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9th ASCOLA Conference Warsaw 2014 on
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Effectiveness through fairness? 'Due process' as institutional precondition for effective decentralised EU competition law enforcement

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CENTRE FOR ANTITRUST AND REGULATORY STUDIES, UNIVERSITY OF WARSAW
Warsaw, 26 – 28 June 2014

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Effectiveness through fairness?
'Due process' as institutional precondition for effective decentralised EU competition law enforcement

Pieter Van Cleynenbreugel[1]

1. Introduction

Attention to 'due process' has come to play an increasingly central role in the day-to-day practice of decentralised EU competition law enforcement. Once a mere corrective mechanism to counter the unmitigated application of competition law provisions and sanctions to investigated undertakings, due process now additionally determines and fundamentally streamlines the *institutional design* of EU competition law enforcement at both supranational and national enforcement levels.

Section two of this paper conceptualises the transformation of due process requirements from corrective to increasingly constitutive elements underlying the institutional design and operational functioning of supranational and national competition authorities. The importance of EU-inspired due process design has increased significantly in the wake of procedural modernisation and 'decentralisation' of Articles 101 and 102 TFEU enforcement by Regulation 1/2003.[2] Section three identifies the constitutive role of due process as giving shape to an 'effectiveness through fairness' narrative underlying EU-inspired NCA institutional design. Relying on the principle of institutional autonomy, the Court of Justice of the European Union would in that model be responsible for the shaping and structuring of an 'effectiveness through fairness' enforcement environment in accordance with which the institutional formats and structures national competition authorities would have to be (re-)designed as a matter of European Union law. Section four criticises the nascent and judicially structured due process- inspired effectiveness through fairness narrative as the prevailing way forward in streamlining EU and national competition law enforcement structures. It argues that the narrative raises significant questions as to the legitimacy of the Court and EU law

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[2] 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). This paper particularly focuses on institutional design evolutions relating to the application and enforcement of Articles 101 and 102 TFEU. Particular enforcement structures such as concentration control regulation and state aid interventions do not form part of the overall analysis developed here.

directly to intervene in national legal orders. This section therefore proposes a more modest judicial intervention test, linking the imposition of institutional design requirements to an assessment of their role in a '*public enforcement adversarialism*'-focused EU competition law enforcement environment that better aligns with the more economic approach underlying the EU competition law system at large. Section five concludes.

It should be clear at the outset that the aim of this paper is not to explore the variegating and possibly extending content of 'due process'-related claims, tools and rights[3], but rather to consider the *context* within which 'due process'-inspired claims shape and structure converging institutional designs of competition enforcement structures at the supranational and the national level. In doing so, the paper particularly seeks to highlight that 'due process' actually and potentially serves as a major instrument to affect and steer the institutional design of (national) competition authorities falling operating in the realm of EU competition law enforcement.

2. The increasingly constitutive role of due process in a modernised EU competition law enforcement environment

Significant sanctioning powers wielded by competition authorities have resulted in investigated parties requesting procedural guarantees surrounding the adoption of fining or infringement decisions.[4] It is well-known that the Court of Justice of the European Union granted those requests by identifying fundamental procedural rights, which it subsequently imposed on the European Commission.[5] Guarantees that have been recognised as such include the right of access to a file built up by the Commission against an undertaking[6], the right to be heard[7], the right to the protection of communication between a lawyer and a client protected by legal professional privilege[8], the right not to incriminate oneself[9], the right not to

[3] See on that interesting issue, A. Sanchez Graells and F. Marcos, ' "Human Rights" Protection for Corporate Antitrust Defendants: Are We Not Going Overboard?', *ASCOLA 2014 Conference Paper*, available at http://www.ascola-conference-2014.wz.uw.edu.pl/.

[4] F. Bignami, 'Creating European Rights: National Values and Supranational Interests', 11 *Columbia Journal of European Law* (2005), 241-353.

[5] See for a clear overview in that regard, the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, [2011] O.J. C308/6. On the best practices, see A. McGregor and B. Gecic, 'Due Process in EU Competition Cases Following the Introduction of the New Best Practices Guidelines on Antitrust Proceedings', 3 *Journal of European Competition Law & Practice* (2012), 425-438.

[6] Case T-30/91, *Solvay v Commission (Soda Ash)* [1995] ECR II-1775, para 81. See for background and precedents, M. Levitt, 'Access to the File: The Commission's Administrative Procedures in Cases under Articles 85 and 86 EC', 34 *Common Market Law Review* (1997), 1413-1444.

[7] Case 17/74, *Transocean Marine Paint v Commission*, [1974] ECR 1063, para 15 and Case 85/76, *Hoffmann La Roche v Commission*, [1979] ECR 461, para 9; see also J. Joshua, 'The Right to be Heard in EEC Competition Procedures', 15, *Fordham International Law Journal* (1991-1992), 16-91.

[8] Case 155/79, *AM&S Europe Limited* v *Commission*, [1982] ECR 1575, para 18 and Case C-550/07, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, judgment of 14 September 2010, nyr. See also A. Andreangeli, The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on the Exchange of

be prosecuted and fined twice or more for the same infringement[10], the right to have a reasoned decision adopted[11] and the right to effective judicial review over administrative decisions, which includes unlimited jurisdiction to alter the amount of a fine imposed by the European Commission.[12] Many of those procedural rights have later on been codified in Regulations 1/2003 and 773/2004.[13] In addition, those Regulations acknowledged particular procedural guarantees – such as the involvement of the national judiciary or national law enforcement in particular inspection situations – complementing the earlier judicially established framework.[14] Within the European Commission, the position of an independent hearing officer has additionally been established and extended to oversee those procedural rights and to draft a report on the scope and status of procedural rights in an on-going infringement or commitment procedure.[15] As a result, procedural guarantees and their oversight have become an important complementary part of the Commission's competition law infringement procedure, without however encroaching upon the original design of such procedure.

The classical understanding of 'due process' as a corrective mechanism to structure and fine-tune Commission infringement procedures still serves to explain many developments and refinements at the Commission level and continues to structure the identified balance between effectiveness and justice said to underlie EU competition law enforcement.[16] At the same time

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Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: one step forward, two steps back?', 2 *Competition Law Review* (2005), 39.

[9] Case 27/88, *Solvay v Commission* [1989] ECR 3355 and Case 374/87, *Orkem v Commission*, [1989] ECR 3283, para 35; see also P. Willis, ' "You have the right to remain silent", or do you? The privilege against self-incrimination following Mannesmannrohren-Werke and other recent decisions', 22 *European Competition Law Review* (2001), 313-321 and V. Benjamin, 'The application of EC competition law and the European Convention on Human Rights', 27 *European Competition Law Review* (2006), 694.

