para 27.

<sup>46</sup> *Ibid*, para 34.

<sup>47</sup> See for a similar point of view, H. Hofmann and A. Morini, ‘Judicial review of Commission Decisions in State aid’ in E. Szyzszak (ed.), *Research Handbook on EU State Aid Law*, Cheltenham, Edward Elgar, 2011, 370; L. Flynn and T. Ottervanger, ‘Judicial Protection’ in L. Hancher, T. Ottervanger and P.J. Slot (eds), *EU State Aids*, London, Sweet & Maxwell, 4<sup>th</sup> Edition, 2012, 1047.

<sup>48</sup> Case C-290/07 P, *Commission v Scott*, [2010] ECR I-7763, para 64.

<sup>49</sup> *Ibid*, para 65.

<sup>50</sup> Case C-290/07 P, *Commission v Scott*, [2010] ECR I-7763, para 66.

*Scott* judgment itself demonstrated.<sup>51</sup> Other judgments have equally extended to Court's grasp on the 'facts' of a case, over which it exercises comprehensive review.<sup>52</sup> In addition, the Court has been willing to acknowledge self-imposed limits by the Commission when developing guidelines in the assessment of aid measures.<sup>53</sup>

The 2013 *Ryanair v. Commission* judgment nevertheless casts new doubts on this approach, as the Court held that '[i]t should be recalled that the duty [...] to state reasons for its judgments does not require the General Court to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the interested parties to know the grounds upon which the General Court relied and provides the Court with sufficient material for it to exercise its powers of review on appeal'.<sup>54</sup> Whilst the Court explicitly confirms the comprehensively tailored review structure, it appears rather hesitant to demand a complete and full reasoning from the General Court. In doing so, it adopts a similarly hesitant position as it did in *Kone*.

### 2.3. Comprehensively tailored judicial review as *de facto* deference

Although the Court's attention to comprehensively tailored judicial review in *KME Germany* has been heralded as a new standard for supranational judicial review<sup>55</sup>, recent case law demonstrates that the application of the comprehensively tailored review standards amounts to *de facto* deference to the Commission's interpretation of facts and classifications in law. The *Schindler* and *Kone* judgments particularly exemplify that the Court of Justice appears unwilling to determine – as a matter of EU law – clear-cut standards in accordance with which the General Court has to take account of tailored pleas and the margin of appreciation entrusted to the Commission. In all mentioned cases, none of the arguments entertained by the applicants has been accepted by the General Court<sup>56</sup> and references have been made to the Commission's margin of appraisal and the responsibility of applicants to tailor their pleas in law appropriately in that regard.<sup>57</sup>

Such *de facto* deference to the Commission's position does not necessarily imply that the Courts are unwilling to review with sufficient intensity the classifications made and assessments conducted by the Commission. The lack of review scope guidance offered by the Court of Justice rather demonstrates that the General Court is maintaining an appropriate standard of review by allowing the parties to tailor their claims but at the same time also recognising the Commissions margin of appreciation in that regard.

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<sup>51</sup> *Ibid*, para 68-85.

<sup>52</sup> See among others Case C-525/04 P, *Spain v Lenzing*, [2007] ECR I-9947, para 57 and references included there.

<sup>53</sup> See also H. Hofmann and A. Morini, n 47, 373-374.

<sup>54</sup> Case C-287/12 P, *Ryanair v Commission*, [2013] ECR I-0000, para 110.

<sup>55</sup> P. Van Cleynenbreugel, n 1, 238.

<sup>56</sup> Case C-501/11 P, *Schindler*, [2013] ECR I-0000, para 47, 60, 69, 76, 84, 116, 130, 145, 161, 171; Case C-510/11 P, *Kone Oyj et al. v Commission*, [2013] ECR I-0000, para 57, 73, 79, 94, 104.

<sup>57</sup> Case C-501/11 P, *Schindler*, [2013] ECR I-0000, para 43; Case C-510/11 P, *Kone Oyj et al. v Commission*, [2013] ECR I-0000, para 61 and 72.

Since the Court does not provide any particular guidance as to how comprehensively tailored judicial review should be conducted however, applicants remain uncertain as to the scope and content of their pleas and the General Court remains at liberty to experiment with the actual intensity of its tailored review. As such, comprehensively tailored judicial review leads to a case-by-case assessment without providing *ex ante* legal certainty on the intensity of review. The *de facto* deference so far detected in the case law epitomises the uncertainty underlying comprehensively tailored review as a supranational review standard. It cannot however be denied that the Court of Justice continues to emphasise the need for comprehensively tailored judicial review as a standard underlying the judicial assessment of Commission infringement decisions in competition law.

### 3. EU COMPETITION LAW BEFORE NATIONAL COURTS: SUPRANATIONAL LITIGATION STANDARDS SUPPORTING DECENTRALISED COMPETITION LAW ENFORCEMENT

EU competition law essentially and consistently relies on national courts to assist in the application and enforcement of its directly effective antitrust and State aid prohibitions within diversified national legal orders. Although Article 104 TFEU only refers to Member State authorities and Article 108 TFEU mentions the responsibility of the Member States, the Court of Justice made clear that national courts have particular responsibilities in the field of EU competition law.<sup>58</sup> Regulation 1/2003 confirmed that role in the realm of antitrust law,<sup>59</sup> as did Regulation 659/1999 in relation to State aid.<sup>60</sup> Both Regulations reflect a particular distinctive and dual role for national courts that is essentially centred on the judicially developed concept of ‘national procedural autonomy’ (3.1.). That concept provided the Court with a welcome review mechanism for national procedural choices in the realm of EU competition law enforcement. In reading multiple standards of review in the procedural autonomy concept, the Court has been able to engage upon a more comprehensive review of national procedural choices (3.2.). In doing so, the Court particularly developed and combined negative and positive comprehensive review standards guiding the design of national competition law enforcement structures (3.3.).

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<sup>58</sup> See the Court’s famous proclamations in Case 48/72 *Brasserie De Haecht* [1973] ECR 77, para 9; Case C-127/73, *BRT v Sabam*, [1974] ECR 51, para 16-17; Case 59/77 *De Bloos v Bouyer* [1977] ECR 2359, para 8 and Case C-234/89, *Delimitis*, [1991] ECR I-935, para 49-54 in that respect. See also H. Wertheimer, ‘The *Haecht II* judgment and its repercussions’, (1973) 10(4) *Common Market Law Review* 386-424.

<sup>59</sup> Article 6 and Article 16(1) 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. L1/1 (hereinafter referred to as Regulation 1/2003).

<sup>60</sup> Article 14(3) Council Regulation 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, [1999] O.J. L83/1 (hereinafter referred to as Regulation 659/1999). Attention to national courts in State aid enforcement has additionally been enhanced by Article 23a, inserted by Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, [2013] O.J. L204/15.