[10] Case C-17/10, *Toshiba*, [2012] ECR I-0000, see also W. Devroe, How General Should General Principles Be? *Ne Bis in Idem* in EU competition law' in U. Bernitz, X. Groussot and F. Shulyok (eds.), *General Principles of EU Law and European Private Law*, (Alphen a/d Rijn, Kluwer, 2013), 401-442.

[11] As explicitly mentioned in Article 105 TFEU.

[12] See Article 261 TFEU jo. Article 31 Regulation 1/2003 and Article 263 TFEU. On the scope of judicial review, see P. Van Cleynenbreugel, 'Constitutionalizing comprehensively tailored judicial review in EU competition law', 18 *Columbia Journal of European Law* (2013), 528-533.

[13] Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, [2004] O.J. L123/18 (hereinafter Regulation 773/2004). For an overview, see L. Ortiz Blanco (ed.), *EU Competition Procedure* (Oxford, Oxford University Press, 2014), 1129 pp.

[14] Articles 20-22 Regulation 1/2003. See also I. Aslam and M. Ramsden, 'EC Dawn Raids: A Human Rights Violation?', 5 *The Competition Law Review* (2008), 65; see also P. Berghe and A. Dawes, '"Little Pig, little pig, let me come in": an evaluation of the European Commission's power of inspection in competition cases', 30 *European Competition Law Review* (2009), 409.

[15] See in that regard, W. Wils, 'The Role of the Hearing Officer in Competition Proceedings before the Commission', 35 *World Competition* (2012), 431-456. On the hearing, see See also W. Wils, 'The Oral Hearing in Competition Proceedings before the European Commission', 35 *World Competition* (2012), 397-430.

[16] J. Flattery, 'Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing', 7 *The Competition Law Review* (2010), 53-81; N. Forwood,

however, due process has equally grown into an instrument of convergence among EU and national authorities as a side effect of a more decentralised competition law environment taking shape in the wake of Regulation 1/2003. The latter Regulation not only codified particular supranational due process requirements that provide inspiration for a particular effective competition law design at the supranational level (2.1.), but also paved the way for the development of due process –inspired 'institutional design' principles in accordance with which EU law can effectively intervene in national legal systems' competition law design choices (2.2.). In the wake of Regulation 1/2003, it can therefore be submitted that 'due process' – understood as an open-textured bundle of rights and guarantees that seek to protect investigated undertakings in their dealings with the Commission or national enforcement authorities – has become a constitutive value in the design of a modernised EU competition law enforcement system.[17]

2.1. Due process as inspiration for a more effective supranational competition law enforcement design

Regulation 1/2003 – and implementing Regulation 773/2004 – gave shape to the necessary balance that needed to underlie effective competition law enforcement steered by the European Commission. In addition to shaping detailed 'due process' inspired entitlements and claims, those documents indirectly also promote a particular and nuanced institutional design underlying EU competition law enforcement by the European Commission, consisting in a very particular *segregation* between prosecuting and decision-making officials. The Hearing Officer provides an effective wedge between both.

The structure and organisation of the European Commission as a competition authority is rather remarkable. Comprising a collegiate and political decision-making body responsible for maintaining the overall general interest of the European Union, it is a highly unlikely expert-driven administrative decision-maker.[18] In EU competition law, that body additionally acts as a supervisor in its own right and adopts individual decisions directly addressed at market operators. Although a particular Directorate-General (Directorate-General for Competition, oftentimes referred to as DG COMP) was set up within the Commission to conduct

'Effective Enforcement and Legal Protection – Friends or Enemies?' in C.D. Ehlermann and I. Atanasiu (ed.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Oxford, Hart, 2007), 663-664; see also W. Wils, *Efficiency and Justice in European Antitrust Enforcement* (Oxford, Hart, 2008), v.

[17] For an earlier position in that respect, see P. Van Cleynenbreugel, 'Institutional assimilation in the wake of EU competition law decentralisation', 8 *The Competition Law Review* (2012-2013), 285-312.

[18] See Article 17(1) Treaty on the European Union (TEU)

investigations and prepare the decision-making process, the college of Commission members formally adopts the final decision and imposes fines or periodic penalty payments.[19]

In reality of course, an intricate division of labour has been set up so as effectively to segregated different actors in the EU competition law enforcement process. Officials within the appropriate Directorate of DG Competition are tasked with compiling a case file on the alleged anticompetitive behaviour of undertakings concerned. Those officials prepare the case file, are called upon to hear the parties' arguments in writing or orally and draft a Decision which will ultimately have to be adopted by the College of Commission Members. As such DG Comp officials are the investigators and prosecutors, making a case before the college of Commissioners as such. The Commission Legal Service, another segregated unit within the Commission, will not only represent the latter before the Courts, adopting its position on the case file assembled by the prosecuting director and on the basis of the decision adopted by the Commission[20], but will also continuously be involved in the prosecution and preparatory stages of decision-making.[21] Even though the college of Commissioners is at liberty not to adopt the draft decision proposed by the DG Comp officials, the College does not hear the investigated undertakings, nor does it preside over an administrative-judicial hearing in which DG Comp prosecutors make their case before it. The College rather confirms the proposed Decision or asks for amendments to be made before formally adopting it. As such, a Commission Decision emerges from a procedure in which the actual decision-makers do not intervene actively in the stages preceding the formal adoption of the decision. DG Comp officials, the legal service and the college itself fulfil their particular roles, resulting in the appearance of a 'monolithic' Commission enforcement body comprising different intertwined parts and triggering the well-known critique that this system does not fit in with requirements

[19] Collegiality is described by the Court as a principle 'based on the equal participation of the Commissioners in the adoption of decisions, from which it follows in particular that decisions should be the subject of collective deliberation and that all the members of the college of Commissioners should bear collective responsibility at the political level for all decisions adopted', see Case C-1/00, *Commission v France*, [2001] ECR I-9989, para 79. See for that structure the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, [2011] O.J. C308/6.

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

[21] M. Asimow an L. Dunlop, The Many Faces of Administrative Adjudication in the European Union', 61 *Administrative Law Review* (2009), 157-158. See also W. Wils, The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis', 27 *World Competition* (2004), 203.

of a fair trial reflected in the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR).[22]

The establishment of a Hearing Officer directly demonstrates how attention to such fair trial requirements nevertheless provided inspiration for the refinement of the Commission's monolithic institutional set-up in this field.[23] Following a critical 1982 House of Lords Report focusing on the monolithic decision-making structure of the Commission, the latter charged a specific Director in the Directorate-General for Competition with conducting the hearings. That director would serve as a more independent arbiter between the investigating and prosecuting officials and the investigated undertakings.[24] The role of the Hearing Officer was explicitly recognised in a 1994 Commission decision.[25] In 2001, the Hearing Officer was formally detached from the Directorate-General for Competition and transferred to an independent unit directly reporting to the Member of the Commission responsible for competition.[26] In that capacity, an even more independent Hearing Officer was responsible to organise the hearing and thus to enable an independent internal check on DG Competition officials. The Hearing Officer reported on the status of the hearing and procedural rights discussions to the College of Commission Members, who would then be able to make an informed decision.[27] The October 2011 reform of the terms of reference of the Hearing Officer constituted the pinnacle of institutional translation of the right to be heard and more generally of an adversarial decision-making system in the EU competition law realm. Decision 2011/695/EU upgraded the Hearing Officer's mandate and extended his competences deep into the investigation stages, without however fundamentally altering his role as the guardian of procedural rights.[28]

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[22] On the applicability and compatibility of Article 6 ECHR in relation to the European Commission, see already See Cases 209-215 and 218/78, *Van Landewyck v Commission* [1980] ECR 3125, para 79-81, confirmed in Case 100-103/80, *Musique Diffusion Française,* [1983] ECR 1825, para 7. See also Case C-501/11 P, *Schindler et al. v Commission*, [2013] ECR I-0000, para 33 and Opinion of AG Sharpston in Case C-272/09 P, *KME Germany*, [2011] ECR I-0000, para 67.

[23] For an overview of the Hearing Officer's historical role before the enactment of the 2011 adaptations, see M. Albers and J. Jourdan, 'The Role of Hearing Officers in EU Competition Proceedings: A Historical and Practical Perspective', 12 *Journal of European Competition Law & Practice* (2011), 185-200; J. Flattery, note 16, 60-71; N. Zingales, 'The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to be Heard?', 7 *Competition Law Review* (2010), 137-156.

[24] *Twelfth Report on Competition Policy*, 1983, para 36-37 and the (informal) mandate in annex at 273.

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

[26] Article 2(2) of Commission Decision 2001/462/EC-ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, [2001] O.J. L 162/21.

[27] Article 15 Decision 2001/462/EC-ECSC.

[28] Decision of the President of the European Commission 2011/695/EU of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, [2011] OJ L 275/29. See also W. Wils, note 15.

Any meaningful procedural control mechanism in the hands of a quasi-independent Hearing Officer would seem useless unless a segregation of functions could be detected between the investigating body called upon to rely on procedural rights and a decision-making body inferring consequences from the (dis)respect to these procedural rights. Although the Hearing Officer does not have particular competences to decide on substantive matters and merely draws up a report for the decision-making College of Commissioners, it effectively checks and balances the operations of DG Competition officials and aims to remedy any procedural defects before the case reaches the College of Commissioners. In so doing, the Hearing Officer provides a wedge between the political body adopting the actual decision and the Directorate-General Competition making a case and defending it with the Commission. Although that system does not provide a full-fledged *separation* of functions – these all constitute departments or parts of one EU institution, the Commission- a clear *segregation* can be detected between the investigation/prosecution stage in which particular procedural rights remain guaranteed by an impartial arbiter and a final decision-making stage building upon the provisional outcome of the earlier stage. In the internal organisation of the European Commission, due process considerations thus justify the coming to being of a particular and peculiar institutional design scheme. That scheme does not as such address the well-known critiques that the Commission accumulates all too many different functions that should rather be separated or that it does not operate in a sufficiently politically independent setting.[29] What it does demonstrate however, is that 'due process' considerations at least *influence* the formats of institutional design underlying EU competition law enforcement.

The foregoing 'due process'-inspired institutional design evolutions – however imperfect – thus highlight that attention to 'due process' can effectively result in minor institutional adaptations to the structuring and functioning of enforcement bodies. In establishing a segregation of functions, the Commission basically allows for different Commission-attached actors to play different roles in the investigation and enforcement processes. Due process in that understanding not only provides procedural entitlements to investigated or interested parties, it also shapes the institutional outlook and design of the competition law enforcement system as such.

[29] In the early 1990s, proposals have been developed for a European Competition Agency to replace the existing Commission-centred framework, see S. Wilks and L. McGowan, 'Disarming the Commission: the Debate over a European Cartel Office', 32 *Journal of Common Market Studies* (1995), 270 and C. D. Ehlermann, 'Reflections on a European Cartel Office', 32 *Common Market Law Review* (1995), 474. See also A. Riley, 'The European Cartel Office: a Guardian without Weapons?', 18 *European Competition Law Review* (1997), 3-16.

At the same time however, the institutionalised segregation of those roles only bears relevance from an *internal organisational* point of view. One can indeed effectively find this segregated distinction within the institutional set up of the European Commission as a direct result of more focal attention being paid to the procedural rights of investigated and interested parties. From an *external* point of view however (i.e. from the point of view of investigated undertakings or an observer looking for different and effectively separated investigative, prosecutorial and adjudicative actors), the Commission remains a singularly structured enforcement institution tasked with adopting EU competition law enforcement decisions. As such, external *accountability* of the Commission decision-making process remains rather limited at first sight. The intervention of the Court of Justice and the scope of its review mandate have therefore always been considered to present the necessary complements to the imperfect institutional design structure of the Commission decision-making process.

According to Articles 263-264 TFEU, the EU Courts are essentially tasked to *review* and *annul* Commission decisions that infringe an essential procedural requirement or rules of law stated in the Treaties or secondary legislation. On the basis of its review powers, the Court has indeed identified particular procedural requirements – such as access to the file and the right to be heard – as essential elements of a fair Commission-led infringement procedure. In addition, the Court additionally also ensures that claims brought forward by the investigated or fined parties will effectively be reviewed. In *KME Germany* and *Chalkor*, the Court essentially made clear that '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'.[30] 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. As such, the Court considered its review mandate as inherently forming part of an institutional framework in which 'due process' or a 'fair trial' when reviewing Commission decisions largely depends on the scope of arguments adduced by the parties claiming an infringement of EU law by the Commission.

[30] Case C-272/09 P, *KME Germany*, [2011] ECR I-0000, para 56; Case C-386/10 P, *Chalkor*, [2011] ECR I-0000, para 49; Case C-389/10 P, *KME Germany*, [2011] ECR I-0000, para 63.

The Court is nevertheless acutely aware of the boundaries of its own mandate[31] and of the institutional balance within which it operates.[32] In *Kone*, it held that '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'.[33] 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'.[34] The Court has not so far explained where EU courts should draw a line between deference to the Commission's margin of assessment and comprehensive review of claims adduced by the parties.