### 3.1. The distinctive role of national procedural autonomy

National courts have gradually been granted a distinctive (private) enforcement role in EU competition law. The role of courts in this regard has been formally recognized in Commission notices on national courts in both antitrust and State aid matters.<sup>61</sup> The direct effect attributed to the prohibition on restrictive agreements in Article 101(2) TFEU enabled national courts to declare anticompetitive agreements null and void, in addition to and as an extension of national contract law sanctions.<sup>62</sup> Whereas the European Commission was deemed exclusively competent to exempt particular agreements from the prohibition, national courts were called upon to determine the anticompetitive object or effect of agreements and to apply the void sanction incorporated in the Treaties.<sup>63</sup> In a similar fashion, national courts could apply the Article 102 TFEU prohibition to dominant undertakings, coupled with national remedies to address abusive behaviour.<sup>64</sup> In the same way, the granting of unlawful State aid – i.e. aid provided without being formally approved by the Commission and/or granted in disregard of the standstill obligation reflected in Article 108(3) TFEU – can be contested by competitors or by affected parties before national courts.<sup>65</sup> The application of so-called ‘block exemption’ regulations equally granted an additional private enforcement role to national courts.<sup>66</sup>

<sup>61</sup> In antitrust, see the Commission Notice on the cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, [1993] O.J. C39/6, subsequently replaced by the 2004 Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, [2004] O.J. C101/54. In State aid, see Notice on cooperation between national courts and the Commission in the State aid field, [1995] O.J. C312/8, subsequently replaced by a 2009 Commission notice on the enforcement of State aid law by national courts, [2009] O.J. C85/1; see in that respect also Notice from the Commission towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible aid, [2007] O.J. C272/4.

<sup>62</sup> See on the interplay between the supranational voidness sanction and national contract law, C. Cauffman, ‘The impact of voidness for infringement of Article 101 TFEU on related contracts’, (2012) 8(1) *European Competition Journal* 95-122.

<sup>63</sup> See Article 4 Council Regulation 17 implementing Articles 85 and 86 of the Treaty, [1962] O.J. L 13/204 (English Special Edition, Chapter 1959-1962, 87). The system was nevertheless more complicated, as agreements had to be notified in accordance with Article 9 of that Regulation and could be captured by a ‘provisional validity’. On the case law concept of provisional validity in general, see already W. Alexander, ‘The Domestic Courts and Article 85 of the Rome Treaty’, (1963) 1(4) *Common Market Law Review*, 449-452 and V. Korah, ‘The Rise and Fall of Provisional Validity – The Need for a Rule of Reason in EEC Antitrust’, (1981) 3 *Northwestern Journal of International Law & Business* 320-357.

<sup>64</sup> On remedies and the issues that continue to rise in this respect, see E. Hjelmeng, ‘Competition Law Remedies: Striving for Coherence or Finding New Ways?’, (2013) 50(4) *Common Market Law Review* 1007-1038.

<sup>65</sup> Article 14 Regulation 659/1999.

<sup>66</sup> In antitrust, see Regulation No 19/65/EEC of 2 March of the Council on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, [1965] O.J. 36/533 (English Special Edition Chapter 1 1965-1966, 35) constitutes the basis upon which particular Commission block exemption Regulations have been adopted. In State aid, Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, [1998] O.J. L142/1.

In addition to the ‘private enforcement’ role directly granted to national courts, the latter have increasingly come to play a subsidiary role in the public enforcement of EU antitrust and State aid law. This public enforcement role took place in at least two respects. Firstly, national courts have been called upon to *review* the decisions adopted by national competition authorities. As national authorities are obliged to apply EU competition law in accordance with Article 3 Regulation 1/2003, national courts are immediately called upon to review the application of EU law. National courts thus effectively become EU law review bodies and EU judicial review standards can as a result more easily be projected onto those courts. Secondly, national courts play an essential role in *recovering* (non-notified) unlawful and incompatible aid. Recovery orders by national authorities can be contested or national authorities can lodge proceedings to ensure recovery of unlawful and incompatible aid. National courts are in that instance called upon to review the legality of national decisions or to consider the enforceability of a Commission decision. In doing so, the national court will additionally be able to refer the matter to the Court of Justice for clarification.<sup>67</sup>

The Court of Justice acknowledged, promoted and structured both types of national courts’ involvement in EU competition law enforcement. As national courts have direct access to the Court of Justice through the reference for a preliminary ruling procedure, the Court has been able to structure national courts’ public and private enforcement roles in accordance with similar principles of EU law. The concept of ‘national procedural autonomy’ has played a key role in that regard.

The application of EU law by national courts has consistently been structured in accordance with an EU law principle of national procedural autonomy. Although only formally recognized as an EU law principle by the Court in 2004<sup>68</sup>, the idea of procedural autonomy has a long history in EU law.<sup>69</sup> Given the lack of EU federal courts and the need for cooperation between national courts and supranational actors, procedural autonomy provided a balance between the necessities of European integration and the confirmation of national institutional diversity. At the same time

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<sup>67</sup> Article 14(3) Regulation 659/1999.

<sup>68</sup> Case C-201/02, *Wells*, [2004] ECR I-723, para 65. Advocate General Darmon referred to procedural autonomy in relation to State aid recovery obligations in his Opinion in Case 94/87, *Commission v Germany*, [1989] ECR 175, para 6. In his understanding however, procedural autonomy did not constitute a *principle* of EU law, but rather a factual setting against the backdrop of which State aid recovery proceedings were to take place. Advocate General Jacobs did however already identify a ‘well-established principle of procedural autonomy’ in his opinion in Case C-104/91, *Borrell*, [1992] ECR I-3003, para 23. He did so on the basis of Case 33/76 *Reve* [1976] ECR 1989, para 5 and Case 45/76 *Comet* [1976] ECR 2043, para 13, which can rightfully be considered to have established the foundations of a principle of national procedural autonomy encapsulating principles of equivalence and effectiveness.

<sup>69</sup> It should indeed be acknowledged that the concept of procedural autonomy – without it formally being attributed the status of EU law *principle* – already surfaces in earlier case law, see Case T-83/96, *Gerard van der Wal v Commission of the European Communities*, [1998] ECR II-585, para 48 (where it was referred to as a and Case C-224/97, *Erich Ciola v Land Vorarlbergand*, [1999] ECR I-2517, para 24, where the Austrian government made a claim on the basis of procedural autonomy (which was not however addressed in those terms by the Court). Advocate General Jacobs’ claim mentioned in the previous footnote indicates that the existence of a principle of procedural autonomy as a matter of EU law was nevertheless implicitly presumed here. For a similar opinion, see C. Kakouris, ‘Do the Member States Possess Judicial Procedural Autonomy?’, (1997) 34(6) *Common Market Law Review* 1389 -1412.

however, the concept of national procedural autonomy has become an inherent part of the EU's conceptual vocabulary. As such, 'national' procedural autonomy operates in accordance with conditions and requirements directly stated at the EU level. In accordance with long-standing case law, procedural autonomy implies that in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law.<sup>70</sup>

The scope of national autonomy in the organization and operation of the court system is nevertheless limited by two principles of EU law: the principle of equivalence and the principle of effectiveness. According to long-standing case law, the principle of equivalence determines that the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions.<sup>71</sup> This implies that supranational claims must be lodged in accordance with the same procedural rules as the ones that govern similar domestic claims. The notion of similarity is essential in that regard. According to the Court, the purpose and the essential characteristics of allegedly similar domestic actions must be taken into account. In contemplating the similarity of domestic and EU-based claims, a national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts.<sup>72</sup> The principle of effectiveness on the other hand states that the application of national procedural rules must not render practically impossible or excessively difficult the exercise of rights conferred by EU law.<sup>73</sup> The effectiveness requirement enabled the Court of Justice to order the non-application of ineffective national procedural rules and to impose a particular image of the effectiveness of EU law on national judges.<sup>74</sup> The Court justified its intrusions on the basis of the EU principle of effective judicial protection, which has also been acknowledged in Article 47 of the Charter of Fundamental Rights (CFR) and Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>75</sup> As such, Member States have been asked to adapt their procedural systems in accordance with a judicially constructed and mandated image of EU effectiveness in the organisation of justice, an EU 'image' of efficient justice.