Judicial review powers – albeit limited to actually checking the legality of a Commission decision – have been considered necessary, yet also sufficient to counter claims that the Commission enforcement system does not fully ascertain 'fair trial' requirements as envisaged in Article 6 ECHR, a provision which is as of now not yet binding on the European Commission, but which inspires the scope of Article 47 of the Charter of Fundamental Rights.[35] The ECHR – and the references to it made by the Court of Justice – nevertheless

[31] See for the different roles played by the General Court and the Court of Justice, Case C-90/09 P, *General Quimica and others v Commission*, [2011] ECR I-1, para 71.

[32] On the relationship between the Court and the Commission in competition law, see R. Nazzini, 'Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition law: a Comparative Contextual-Functionalist Perspective', 49 *Common Market Law Review* (2012), 996; see also I. Forrester, 'A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review' 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, 2011), 407-452. J. Ratliff on the other hand states that judicial review has overall been thorough, see J. Ratliff, 'Judicial Review in EC competition cases before the European Courts: Avoiding double renvoi' in the abovementioned volume, 455 and 462. For a similar discussion, see M. Jaeger, 'The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?', 3 *Journal of European Competition Law & Practice* (2012), 295-314: B. Nascimbene, 'Fair trial and the rights of the defence in antitrust proceedings before the Commission: a need for reform?', 38 *European Law Review* (2013), 573-582.

[33] Case C-510/11 P, *Kone Oyj et al. v* Commission, [2013] ECR I-0000, para 26.

[34] Case C-510/11 P, *Kone Oyj et al. v* Commission, [2013] ECR I-0000, para 27.

[35] Contrary to Article 47 of the Charter, Article 6 ECHR distinguishes between civil and criminal procedures. On the notion of 'criminal' in relation to competition law enforcement, see ECtHR *Société Stenuit v. France*, judgment of 27 February 1992. The case was in fact withdrawn from the European Court of Human Rights before a decision was adopted. It should however be remembered that the then-existing European Commission for Human Rights considered the case admissible. The Court therefore continued to refer to the case in order to maintain that antitrust proceedings are covered by Article 6. In accordance with the criteria developed in ECtHR, *Engel v The Netherlands*, judgment of 8 June 1976, para 83, it could be maintained that EU competition law enforcement would be considered a criminal procedure. In that case, the ECtHR (*Jussila v Finland*, judgment of 23 November 2006, para 43) maintains that that *'[n]otwithstanding the consideration that a certain gravity*

cast a shadow over the operations of the European Commission. Although it is commonly argued that the Commission's administrative sanctioning procedure could remain in existence as long as judicial review was open to those affected by its decisions[36], the Commission responded to ECHR-induced national law concerns to improve attention for procedural rights and to implement the fair trial requirements of Article 6 ECHR already during the administrative stage.

One should be mindful however not to overstate the incentivising nature of 'due process' in that regard. Whilst it cannot be denied that due process is responsible for some minor institutional or review standard adaptations, the adaptations noticed are only minor and have not fundamentally transformed the system of Commission-led competition law enforcement in place. At the supranational level, 'due process' did not therefore constitute the motor for a major institutional overhaul led by the Commission and the Court. Both institutions rather sought to streamline or somehow re-structure their roles by increasingly paying attention to 'due process' considerations.

2.2. Streamlining national competition authorities' design?

Due process inspired incentives for institutional adaptations more readily occur in relation to the organisation and structuring of national competition authorities tasked with the application of EU competition law. EU law in general and the Court of Justice in particular *potentially* – and to some extent already in reality – are capable more or less directly to reshape the institutional outlook of national competition authorities into specific EU-

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attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly "criminal charges" of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties (Öztürk, cited above), prison disciplinary proceedings (Campbell and Fell v. the United Kingdom, 28 June 1984, Series A no. 80), customs law (Salabiaku v. France, 7 October 1988, Series A no. 141-A), competition law (Société Stenuit v. France, 27 February 1992, Series A no. 232-A), and penalties imposed by a court with jurisdiction in financial matters (Guisset v. France, no. 33933/96, ECHR 2000-IX). Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency (see Bendenoun and Janosevic, § 46 and § 81 respectively, where it was found compatible with Article 6 § 1 for criminal penalties to be imposed, in the first instance, by an administrative or non-judicial body, and, a contrario, Findlay, cited above)'. That position gave rise to significant debates among EU competition law scholars as to whether or not Commission fines would be included among 'hard core' sanctions, which as a result would require imposition by a tribunal at first instance. Forrester maintains that Commission fines are indeed hard core (see I. Forrester, 'A challenge for Europe's judges: the review of fines in competition cases', 36 *European Law Review* (2011), 202), while Wils argues the contrary (W. Wils, 'The Increased Level of Antitrust Fines, Judicial Review and the ECHR', 33 *World Competition* (2010), 5-29).

[36] Speech by A. Italianer, Director-General of the Directorate-General for Competition at the OECD Competition Committee Meeting, Paris, 18 October 2011, 3, http://ec.europa.eu/competition/speeches/text/sp2011_12_en.pdf. See also M. Bernatt, 'The Compatibility of Deferential Standard of Judicial Review in the EU Competition Proceedings with Article 6 of the European Convention on Human Rights', *ASCOLA 2014 Conference Paper*, available at http://www.ascola-conference-2014.wz.uw.edu.pl/.

compatible institutional organisation formats. In doing so, room for national institutional autonomy is essentially encapsulated into a 'due process' focused institutional design narrative, serving the maintenance of an effectively operational decentralised EU competition law environment. Both Regulation 1/2003 as well as ECHR-inspired case law contribute to the emergence of such environment.

Article 35 of Regulation 1/2003 confirms that Member States are free to designate the appropriate competition authorities. The Regulation particularly acknowledges institutional variability and does not mandate a single national institutional blueprint for national competition authorities to be established. It rather allows each Member State to design its competition authorities in ways that would best enable them to exercise their functions.[37] Such authorities may be courts.[38] When enforcement of EU competition law is entrusted to national administrative and judicial authorities, the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial.[39] According to Wright, Member States' competition authorities can be divided into (a) integrated agencies, competent to investigate and to take decisions, with potential for judicial review of the final agency decision before a competent court; (b) split – or bifurcated[40] – authorities, with the investigation carried out by an administrative agency, and the final decision taken by a court, again with the possibility of judicial review of the final decision; and (c) separated agencies and courts, whereby the administrative agency may reach a finding of an infringement or not, whilst a court must pronounce a prohibition or impose sanctions, with the possibility of that decision being appealed to a higher court.[41] A fourth example, where a court as such is responsible for prosecution and adjudication, could additionally also be envisaged in that respect.[42] Remarkably, the provision only mentions

[37] And thus to overcome any dangers of regulatory capture, see R. Van den Bergh and P. Camesasca, *European Competition Law and Economics: A Comparativie Perspective* (London, 2nd Edition, Sweet & Maxwell, 2006), 441-442 for examples in national law. See for an overview of different enforcement structures, J. Steenbergen, 'Decision-making in Competition Cases: The Investigator, the Prosecutor and the Judge' in L. Gormley (ed.), *Current and Future Perspectives on EC Competition Law* (The Hague, Kluwer Law International, 1997), 106-107; W. Wils, Regulation 1/2003: A Reminder of the Main Issues' in D. Geradin (ed.), *Modernisation and Enlargement: Two major challenges for EC competition law* (Antwerp, Intersentia, 2004), 65-66.