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<sup>70</sup> Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para 12; Case C-432/05, *Unibet*, [2007] ECR I-2271, para 39; and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, para 28; Case C-268/06, *Impact*, [2008] ECR I-2483, para 44.

<sup>71</sup> Case C-432/05, *Unibet*, [2007] ECR I-2271, para 43.

<sup>72</sup> Case C-326/96, *Levez*, [1998] ECR I-7835, para 43-44; C-63/08 *Pontin* [2009] ECR I-10467, para 45; Case C-591/10 *Littlewoods Retail and Others* [2012] ECR I-0000, para 31; Case C-93/12, *Stoyanov*, [2013] ECR I-0000, para 38.

<sup>73</sup> Case C-432/05, *Unibet*, [2007] ECR I-2271, para 43. See also Case C-452/09, *Iaia*, [2011] ECR I-4043, para 16; case C-262/09, *Meilicke*, [2011] ECR I-5669, para 55.

<sup>74</sup> See for that image, M. Accetto and S. Zleptnig, 'The Principle of Effectiveness: Rethinking its Role in Community Law', (2003) 11(3) *European Public Law* 375-403.

<sup>75</sup> For that perspective and an overview of relevant cases, see P. Van Cleynenbreugel, 'Judge-Made Standards of National Procedure in the Post-Lisbon Constitutional Framework', (2012) 37(1) *European Law Review* 90-100.

### 3.2. Towards supranational litigation standards in EU competition law enforcement

EU competition law has particularly been prone to such review of national procedural choices. In the realm of EU antitrust law, the Court has specifically been aided by the perceived need for uniform enforcement in the decentralised enforcement context of Regulation 1/2003 and by its willingness to promote a framework for the effective private enforcement of EU competition law before national judges. In State aid law enforcement, enhanced attention for effective recovery and for diminishing national diversity in that regard have gradually painted a similar picture. All in all, both fields reflect the Court's preference for the shaping of particular supranational litigation standards that reflect a more comprehensive review over national procedural choices.

#### 3.2.a. Review of national antitrust law enforcement structures in the wake of Regulation 1/2003

The Court of Justice most directly intervened in the organisation of national courts and procedures in relation to the decentralised enforcement context in Regulation 1/2003. In its judgments, the Court explicitly emphasised the need for uniform enforcement of EU competition law in a decentralised and multi-dimensional enforcement context. National judges in that understanding particularly functioned as extensions to the Court of Justice. The latter applied both negative and positive comprehensive review standards to translate that extension into reality.

In the public enforcement sphere, recent Court of Justice judgments interpreting Regulation 1/2003 refer to the uniform and effective EU law application and translate the uniformity requirements into positive procedural standards imposed on national courts in particular and national legal orders in general.<sup>76</sup> In *X. BV*, the Court held that the European Commission could intervene in national proceedings that do not directly pertain to issues relating to the application of Article 101 or 102 TFEU.<sup>77</sup> The only requirement imposed is that the coherent application of Article 101 or 102 so requires.<sup>78</sup> As such, Member States' procedural systems have been obliged to allow for Commission interventions in non-competition proceedings as well. The European Commission would thus be allowed to submit on its own initiative written observations to a national court of a Member State in proceedings relating to the deductibility from

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<sup>76</sup> It could be argued that Regulation 1/2003 constitutes a 'harmonised' set of EU procedural rules in relation to competition law enforcement, contrary to different sectors of law that do not know any procedural harmonization at all, see M. Böse, 'Case Note Case C-45/08, Spector Photo Group NV, Chris Van Raemdonck v. Commissie voor het Bank-, Financier- en Assurantiewezen, Judgement of the European Court of Justice of 23 December 2009, nyr', (2011) 48(1) *Common Market Law Review* 199. According to Regulation 1/2003, Member States are not precluded from adopting national legislation, as long as that legislation respects fundamental principles of EU law (see among others consideration 9). In so doing, the Regulation recognizes the procedural autonomy of Member States to the extent no specific EU procedural rules have been established.

<sup>77</sup> 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>78</sup> Case C-429/07, *X. BV*, [2009] ECR I-4833, para 32.

taxable profits of the amount of a fine or a part thereof imposed by the Commission from infringement of Articles 101 and 102 TFEU.<sup>79</sup> *Tele2Polska* prohibited national authorities to adopt a general decision holding that a particular restrictive practice does not infringe EU law. National courts had to supervise and enforce that prohibition.<sup>80</sup> In *T-Mobile*, the Court of Justice maintained that national courts were required to apply a presumption of causal connection between undertakings' behaviour and anticompetitive practices as developed in Court of Justice case law.<sup>81</sup> It considered these presumptions to be a part of substantive EU competition law and therefore imposed them on national courts.<sup>82</sup> *Vebic* demanded the potential participation of a competition authority in appellate proceedings against its own decisions.<sup>83</sup> National judges or national legal systems in some ways had to take that element into account.<sup>84</sup> *Toshiba* held that '[t]he opening by the European Commission of a proceeding against a cartel [...] Regulation No 1/2003 does not, pursuant to Article 11(6) of Regulation No 1/2003, read in combination with Article 3(1) of the same regulation, cause the competition authority of the Member State concerned to lose its power, by the application of national competition law, to penalise the anti-competitive effects produced by that cartel in the territory of the said Member State *during periods before the accession of the latter to the European Union*'.<sup>85</sup> From the time that a Member State accedes to the EU however, EU competition law applies, including its principle of *ne bis in idem*. As a result, a national competition authority would no longer be able to prosecute and sanction the same facts the Commission already decided on.<sup>86</sup> National courts are called upon to enforce and apply this particular understanding of *ne bis in idem* in addition to and distinct from the Charter of Fundamental Rights' provision with the same content.<sup>87</sup> The *Schenker* judgment additionally held that an undertaking which has infringed that provision may not escape imposition of a fine where the infringement has resulted from that undertaking erring as to the lawfulness of its conduct on account of the terms of legal advice given by a lawyer or of the terms of a decision of a national

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<sup>79</sup> *Ibid*, para 16 and 40.

<sup>80</sup> Case C-375/09, *Tele 2 Polska*, [2011] ECR I-3055, para 27.

<sup>81</sup> Case C-8/08, *T-Mobile*, [2009] ECR I-4529. For comments on this case, see A. Gerbrandy, 'Case Note, Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV, Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, Judgment of the Court (Third Chamber) of 4 June 2009', (2010) 47(4) *Common Market Law Review* 1199-1220.

<sup>82</sup> Case C-8/08, *T-Mobile*, [2009] ECR I-4529, para 52.

<sup>83</sup> Case C-439/08, *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebepwerkers (VEBIC) VZW*, [2010] ECR I-12471, para 59.

<sup>84</sup> *Ibid*, para 63.

<sup>85</sup> Case C-17/10, *Toshiba*, [2012] ECR I-0000, para 92.

<sup>86</sup> Case C-17/10, *Toshiba*, [2012] ECR I-0000, para 103. See in general, M. Wasmeier and N. Thwaites, 'The development of *ne bis in idem* into a transnational fundamental right in EU law: comments on recent developments', (2006) 31(4) *European Law Review* 565-578; F. Louis and G. Accardo, '*Ne Bis in Idem*, part "Bis"', 34 *World Competition* (2011), 97-112; G. Di Federico, 'EU Competition Law and the Principle of *Ne Bis in Idem*', (2011) 34(2) *World Competition* 241-260.

<sup>87</sup> For that analysis, see W. Devroe, 'How General Should General Principles Be? *Ne Bis in Idem* in EU Competition Law' in U. Bernitz X. Groussot and F. Schulyok (eds), *General Principles of EU law and European Private Law*, Alphen a/d Rijn, Kluwer, 2013, 437.



competition authority.<sup>88</sup> National courts were to ensure that national courts did not remove a fining decision for exclusively those reasons, although the circumstances of the case could warrant the imposition of no fine in the specific case.

The imposition of positive obligations on Member States has most directly taken shape in the realm of private enforcement of EU competition law. In its 2001 *Courage* judgment, the Court of Justice courageously stated that '[t]he full effectiveness of Article [101] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition'.<sup>89</sup> The Court continued by holding that the 'national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals'.<sup>90</sup> Later case law not only confirmed that possibility<sup>91</sup>, but also developed particular standards in accordance with which private enforcement should be organised. In *Pfleiderer*, the Court imposed an obligation on national courts to balance the public interest objectives in not disclosing leniency documents with the need for effective private enforcement of EU competition law.<sup>92</sup> The Court did not however clarify exactly how that balancing or weighing should take place.<sup>93</sup> The *Donau Chemie* judgment explicitly held that national law must not be developed in such a way as to preclude any possibility for the national courts to conduct that weighing-up on a case-by-case basis.<sup>94</sup> As a result, courts remain at the forefront of the balancing exercise. The same judgment also posited that courts, which are empowered only to take due note of the consent or refusal expressed by the parties to the proceedings concerning the disclosure of the evidence in the file, cannot sufficiently intervene in order to protect overriding public interests or the legitimate overriding interests of other parties, including that of allowing disclosure of the documents requested.<sup>95</sup> That situation cannot be maintained as a matter of EU law enforcement.

The principles and obligations decided upon by the Court in the abovementioned cases provide a set of standards in accordance with which national procedural systems have to operate. In themselves, the positive obligations reflected throughout those

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<sup>88</sup> Case C-681/11, *Schenker et al.*, [2013] ECR I-0000, para 49-50.

<sup>89</sup> Case C-453/99, *Courage v Crehan*, [2001] ECR I-6297, para 26.

<sup>90</sup> *Ibid.*, para 25, see also para 33.

<sup>91</sup> Joined Cases C-295/04 to C-298/04, *Manfredi*, [2006] ECR I-6619, para 39; Case C-199/11, *Otis*, [2012] ECR I-0000, para 41 and 43.

<sup>92</sup> That balancing application resembles the balancing required from supranational judges in directly or indirectly granting access to Commission documents in EU law, see A.E. Beumer and A. Karpetas, 'The Disclosure of Files and Documents in EU Cartel Cases: Fairytale or Reality', (2012) 8(1) *European Competition Journal* 131.

<sup>93</sup> Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, [2011] ECR I-5161, para 31. On the scope of *Pfleiderer* in that regard, C. Cauffman, 'Access to Leniency-Related Documents after *Pfleiderer*', (2011) 34(4) *World Competition* 607. See also G. Goddin, 'The *Pfleiderer* Judgment on Transparency: The National Sequel of the Access to Document Saga', (2012) 3(1) *Journal of European Competition Law & Practice* 40-42.

<sup>94</sup> Case C-536/11, *Donau Chemie*, [2013] ECR I-0000, para 35.

<sup>95</sup> Case C-536/11, *Donau Chemie*, [2013] ECR I-0000, para 37.

judgments reflect *standards that structure and govern the litigious context* national courts are called upon to enforce. As such, the Court can be said to have developed particular supranational litigation standards as a result of its positive comprehensive review of national antitrust procedures.

### 3.2.b. National courts and EU State aid enforcement

In the realm of State aid, the Court particularly interpreted and refined Regulation 659/1999 in order to structure national courts' secondary role in the State aid recovery regime. As such, the Court's case law generally complemented the 2009 Notice on the Enforcement of EU State aid law. The Court's case law in this field mainly focused on the scope of the obligation to recover unlawful (non-notified) state aid in accordance with Article 108(3) TFEU, and on the review of Commission or national authorities' decisions to initiate recovery proceedings in that regard. In doing so, the Court's recovery case law built upon earlier judgments that enabled competitors to rely upon national judges to contest the granting of aid approved by the Commission to a specific undertaking.<sup>96</sup> As a result, the obligations imposed by the Court on national courts and legal orders generally reflect *negative* obligations, i.e. obligations to refrain from acting.

The *CELF I* judgment provides a good example of confining the scope of recovery obligations imposed on national judges. In that case, the Court essentially maintained that a full recovery of unlawfully granted aid is no longer necessary if the Commission subsequently declares the aid compatible with the EU law.<sup>97</sup> At the same time however, national judges should be able to take all measures to initiate recovery if the aid has been declared incompatible, even if the addressees or Member State concerned lodged an appeal before the General Court.<sup>98</sup> A national judge cannot in that regard stay proceedings until the Commission or the Court delivered a final judgment on the matter.<sup>99</sup> In *Lucchini*, the Court mandated the removal of a national rule on *res judicata* which would impede the effective application of EU state aid law.<sup>100</sup> Explicitly relying on a negative comprehensive review standard grounded in EU primacy<sup>101</sup>, the Court set as a standard that national judges could no longer rely on national procedural rules that would impede the recovery obligation resulting from a final Commission decision holding the aid to be incompatible with EU law.

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<sup>96</sup> See for overviews in that respect, L. Flynn and T. Ottervanger, n 47, 1057-1065; P. Nebbia, 'State aid and the role of national courts' in E. Szyssczak (ed.), n 47, 390-403.

<sup>97</sup> Case C-199/06, *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)*, [2008] ECR I-469, para 55. See also P. Adriaanse, 'Appropriate Measures to Remedy the Consequences of Unlawful State Aid An analysis of the ECJ Judgment of 12 February 2008 in Case C-199/06 (*CELF/SIDE*)', (2009) 2(1) *Review of European Administrative Law* 84-85.

<sup>98</sup> Case C-1/09, *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)*, [2010] ECR I-2099, para 29-30.

<sup>99</sup> *Ibid*, para 31. See also T. Jaeger, 'Settling into a Weak effet utile Standard for Private State Aid Enforcement', (2010) 1(4) *Journal of European Competition Law & Practice* 319-324.

<sup>100</sup> Case C-119/05, *Lucchini*, [2007] ECR I-6199, para 61.

<sup>101</sup> See also P. Nebbia, 'Do the rules on state aids have a life of their own? National procedural autonomy and effectiveness in the Lucchini case', 33 *European Law Review* (2008), 427-438.