[38] See Article 35(1), final sentence Regulation 1/2003.

[39] Article 35(2) Regulation 1/2003.

[40] See also F. Rizzuto, 'The procedural implications of VEBIC', 32 *European Competition Law Review* (2011), 286.

[41] K. Wright, 'The 'Judicial', the 'Administrative' and consistent application after the decentralisation of EC antitrust enforcement', Paper for European Union Studies Association Eleventh Biennial International Conference, April 2009, available at www.eustudies.org, 7-8. See on the differences and (dis-)advantages of different enforcement institutions, D. Zimmer, 'Competition law enforcement: administrative versus judicial systems', *ASCOLA 2014 Conference Paper*, available at http://www.ascola-conference-2014.wz.uw.edu.pl/.

[42] See Sections 4 and 5 Irish Competition Act 2002, the infringement of which constitute criminal offences that will be brought by the Competition Authority before the District Court or the Central Criminal Court. F. Rizzuto,

administrative and judicial bodies. In doing so, it seems to presuppose that competition authorities at the very least function independently from centralised government or administrative departments. Although the Regulation never mentions the need for completely independent authorities, the explicit referral to administrative authorities – rather than administrative departments – hints at the EU's preference for such more independent authorities, without however directly imposing independence as a constitutive criterion in that regard.[43]

At first sight, Article 35 of Regulation 1/2003 only seems to impose one organisational explicit institutional organisation requirement on designated national authorities. Given the specificities of a decentralised EU competition law enforcement scheme, the European Commission is able to relieve a national competition authority of their competence to apply Articles 101 and 102 TFEU in a particular case. In instances where the national competition authority is a court, national law should equally allow for a case to be taken away from that court in favour of continued treatment by the European Commission. In a situation – such as the Irish enforcement design – where administrative authorities and courts complement each other, the Regulation states that the effects relieving a case by the Commission shall be limited to the authority prosecuting the case. That authority is subsequently – as a matter of secondary EU law – called upon to withdraw its claim before the judicial authority when the Commission opens proceedings and this withdrawal shall bring the national proceedings effectively to an end.

Article 35 Regulation 1/2003 would seem to imply that EU law essentially allows for a wide variety of national institutional formats to remain in place. At the same time however, the Court of Justice made clear that Article 35 incorporates at least some limits on national institutional autonomy. In its 2010 *Vebic* judgment, the Court stated that '[a]lthough Article 35(1) of the Regulation leaves it to the domestic legal order of each Member State to determine the detailed procedural rules for legal proceedings brought against decisions of the competition authorities designated thereunder, such rules must not jeopardise the attainment of the objective of the regulation, which is to ensure that Articles 101 TFEU and 102 TFEU are applied effectively by those authorities'.[44] In cases where a national competition authority

note 40, 286 also refers to Austria and Finland as examples of this model of enforcement, without direct reference to the criminal law nature of competition law in these systems. The Belgian model predating the 2006 legislative reform was captured by this format as well.

[43] On independence, S. Lavrijssen and A. Ottow, 'Independent Supervisory Authorities: A Fragile Concept', 39 *Legal Issues of Economic Integration* (2012), 419-446.

[44] C-439/08, *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW*, [2010] ECR I-12471, para 57.

would not be afforded rights as a party to proceedings, a risk remains that the court before which the proceedings have been brought might be wholly captive to the pleas in law and arguments put forward by the undertaking(s) bringing the proceedings.[45] Article 35 Regulation 1/2003 should therefore be read to preclude national rules which do not allow a national competition authority to participate, as a defendant or respondent, in judicial proceedings brought against a decision that the authority itself has taken.[46] The judgment – although only addressing the very peculiar institutional format of the former Belgian competition authority[47] – made clear that the Court of Justice considered itself able to impose particular limits on national institutional diversity in the service of 'effective' decentralised competition law enforcement. As such, I have argued somewhere else, the Court has the final authority to regulate and potentially streamline institutional diversity in the service of a more integrated and converging competition law enforcement environment. In the four years following on *Vebic*, the Court did not however proceed actively with scrutinising and modifying national authorities' institutional organisation schemes.

In addition to the limited scope of Court-led EU interventions in national institutional designs so far, Article 6 ECHR's fair trial requirements directly govern and structure national administrative authorities and affect their institutional design as such. Article 6 ECHR can effectively be read to incorporate such design features that support and complement the segregation tendencies identified previously at the supranational level. Moreover, that provision provides an even stronger legal basis for imposing institutional adaptations than Article 35 of the Regulation would. Article 6 ECHR requires that any dispute concerning civil rights or criminal sanctions will be brought before a jurisdiction that complies with all requirements mandated by that provision, most notably independence and impartiality as well as equality of arms during the entire procedure. In some cases however, decisions affecting civil rights or imposing (non hard-core) criminal sanctions can be adopted by administrative bodies that do not as such comply with all Article 6 standards. Such administrative decisions

[45] Case C-439/08, *Vebic*, para 58. The Court subsequently stated that '[i]n a field such as that of establishing infringements of the competition rules and imposing fines, which involves complex legal and economic assessments, the very existence of such a risk is likely to compromise the exercise of the specific obligation on national competition authorities under the Regulation to ensure the effective application of Articles 101 TFEU and 102 TFEU'.
[46] Case C-439/08, *Vebic*, para 59.
[47] F. Louis, 'L'arrêt de la Cour de Justice dans l'affaire VEBIC: une opportunité de parfaire l'organisation de l'autorité belge de concurrence', *Tijdschrift voor Belgische Mededinging – Revue de la Concurrence Belge* 1 (2011), 14.

should nevertheless be amenable to judicial review by a national court with sufficient jurisdiction to consider all matters of fact and law brought forward.[48]