In the 2013 *Flughafen Frankfurt Hahn* judgment, the Court confirmed this position. It stated that ‘the national courts’ tasks is [...] to pronounce measures appropriate to remedy the unlawfulness of the implementation of the aid, in order that the aid does not remain at the free disposal of the recipient during the period remaining until the Commission makes its decision’.<sup>102</sup> To that extent, the national court is obliged as a matter of EU law ‘to adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure’. Those measures may include the suspension of the implementation of the measure in question and the ordering of the recovery of payments already made. That court may also decide to order provisional measures in order to safeguard both the interests of the parties concerned and the effectiveness of the Commission’s decision to initiate the formal examination procedure.<sup>103</sup> In all instances, the Commission and the Court of Justice could additionally be involved in the process of clarifying the notion of aid by interpreting that notion as a matter of EU law.<sup>104</sup>

Whilst national authorities and State aid addressees have access to the national court to contest the scope of a recovery obligation, national courts have no powers to annul EU decisions. A national court cannot rule on the validity of a Commission decision on the (in-) compatibility of State aid with EU law. In those circumstances, national courts have to refer the matter to the Court, as a national court cannot directly rule on the validity of a Commission decision.<sup>105</sup> That reference opportunity cannot however be relied upon by addressees of Commission State aid decisions to question the compatibility of the aid with EU law. Those addressees should rely on the annulment procedure and accompanying time limits in Article 263 TFEU.<sup>106</sup> Only the obligation for Member States not to put proposed measures into effect until the Commission procedure has resulted in a final decision, can be directly enforced before national courts by all parties involved in the aid scheme.<sup>107</sup>

### **3.3 Supranational litigation standards as comprehensive judicial review of national competition law enforcement settings**

The principles of procedural autonomy, equivalence and effectiveness have consistently guided the Court in reviewing national procedural choices in relation to EU competition law enforcement. At the same time however, those principles have not been applied with the same rigour across all cases. In fact, those principles and their application reflect or incorporate different underlying *standards of review* that imply judicial choices whether or not to transform national legal orders into EU-tailored

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<sup>102</sup> Case C-284/12, *Deutsche Lufthansa v Flughafen Frankfurt-Hahn*, [2013] ECR I-0000, para 31.

<sup>103</sup> *Ibid*, para 45.

<sup>104</sup> *Ibid*, para 45.

<sup>105</sup> See P. Nebbia, n 96, 392.

<sup>106</sup> Case C-188/92, *Textilwerke Degendorf*, [1994] ECR I-833, para 17.

<sup>107</sup> See for a recent reconfirmation of that approach, Case C-6/12, *P Oy*, [2013] ECR I-0000, para 38-41.

procedural regimes.<sup>108</sup> Understanding ‘procedural autonomy’ as a bundle of different standards of review allows us to conceptualize the supranational judicial role in national procedural matters and the ensuing establishment of supranational litigation standards.

Within the realm of national procedural review in general, four standards of review can be distinguished: marginal review, intermediate review, negative comprehensive review and positive comprehensive review. Whereas the former two categories indicate a preference for judicial deference, the latter two demonstrate the Court’s ability and willingness directly to intervene and structure national procedural law frameworks. The Court continues to rely on all four standards simultaneously, without a clear predictive framework being available for the Court’s choice for a particular review standard in that regard. In the realm of EU antitrust and State aid law, the two ‘comprehensive review’ categories have become preferable instruments of EU judicial intervention.

Marginal and intermediate review standards start from the assumption that a *conflict* between supranational and national law requires remediation by a national court. In marginal review cases, the Court asserts that no actual conflict is taking place between supranational requirements and national procedural law. It can therefore suffice in determining that national procedural law does not directly restrict the full application of EU law. In marginal review judgments, the Court therefore generously defers to national judges to make EU law work in the national legal order.<sup>109</sup> In intermediate review cases, the Court identifies a particular conflict between supranational requirements and one specific national (procedural) rule. The Court subsequently imposes the non-application of that particular rule, but leaves the actual resolution of the dispute and the ways in which alternative or other national procedural rules are applied, to the national court.<sup>110</sup> Relying on the primacy of EU law, the Court thus entrusts national courts with providing an adequate alternative once the actual conflict has been resolved.<sup>111</sup>

Comprehensive review approaches project with a more direct involvement – or even intrusion – of the Court of Justice in national procedural law frameworks. Rather than attempting to resolve an actual conflict between supranational law requirements and national procedural rules, comprehensive review approaches envisage *potential* conflicts between national and supranational requirements. With a view to *avoid* future actual conflicts, the Court decides to intervene in a preliminary fashion. It does so by either indirectly resolving the perceived potential conflict or by actually avoiding the conflict at all. Indirect resolution of the conflict entails the non-application and indirect removal of a (procedural) rule from the national framework in the name of EU effectiveness. Although the Court does not replace the rule with a supranational designed alternative,

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<sup>108</sup> See for a more complete analysis of standards of review, also outside the realm of EU competition law, P. Van Cleynebreugel, ‘National procedural choices before the European Court of Justice’ in L. Gruszscynski And W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, Oxford, Oxford University Press, 2014, 179-185.

<sup>109</sup> See Joined Cases C-430/93 and C-431/93, *Van Schijndel*, [1995] ECR I-4705, para 21 and Case C-432/05, *Unibet*, [2007] ECR I2271, para 54 for examples.

<sup>110</sup> Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para 21.

<sup>111</sup> Case C-268/06, *Impact*, [2008] ECR I-2483, para 50.

this approach makes clear – more than an intermediate review approach – that the national rule can no longer be in place in the national legal system – beyond the scope of the case at hand. National judges are thus called upon to interpret their national systems to accommodate supranational judicial concerns and permanently to remove the contested national procedural rule.<sup>112</sup> This approach can be termed negative comprehensive review, as the Court does not impose a direct positive obligation on national legal systems. Such positive obligations have nevertheless also found their way into the Court's case law. Relying on supranational and international fundamental rights provisions<sup>113</sup>, the Court has come to impose direct obligations on national legal systems in the name of EU effective judicial protection.<sup>114</sup> In doing so, the Court did not only remove contested national provisions from the legal order, it did also replace them with an EU-compatible alternative 'litigation standard'. Supranational litigation standards function as supranational standards governing national procedural choices. As standards, they are less precise and predictable than rules, but nevertheless limit the options for Member States to design their procedural systems. Standards do not intend directly to replace national procedural rules. They serve to complement those rules and to ensure that national rules actually reflect and respect EU-tailored values. Rather than providing a single blueprint of national procedural organization, standards determine the boundaries within which national procedural options can remain in place. As a result, national judges – and legislators – retain only limited options to accommodate for the judicially determined standard of procedure in their national legal orders. Positive comprehensive review thus conceived allowed the Court to directly restructure and re-develop bits and pieces of national procedural systems.

The previous subsection demonstrated national competition law enforcement structures have been subject to both positive and negative comprehensive review standards. A particular division of standards emerges from the foregoing analysis. Whereas the Court appears to be more inclined to engage upon positive comprehensive review in relation to EU antitrust enforcement choices<sup>115</sup>, State aid obligations rather remain limited to negative comprehensive review. The Court rather focuses on what national courts cannot do in that regard and does not impose specific or clear-cut positive obligations on them. The judgment in *Flughafen Frankfurt Hahn* confirms that position. The Court did not indeed impose specific positive obligations to ensure the recovery or suspension of aid. It rather requires national courts to have at their disposal different national remedial techniques to ensure the effective application of EU State aid law, without clearly requiring a particular remedy in that regard.<sup>116</sup>

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<sup>112</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, [1978] ECR 629, para 17-18.

<sup>113</sup> See for an overview of relevant provisions, P. Van Cleynenbreugel, 'The Confusing Constitutional Status of Positive Procedural Obligations in EU Law. Observations on effective judicial protection and national procedural autonomy in the wake of *Boxus*', (2012) 5(1) *Review of European Administrative Law* 97.

<sup>114</sup> See for examples in that respect among others Case C-208/90, *Emmott*, [1991] ECR I-4269, para. 23; Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft*, [2010] ECR I-13849, para 45 and 59.

<sup>115</sup> See Case C-439/08, *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebenederks (VEBIC) VZW*, [2010] ECR I-12471, para 57; Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, [2011] ECR I-5161, para 31.

<sup>116</sup> Case C-284/12, *Deutsche Lufthansa v Flughafen Frankfurt-Hahn*, [2013] ECR I-0000, para 45.

#### 4. EXPLAINING VARIETIES OF COMPREHENSIVENESS: EFFICIENT JUSTICE IN THE SERVICE OF JUSTICIABLE EFFICIENCY?

The simultaneous emergence of comprehensively tailored judicial review and more comprehensive supranational litigation standards has so far been documented without further explanation. It can nevertheless be submitted that both approaches represent two sides of the same coin. Although comprehensively tailored judicial review refers to a standard of substantive review at the supranational level, a remarkable parallel can be drawn with the emergence of intensified ‘supranational litigation standards’ governing procedural choices at the national level (4.1). This section proposes an explanatory framework for the concurrent appearance of more comprehensive judicial review standards in EU competition law enforcement. That explanation can be found in a particular image of ‘efficiency’ in the organisation of EU ‘judicial federalism’ that reflects a preference for *adversarial legalism* (4.2). That image of judicial federalism is particularly tailored to the ‘modernisation’ dynamics in EU antitrust and State aid law and the judicial role in assessing economic efficiency considerations in that regard (4.3). As (national) judges are called upon to render economic efficiency claims more than ever justiciable and to develop economic conceptions into refined legal categories, the Court of Justice seeks to maintain a certain degree of *legal control* over the incorporation of such efficiency considerations. Supranational litigation standards at the national level and comprehensively tailored review structures at the supranational level essentially contribute to that aim.

##### 4.1. Comprehensively tailored judicial review and supranational litigation standards: two sides of the same coin?

Whilst comprehensively tailored supranational review standards provide *substantive* guidelines for Courts and parties to the proceedings, supranational litigation standards as mentioned in the previous section rather reflect *procedural* benchmarks in accordance with which national legal orders have to function as a matter of EU law enforcement. Although having different functions, both concepts reflect some similarities. In both situations, the Court directly and evidently determined the boundary conditions within which individuals or Member States’ authorities can develop claims grounded in EU competition law. As such, enhanced attention to comprehensive review standards in antitrust – and to a lesser extent – in State aid law, could be interpreted as reflecting standards in accordance with which review litigation should take place. Comprehensive substantive review standards thus also function as *litigation standards* guiding both parties and judges at the supranational level.

The effects of supranational litigation standards at the national level are similar in nature. In a national situation, judges will have to apply EU substantive law in its entirety. That also includes presumptions and assessment standards determined at the supranational level. Supranational litigation standards reflect *additional* requirements imposed on national legal orders in order to comply with EU law enforcement standards.

It could therefore be argued that both supranational litigation standards and comprehensive review approaches serve to determine the framework conditions within

which substantive law debates in EU competition law can effectively be organized. As standards determining the application and enforcement of EU competition law, more comprehensive supranational review approaches and nationally imposed litigation standards first and foremost express a preference for judicial fine-tuning and the continuous involvement of the Court in outlining the conditions within which EU competition can be applied and enforced. From that point of view, the emergence of comprehensive review standards and the re-iteration of ‘comprehensively tailored review’ in *KME Germany* and *Chalkor* can be deemed to point towards a similar concern residing in the Court to structure and establish a particular competition infringement system.

#### **4.2. Institutionalising adversarialism through rights: supranational litigation standards and the EU’s image of ‘efficient justice’ in a multi-level governance setting**

Whilst attention for comprehensive review can be considered part and parcel of the European Union’s search for adequate accountability mechanisms<sup>117</sup>, the simultaneous development of supranational litigation standards in EU antitrust – and to a lesser extent State aid – law, points towards the need for national courts to be included in a particular image EU law aims to project on both the Member States and the functioning of its own institutions. That image has recently been identified as a movement towards adversarial legalism or ‘adversarialism’.<sup>118</sup> Adversarialism emphasises the incentives reflected in EU law ‘to create justiciable rights and to empower *private parties* to serve as enforcers of EU law’.<sup>119</sup> Justiciable rights allow private parties to invoke EU law in their disputes with fellow private parties.<sup>120</sup> The rise of private enforcement in EU competition law most directly exemplifies that approach. Even in instances where the Commission itself encountered damages, the latter could file an action for damages in a national court in accordance with national law.<sup>121</sup>

Although the same evolution has not yet as explicitly been addressed in the literature, the adversarial posture reflected equally applies in relation to public authorities enforcing EU law. Adversarialism in that understanding empowers ‘private actors to assert their rights’ against public authorities called upon to take stock of those rights.<sup>122</sup> The recognition of fundamental rights constraining administrative authorities’ decision-making powers essentially contributed to that aim.<sup>123</sup> Public enforcement adversarialism

<sup>117</sup> H. Hofmann and A. Morini, n 47, 354.

<sup>118</sup> See in that regard, R. Kagan, ‘Should Europe Worry about Adversarial Legalism?’, (1997) 17(2) *Oxford Journal of Legal Studies* 165-183.

<sup>119</sup> R. D. Kelemen, *Eurolegalism. The transformation of law and regulation in the European Union*, Cambridge, Harvard University Press, 2011, 8.

<sup>120</sup> See also W. Van Gerven, ‘Of Rights, Remedies and Procedures’, (2000) 37(3) *Common Market Law Review* 502.

<sup>121</sup> See Case C-199/11, *Otis*, [2012] ECR I-0000, para 43.

<sup>122</sup> R. D. Kelemen, note 119, 6; P. Craig, *EU Administrative Law*, Oxford, Oxford University Press, 2<sup>nd</sup> Edition, 2012, 446, referring to fundamental rights as essential in that image.

<sup>123</sup> See for that image already F. Bignami, ‘Creating European Rights: National Values and Supranational Interests’, (2005) 11(1) *Columbia Journal of European Law* 258-292.

thus understood comprises the opportunity for a market operator to contest the allegations made by a market supervision authority in the context of a formalized procedure in which a neutral third party allows both sides to make their claims before comprehensively reviewing the merits of these claims. Not only do EU lawmakers recognise such rights, the Court of Justice directly contributes to the emergence of more adversarial public enforcement regimes. In the realm of EU competition law, fundamental ‘due process’ rights have indeed not only brought about significant adaptations to the Commission’s infringement procedure, but also substantially affected the scope and institutional organisation of national competition authorities.<sup>124</sup> The latter had to be (re-)organised in order to accommodate for such (fundamental) rights claims to be taken seriously. In addition, the institutional organisation of those authorities had to reflect and render possible the invocation and honouring of those rights.<sup>125</sup> The resulting ‘rights revolution’ in the realm of public enforcement therefore also contributed to the emergence of a more adversarial enforcement context.