That scheme also applies to national supervisory authorities, as the ECtHR's judgments in *Dubus* and *Sigma Radio* demonstrate. In *Dubus*, the French Government itself acknowledged that its then-*Commission Bancaire* was a jurisdiction in the meaning of Article 6 §1, even though it functioned as a national administrative authority in accordance with French law.[49] As a result, it had to comply with all Article 6 ECHR requirements. Accepting the argument that the *Commission Bancaire* was a 'jurisdiction' within the meaning of Article 6 ECHR, the ECtHR held that it did not comply with the required institutional conditions of independence. The administrative commission did not sufficiently distinguish between the investigative, prosecutorial and adjudicative functions.[50] As a result, the impartiality of the members of the Banking Commission ultimately deciding on the basis of a report issued by its Legal Service was not guaranteed.[51] More fundamentally, the ECtHR held that an adjudicative body should be structured through a separation or at least functional segregation between its prosecuting and its adjudicative departments in order to comply with Article 6.[52] The case only considered the *judicial role* directly attributed to the *Commission Bancaire*. It did not directly concern the scope of judicial *review* against supervisory authorities' decisions.[53] In doing so however, the ECtHR made clear that supervisory authorities can indeed be considered 'jurisdictions' for the purposes of ECHR scrutiny. *Sigma Radio* considered the role of the Cyprus Radio and Television Authority (CRTA). An *administrative body*, it supervised the Cyprus broadcasting rules. CRTA's investigation was carried out by an investigating officer who was an employee of the authority. The CRTA acted as a prosecuting body, and its members determined the violation of relevant legislation.[54] The ECtHR held that the combination of different functions of the CRTA and, in particular, the fact that all fines are deposited in its own fund for its own use, gives rise to legitimate concerns that the CRTA lacks the necessary structural impartiality to comply with the

[48] See T. Perroud, 'The Impact of Article 6(1) ECHR on competition law enforcement: A comparison between France and the United Kingdom', *Global Antitrust Review* (2008), 51-52.
[49] ECtHR, *Dubus v France*, judgment of 11 June 2009, para 50-51. See also ECtHR, *Vernes v France*, judgment of 20 January 2011, para 25 and 32. That case considered the similarly structured *Commission des Opérations de la Bourse (COB).*
[50] *Dubus*, para 57 and 60.
[51] *Dubus*, para 61.
[52] *Dubus*, para 60, according to which the ECtHR 'croit nécessaire d'encadrer plus précisément le pouvoir de se saisir d'office de manière à ce que soit effacée l'impression que la culpabilité de la requérante a été établie dès le stade de l'ouverture de la procédure'.See also *Vernes*, para 42 and 49.
[53] *Dubus*, para 69-70.
[54] ECtHR, *Sigma Radio Television Ltd. v Cyprus*, judgment of 21 July 2011, para 40 for an overview of griefs in that regard.

requirements of Article 6.[55] The adjudicative nature of the CRTA was therefore undisputed.[56] Once again, the Court referred to the lack of separation between or at least segregation of prosecutorial and adjudicative functions as essentially problematic. The Court nevertheless continued that 'even where an adjudicatory body, including an administrative one as in the present case, which determines disputes over "civil rights and obligations" does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has "full" jurisdiction and does provide the guarantees of Article 6 § 1'.[57] The *Sigma Radio* case therefore revolved around the scope of judicial review against the authority's decision, despite that authority being an adjudicative body in accordance with Article 6 ECHR. The Court did indeed proceed with developing its notion of sufficient jurisdiction.[58]

Both cases illustrate the implicit institutional mandate incorporated in the ECtHR judgments. In particular, the ECtHR adheres to a particular variant of institutional segregation as a way to promote a more adversarial *review* culture in sectors regulated by inquisitorial procedures.[59] In that image, it coins market supervision authorities capable of addressing binding decisions or imposing sanctions on market operators as adjudicative bodies that are subject to the requirements of Article 6 ECHR. From that perspective, the ECtHR imposes two cumulative or three alternative principles of institutional organization of these supervisory authorities. Those principles determine the general framework within which national supervisory authorities function. As such, they reflect the implicit supranational constitutional framework enabling and restraining supervisory operations.[60]

[55] *Sigma Radio*, para 147-148.
[56] *Sigma Radio*, para 150.
[57] *Sigma Radio*, para 151.
[58] *Sigma Radio*, para 152, see also nr. 120 of this dissertation. See also ECtHR, *Steinniger v Austria*, judgment of 17 April 2012, para 49-50.
[59] For that position, see *Vernes*, para 42, arguing that 'qui est en cause, c'est l'impossibilité même de vérifier, du fait des dispositions de droit interne alors en vigueur, l'impartialité de la commission. En effet, la loi ne permettait pas au requérant d'avoir connaissance de la composition de la commission qui lui a infligé la sanction précitée, et donc de s'assurer de l'absence d'un éventuel préjugement de sa part ou d'un lien de l'un de ses membres avec la partie en cause, susceptibles de vicier la procédure. Dans ces conditions, et au nom des apparences, la Cour est d'avis, avec le requérant, que le défaut d'indication de l'identité de l'ensemble des membres de la COB ayant délibéré était de nature à faire douter de son impartialité'. An adversarial system presupposes equality of arms and transparency as preconditions for a meaningful debate to take place. From a criminal law perspective in particular, see R. Myers, 'Adversarial Counsel in an Inquisitorial System', 37 *North Carolina Journal of International Law and Commercial Regulation* (2011), 411-435.
[60] They do not however reflect a singular blueprint, see R. Nazzini, note 32, 990, stating that neither the European Court of Human Rights nor the Union courts have articulated a test to balance the degree to which a first instance administrative authority complies with the requirements of independence and impartiality and the intensity of the subsequent judicial review.

A first set incorporates *cumulative* principles. It starts from the assumption that a national supervisory authority acts as an adjudicative body for the purposes of Article 6 ECHR. To the extent that this is the case, requirements of independence and impartiality outlined in that provision mandate guarantees of independence in the appointment and functioning of the members of the authority taking sanctioning decisions and a clear separation or at least segregation of the prosecuting and adjudicative services. This *segregation* condition is supplemented by a procedural adequateness condition. In *Dubus*, the Court emphasized the importance of the *equality of arms* and the occurrence of a real debate between the prosecuting department and the market operators being subject to supervisory review.[61] In *Vernes v France*, the ECtHR elaborated on that second condition. The Court held that the inability of a market operator to demand for public debates and the absence to know the identity of the persons adjudicating his case in a sanction procedure operated by the *Commission des opérations de bourse* (COB) – later transformed into the *Autorité des Marchés Financiers* – constituted a violation of Article 6 § 1. The Court did not deem it necessary *de s'interroger sur la différence entre la COB, autorité administrative et indépendante à l'époque des faits litigieux et les juridictions financières*.[62] It rather required the conditions of impartiality to be fulfilled as a matter of course in a functionally adjudicative administrative authority. In addition to segregation and equality of arms conditions, the ECtHR also presented the faculty of having appellate judicial review against these adjudicative decisions. Appellate review decisions did not however have to reflect the ECtHR's own standard of full jurisdiction, or should be available as a matter of course in non-criminal proceedings.[63] In *Dubus*, the Court mainly acknowledged national review of *Commission Bancaire* decisions by the Conseil d'Etat. As long as a national authority itself would comply with all requirements of Article 6 rights, appellate judicial review does not appear a necessity.[64]

A second set of *alternative* principles builds upon the first, but allows the supervisory authority not *entirely* to comply with the cumulative list of principles. It is well-known that administrative authorities can impose sanctions upon individuals. These sanctions may as a result affect their civil rights or amount to non hard-core criminal sanctions.[65] These administrative authorities function as quasi-judicial authorities, but do not as a matter of

[61] *Dubus*, para 64. The ECtHR did not however proceed in investigating this grief, as the applicant already succeeded in demonstrating the lack of impartiality in the Commission Bancaire's proceedings.
[62] *Vernes*, para 32.
[63] *Vernes*, para 32.
[64] *Dubus*, para 69.
[65] See the cases referred to in note 35.

course have to comply with all requirements reflected in Article 6 ECHR. To the extent that these administrative decisions can be reviewed by a judicial body that has full – i.e. sufficient – jurisdiction to re-examine the matter at hand, a national administrative authority does not itself have to inhabit all fair trial requirements read in Article 6.[66] In the field of competition law, this has particularly been confirmed in the *Menarini* judgment.[67] The ECtHR in that case held that, despite the criminal nature of competition law sanctions[68], subsequent appeals to the administrative tribunal and the Council of State were sufficient once these organs had full jurisdiction to consider the Autorità's decision. In the Italian case, the ECtHR held that '*la compétence des juridictions administratives n'était pas limitée à un simple contrôle de légalité. Les juridictions administratives ont pu vérifier si, par rapport aux circonstances particulières de l'affaire, l'[Autorità] avait fait un usage approprié de ses pouvoirs. Elles ont pu examiner le bien-fondé et la proportionnalité des choix de l'[Autorità] et même vérifier ses évaluations d'ordre technique'.*[69] In addition, the administrative courts retain unlimited jurisdiction to vary the amount of fines imposed by the Autorità.[70] As a result, the availability of legality review as entertained in Italy and unlimited review related to fines sufficed to establish an Article 6-compatible supervision regime.

The foregoing is not to say however that these national authorities would not have to comply with Article 6 ECHR at all. In *Dubus,* the Court still expressed a preference for segregated prosecution and adjudication functions in order to guarantee more impartial decision-making practices.[71] A lack of Article 6-proof administrative institutions in that image refers to a lack of independence of the entrusted administrative decision-makers. Judges are specifically called upon to provide additional guarantees of independence. In addition to a preference for segregated decision-making, the Court suggests the importance of the right to be heard and to enjoy public debates in sanctioning procedures. At the same time however, any deficiencies in the presence of these rights should be remedied at a judicial review stage before a court with full jurisdiction. The requirements of full jurisdiction incorporate both a segregation of functions and an equality of arms dimension. From a segregation point of view,

[66] For a recent example, *Steinniger*, para 49.
[67] ECtHR, *A. Menarini Diagnotics S.R.L. v Italy*, judgment of 27 September 2011; P. Oliver, ' "Diagnostics" – a Judgment Applying the Convention of Human Rights to the Field of Competition', 3 *Journal of European Competition Law & Practice* (2012), 163-165; M. Bronckers and A. Vallery, 'Fair and effective competition policy in the EU: which role for Authorities and which role for the courts after *Menarini*?', 8 *European Competition Journal* (2012), 283-299.
[68] *Menarini*, para 59.
[69] *Menarini*, para 64.
[70] *Menarini*, para 65.
[71] *Dubus*, para 60.

full jurisdiction implies that a market operator should be able to contest a decision adopted by an earlier administrative-adjudicatory body in the presence of representatives of that body. This could be the body itself, or most likely, the prosecution department within that body that is once again bringing a case in front of a new, Article 6-compliant adjudicatory organ. Although the Court seems to indicate a preference for functional segregation in order to allow meaningful appellate judicial review, it does not as such mandate that situation. It merely requires a court having full jurisdiction to rule on the matter at hand. In the same vein, the Court merely suggests the organization of hearings and debates before an administrative adjudicatory body, in order to ensure meaningful decisions being taken and with a view to limit the scope of obligatory judicial review mandated by Article 6 ECHR.[72] The following table presents these alternative choices and contrasts them with the cumulative model implicit in *Dubus*.

institutional suggestions of art 6 ECHR	segregation	equality of arms	appellate judicial review
cumulative procedural principles	mandated	public debate	optional
alternative review principles	preferred	suggested	sufficient review standard and public debate

In light of the above, it should be no surprise that some national competition authorities have been the subject of significant reorganisation, redevelopment or adaptation over the past five years. The Belgian competition authority has been transformed from a specialised administrative court comprising a prosecuting service into a full-fledged integrated administrative agency.[73] The Dutch Competition Authority merged with the Postal and Telecommunications Authority and the Consumer Authority in a new Authority for Consumers and Markets (ACM).[74] The UK's Office of Fair Trading was merged with the Competition Commission to continue as Competition and Markets Authority from 2014

[72] For a similar argument in EU competition law, see R. Nazzini, note 32, 990.
[73] See on the new Belgian Competition Authority, J. Steenbergen, 'Van de WBEM naar de BMA' in *Mijlpalen uit het Belgisch Mededingingsrecht geannoteerd. Liber Amicorum Jules Stuyck* (Mechelen, Kluwer, 2013), 557-564.
[74] A. Ottow, 'Erosion of innovation? The institutional design of competition agencies – A Dutch case study, *Journal of Antitrust Enforcement* (2014), 1-19 (advance access).

onwards.[75] Despite the momentous importance the need for effective EU competition law enforcement and 'fair trial' requirements seems to play in the Court of Justice's and the ECtHR's case law, the establishment of a fair trial proof organisation was not at the foreground of those reforms. At the same time however, due process or fair trial requirements consistently comprise a policymaking background against which larger political reforms or institutional adaptations have taken shape. Two specific examples hint at such developments. First, a senior responsible officer – comparable with yet also different from the Hearing Officer – has been introduced in the UK authority and has been maintained in the integrated authority.[76] Second, the new Belgian authority clearly segregates investigation and decision-making powers.[77] Both examples highlight that 'due process'-structured requirements are nevertheless taken into account in a broader reform context and thus shape the outlook and institutional design formats relied upon across national legal orders.