The foregoing allows us to conclude that the EU’s legal and constitutional structures promote – or even mandate – this type of ‘public enforcement’ adversarialism as a constitutional value in EU competition law enforcement.<sup>126</sup> From that point of view, supranational litigation standards serve to enable national courts to oversee and intervene in the operations of those authorities. At the same time – and given their direct connection with the Court of Justice through the preliminary ruling reference mechanism – national courts are considered best placed to enable an adversarial legal culture underlying EU competition law enforcement to take shape. As such, the Court of Justice is able to nudge national courts in promoting or maintaining such adversarial posture across all national legal orders.

#### **4.3. Supranational litigation standards and modernised competition law: adversarial procedures in the service of economic efficiency?**

Although attractive in its own right, supranational attention to adversarialism does not explain *why* competition law appears to incline more directly towards public adversarialism approaches through supranational litigation standards and *how* that approach relates to increased attention to comprehensively tailored review of Commission decisions and General Court judgments. Enhanced attention to adversarialism, I would like to submit, could therefore be considered a symptom of a more fundamental shift in the enforcement of EU competition law: the *substantive modernisation* of EU competition law and the increased attention for more refined economic analysis throughout the antitrust and State aid decision-making processes. Adversarialism in competition law presents a symptom of the Court of Justice coming to terms with such modernisation without losing its influence over the shaping and

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<sup>124</sup> P. Van Cleynenbreugel, ‘Institutional assimilation in the wake of EU competition law decentralisation’, (2012) 8(3) *Competition Law Review* 285-312.

<sup>125</sup> See Case C-439/08, *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkeres (VEBIC) VZW*, [2010] ECR I-12471, para 63.

<sup>126</sup> Article 47 of the Charter appears to provide a potential basis for such value to be translated into specific legal standards, see P. Van Cleynenbreugel, n 113, 97.



review of EU competition law decisions. As such, modernisation provides an explanation for adversarialism, which in return explains the importance and emergence of supranational litigation standards.

Modernisation can be described as a tendency to take the effects of market behaviour more directly into account in the application of competition law. Relinquishing overly attention to form and legal standards, EU competition law sought to incorporate and include economics-guided effects standards in its classification and appreciation of facts.<sup>127</sup> The origins of the modernisation debate have traditionally been traced back to a 1998 Commission Communication following up on a Green Paper proposing adaptations to the law applicable to vertical restraints.<sup>128</sup> A ‘more economic approach’ was not only considered necessary, it was equally presented as a shift from legalistic formalism to an ‘effects’-oriented approach.<sup>129</sup> Over time, that shift pervaded other domains of EU competition law. Guidance papers or communications have been developed in relation to Article 102 TFEU<sup>130</sup>, horizontal agreements<sup>131</sup>, mergers<sup>132</sup> and State aid<sup>133</sup>. In addition, guidelines on vertical agreements have been updated and upgraded and translated into new block exemption Regulations.<sup>134</sup> Although the specific contents of the measures highlighted here differ, increased attention to ‘effects’ and the search for a more economic vocabulary to detect those effects and to translate them into law have become central to the Commission’s attempts to refine EU competition law analysis. As such, modernisation reflects a new *means* of analysis underlying the application and development of EU competition law.

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<sup>127</sup> J. Basedow, ‘Introduction’ in J. Basedow and W. Wurmnest (eds), *Structure and Effects in EU Competition Law: studies on exclusionary conduct and State aid*, Alphen a/d Rijn, Kluwer, 2011, 4.

<sup>128</sup> ‘Green Paper on vertical restraints in EC competition policy’ (97/C 296/05).

<sup>129</sup> See also G. Monti, ‘New Directions in EC Competition Law’ in T. Tridimas & P. Nebbia (eds) *European Union Law for the Twenty-First Century: Rethinking the New Legal Order*, Oxford, Hart, 2004, 186.

<sup>130</sup> Communication from the Commission — Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] O.J. C45/7.

<sup>131</sup> Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, [2011] O.J. C11/1.

<sup>132</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2004] O.J. C31/5; Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2008] O.J. C265/6.

<sup>133</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU State aid modernisation (SAM), 2012 C 209.

<sup>134</sup> Among other examples, see Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] O.J. L102/1 and the accompanying ‘Guidelines on Vertical Restraints’, [2010] O.J. C130/1. See for a critique on the continued existence of block exemptions, F. Marcos and A. Sanchez Graells, ‘A Missing Step in the Modernisation Stairway of EU Competition Law – Any Role for Block Exemption Regulations in the Realm of Regulation 1/2003?’, (2010) 6(2) *Competition Law Review* 183-201.

At the same time, the modernisation dynamics resulted in a more profound reflection on the *goals and ends* of competition law.<sup>135</sup> Whereas competition law traditionally served as a tool to ensure *market integration* and *economic freedom* across an integrated European market<sup>136</sup>, questions have more recently been raised as to whether the goals and ends of competition law should be reconsidered in the light of a more economic approach. In that regard, attention to ‘consumer welfare’ as the most important goal in EU competition law surfaced.<sup>137</sup> Undoubtedly inspired by insights from the U.S. Chicago School that influenced antitrust law<sup>138</sup>, the Commission and the General Court appear to have accepted consumer welfare as at least *one* of the goals EU competition law should protect.<sup>139</sup> The Court of Justice confirmed that consumer welfare should never be *the* only goal that requires protection, but did not completely exclude attention paid to overall welfare throughout competition analysis.<sup>140</sup> The precise extent to which allocative, productive and technical efficiency should or could be attained, somewhat remains elusive from the Commission’s and Court’s positions. At the very least however, *efficiency* seems to have become a central element in EU competition analysis.

Whilst the role of efficiency analysis in competition law is more nuanced than the picture painted here, the increased attention to efficiency across the board in EU competition law directly affects the role of *national judges*. Efficiency claims and positions on how EU competition law standards contribute to such efficiency have to be rendered justiciable: judges have to be able directly to assess competing economic claims and to apply legal standards of EU law that reflect, confront or incorporate those claims. In the context of decentralised competition law enforcement and – to a lesser extent – State aid recovery proceedings, national judges are called upon to apply and oversee this essential task of EU competition law. National judges have the primary responsibility to develop and refine – in cooperation with the Court of Justice – economic efficiency claims into legal standards of EU competition law. *Judges bear the particular responsibility under EU law to render efficiency justiciable*. At the same time, judges bear an additional responsibility to give parties the opportunity to develop their claims and argue in favour of or against an exception or to claim that the extent and scope of recovery – including interests – should be differentiated. In order to create a judicially moderated debate in doing so, an adversarial context proves necessary.

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<sup>135</sup> See in that regard specifically, L. Parret, ‘Shouldn't We Know What We are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate about the Objectives of EU Competition Law and Policy’, (2010) 6(2) *European Competition Journal* 339-376.

<sup>136</sup> See for that analysis, R. Wesseling, *The Modernisation of EC Antitrust Law*, Oxford, Hart, 2000, 80-83.

<sup>137</sup> See P. Akman, ‘Consumer Welfare and Article 82 EC: Practice and Rhetoric’, (2009) 32(1) *World Competition* 71-90; B. Jedličková, ‘One among many or one above all? The role of consumers and their welfare in competition law’, (2012) 33(12) *European Competition Law Review* 568-575. For a different opinion, see R. Nazzini, *The Foundations of European Union Competition Law. The Objective and Principles of Article 102*, Oxford, Oxford University Press, 2012, 400 pp.

<sup>138</sup> See among others L. Gormsen. ‘The Parallels between the Harvard Structural School and Article 82 EC and the Divergences between the Chicago and Post-Chicago Schools and Article 82 EC’, (2008) 4(2) *European Competition Journal* 221-241.

<sup>139</sup> See Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission*, [2006] ECR II-2969 and the position of the Commission adopted in that case.

<sup>140</sup> Case C-501/06 P, *GlaxoSmithKline Services Unlimited v Commission*, [2009] ECR I-9291, para 62-65.

National judges are not only confronted with competing efficiency claims, they will need to create the playing field within which those claims can be developed. Their direct access to the Court of Justice should enable them to do so in a coherent and EU-compliant way. That access is in many instances nevertheless optional and national judges are at times left on their own to decide how to deal with competing economic claims. Their primary responsibility to take EU efficiency claims into account and to classify those claims in accordance with appropriate legal standards could therefore potentially threaten the effective and coherent application of EU law across different national legal orders. Judicially developed standards in that image serve as a second-best alternative that allows the Court to structure the content of economic efficiency debates in the light of a desirable EU template as to how national judges should act when ruling on EU competition law analysis.

From that point of view, supranational litigation standards serve as necessary and legally feasible instruments for the Court to impose a particular blueprint of adequate procedures on national courts called upon to apply and enforce EU competition law in an increasingly decentralised enforcement context. Supranational litigation standards thus create the adversarial context in which economic efficiency claims can be designed, refined and assessed from the vantage point of EU law. In doing so, supranational litigation standards essentially constitute a bridge between supranational judicial involvement and national judicial autonomy to rule on economic efficiency claims.

The adversarial framework – EU-style – that has been projected on Member States reaffirms the need for a transparent debate about the economic merits of particular market behaviour and the need for a supranationally structured framework to support that debate across national legal orders. Whereas attention to economic efficiency arguments in a decentralised enforcement context can hardly be the only reason for the Court developing supranational litigation standards, such attention at the very least limits and legitimises judicial interventions in national procedural systems. At the same time, the need for an adversarial context in which economic efficiency arguments can be developed provides an additional *limit* on the scope of the Court's intervention in this field. Whilst national procedural systems have to be included into EU law, the latter may not go beyond the needs for economic efficiency arguments to be taken care of in an adversarial procedural setting. As such, the Court would not be able to demand the complete redesign of national procedural frameworks as a matter of EU competition law. Only slight modifications to make national judicial systems better tailored to their EU competition law mandate would in that image be allowed for as a matter of EU law. Beyond those slight modifications however, national procedural autonomy should remain the rule, even in an extensively regulated EU competition law context. That posture, as presently underlying the Court's supranational litigation standards, should therefore always remain in the background as the Court further develops its approach towards supranational litigation standards in EU competition law enforcement. As such, it should form the critical background structure against which judicial adaptations imposed on national systems of competition law enforcement should be assessed.

## 5. CONCLUSION

The role of supranational and national courts in EU antitrust and State aid enforcement is multi-faceted. Recently however, the Court of Justice has developed a more comprehensive stance towards reviewing supranational competition law decisions and national competition law enforcement structures supporting the adoption of such decisions. Two dimensions have been explored in that regard.

Firstly, the Court of Justice's preference for more comprehensive *substantive competition law review* at the supranational level has been charted. In a series of recent judgments (*Tetra Laval*, *Alrosa*, *KME Germany*, *Chalkor*, *E.ON*, *Ryanair*), the Court of Justice demonstrated an at least rhetorical preference for more comprehensive review of Commission competition decisions and imposed that preference on the General Court. In doing so, the Court essentially confirmed that the General Court should not easily defer to the Commission, without however providing clear-cut guidelines as to how the General Court should make its review more comprehensive. The overall approach has been identified as a 'comprehensively tailored review' image. According to that image, both parties to the proceedings and the General Court bear a joint responsibility to come to terms with economic concepts and their translation into EU competition law tests. In practice however – and as explicitly confirmed by the Court in *Kone* – this approach appears difficult to be put into practice. As a result, the Court continues to defer to assessments made by the Commission in spite of 'tailored' pleas developed by the parties. Beyond comprehensive intentions, a truly comprehensive review standard has not therefore been detected in the wake of *KME* and *Chalkor*.

Secondly, the Court's case law incrementally sought to include national courts in a developed and supranationally structured antitrust and State aid enforcement mechanism. To that extent, it extensively relied on the notion of 'national procedural autonomy' as a tie-breaker for supranational involvement into Member States' organization of courts and procedures. The concept of national procedural autonomy has come to be relied on as an instrument for the Court of Justice to develop standards of national procedural review that guide and structure national enforcement systems. Recent case law in both antitrust and State aid law confirms a preference for 'more comprehensive' review of national institutional, remedial and procedural choices, expressing underlying 'supranational litigation standards'. Those supranational litigation standards allow the Court to restructure and to some extent redesign the framework within which national courts operate. In the realm of antitrust law, these standards related to the application of presumptions in EU competition law, the organisation of national review procedures and the balancing of 'public interests' underlying EU competition law enforcement. The Court here gave shape to a 'positive comprehensive review' approach towards national procedural choices, effectively replacing those choices with a more fitting supranational alternative. In relation to State aid law, supranational litigation standards have determined the scope of the recovery obligation and the ability for national courts to review national authorities' decisions. Although the institutional framework of national State aid recovery has not directly been addressed, the Court clarified the scope of intervention entrusted to national courts. In doing so, it

enhanced its procedural grip on national enforcement and recovery mechanisms and clearly preferred a strong ‘negative comprehensive review’ framework.

The paper subsequently undertook to explain the simultaneous attention for supranational comprehensively tailored substantive law review and comprehensive national procedural review. It developed a claim that the modernisation of EU competition law and the enhanced attention for different conceptions of economic efficiency engendered the creation of an institutional framework in which those efficiency claims could be brought forward and guided by the Court of Justice in a ‘rights-based’ environment. A framework grounded in *adversarial legalism* appears to fit that purpose. Although enhanced attention to economic efficiency cannot be deemed the only and exclusive reason for the Court stepping up its ‘effectiveness’ approach to the organization of national and supranational judicial review and reasoning, it offers a fair explanation as to why attention to more comprehensive judicial review is taking place now. As such, it can indeed be argued that the Court of Justice seeks to maintain its position at the apex of EU competition law enforcement, even in times where economic reasoning threatens to shift the locus of power away from the courts. A specifically tailored justice system serves to allow for efficiency claims to have a role *within the institutional confines* and accompanying legal categories outlined by the Court itself. By creating those confines, the Court carves out its own more permanent place in a constantly evolving and increasingly ‘economics-determined’ EU competition law framework.