The importance of the Courts' case law cannot be underestimated in that regard. Across the board, national enforcement bodies have been obliged participate as defendant or respondent in review proceedings against their own decisions as a result of the *Vebic* judgment. The French competition law framework has been adapted to accommodate for such participation.[78] From that point of view, 'fair trial' requirements directly shape and structure the outlook of national competition authorities and the judicial review of their decisions.

The fair trial or due process requirements outlined in Article 6 ECHR directly determine and structure the potential scope of CJEU intervention into Member States' institutional autonomy over the organisation of EU competition law enforcement structures. Whereas the Court's judgment in *Vebic* did merely address the Belgian authority's situation and status, the Court in that judgment also made clear that EU competition law enforcement required national authorities to be structured so as to ensure that fundamental rights are observed and

[75] See the Enterprise and Regulatory Reform Act 2013 adopted in that respect.

[76] The Senior Responsible Officer would in that image be supported by the General Counsel's staff. On the system of OFT decision-making and on the responsibilities of a Senior Responsible Officer, see OFT Guidance, 'A guide to the OFT's investigation procedures in competition cases', October 2012. The OFT also inaugurated a Procedural Adjudicator to the image of the Commission's Hearing Officer. This might indicate that the movement towards convergence is more directly affecting the institutional realm of EU competition law enforcement. Future judicial proclamations in that regard could transform these convergence modes into necessary principles of adequate national institutional organisation mandated by EU law.

[77] See Article IV.16 Projet de Loi of 27 December 2012 portant insertion du Livre IV "Protection de la concurrence" et du Livre V "La concurrence et les évolutions de prix" dans le Code de droit économique et portant insertion des définitions propres au livre IV et au livre V et des dispositions d'application de la loi propres au livre IV et au livre V, dans les livres I et XV du Code de droit économique, available at http://www.dekamer.be/FLWB/PDF/53/2592/53K2592001.pdf.

[78] Albeit implicitly, see See Paris Cour d'Appel, SCP Fisselier Chiloux Boulay, judgment of 27 January 2011, available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=138.

that EU competition law is fully effective.[79] As such, it could at the very least be predicted that the Court of Justice considers itself able – in the future – to determine to what extent fundamental rights have been taken into account in national competition authorities' institutional design and in what ways the Article 6 ECHR requirements should particularly be interpreted to enable a more effective EU competition law enforcement environment to come into being.[80] The right to a fair trial would thus provide the Court with a constitutional benchmark to impose *positive institutional obligations* read into the ECHR onto national competition authorities *as a matter of EU law*. As such, national competition authorities would more readily be subject to judicial scrutiny of their compatibility with due process conditions. So far, the Court of Justice's ventures into this field have been extremely limited. *Vebic* nevertheless showed that the Court would not refrain from doing so when asked by a national judge. From that perspective, 'due process' conditions are able directly to structure and fine-tune the organisation of national competition authorities, with the Court of Justice functioning as a judicial oversight body in that regard.

3. From due process to 'effectiveness through fairness'

The institutional design dynamics outlined in the second part of the paper illustrate that due process or procedural fairness requirements can in principle *directly contribute to* a more effective competition law enforcement context. Attention to due process particularly allows supranational judges more directly to intervene in the institutional organisation of national and supranational administrative enforcement mechanisms with a view to reconfigure them to their own image of effective competition law enforcement. In that understanding, due process or procedural fairness can be considered to form a *constitutive requirement for an effective competition law enforcement environment*. This section fits the constitutive role of 'due process' requirements in a nascent 'effectiveness through fairness' narrative that seems to guide EU competition law enforcement scholarship and policymaking (3.1.). It subsequently highlights the *prima facie* boundless consequences of maintaining this approach and the scope for potentially illegitimate judicial policymaking it incorporates (3.2.).

3.1. A gradually developing judicial 'effectiveness through fairness' narrative

The increasingly constitutive role of 'due process' as outlined in the previous section directly challenges classical scholarly debates on the relationship between effectiveness and justice as two complementary yet distinct pillars that make a competition law enforcement

[79] Case C-439/08, *Vebic*, para 63.
[80] For that argument, P. Van Cleynenbreugel, note 17, 308.

system work.[81] Indeed, the system of EU competition law enforcement has generally been perceived as striking a refined balance between effectiveness and justice. Only if that balance is struck appropriately can a legitimate law enforcement system be established. Following a brief recapitulation of that classical debate, this subsection identifies how the increasingly constitutive role of due process calls for a more nuanced approach to the balance between justice and effectiveness.

Effectiveness refers to the emergence or maintenance of a system that most effectively contributes to the realisation of substantive (economic or political) goals. Law enforcement is perceived as legitimate if and to the extent that it contributes to these goals. In that constellation, a competition law enforcement system's legitimacy is directly focused on the *output* generated by that law. To the extent that an enforcement system is only concerned with effectiveness, alternative concerns relating to democratic, transparent or equitable processes underlying the adoption of enforcement decisions are downplayed in favour of attaining a set of predetermined policy goals.

In order to be perceived effective, the nature and scope of the output generated by a system of laws should in that image be clear at the outset. Originally, the goals of EU competition law were considered to be enhancing market integration[82] and ensuring competitor protection within that newly integrated market.[83] In the 1990s, *consumer* protection and the welfare of consumers more explicitly surfaced as goals worthy of EU competition law's protection.[84] Increased attention to 'consumer welfare' equally underlies the 'more economic approach' in EU competition discourse.[85] The latter perspective is at present considered to legitimize supranational intervention through competition *law*.[86] From an output perspective, EU competition law rules and a supporting enforcement system would be legitimate once concrete national and EU decisions support the idea of consumer welfare and incorporate that idea in the application of legal rules and principles. In addition,

[81] Examples highlighting this balance are the scholarly references in note 16.
[82] See R. D. Kelemen, *Eurolegalism. The transformation of law and regulation in the European Union* (Cambridge, Harvard University Press, 2011), 153; D. Gerber, *Law and Competition in Twentieth Century Europe. Protecting Prometheus*, (Oxford, Oxford University Press, 1998), 343.
[83] J. Joshua and C. Harding, *Regulating Cartels in Europe*, (Oxford, Oxford University Press, 2nd edition, 2010), 117-118 pinpoint the early competitor protection dynamic in the earliest cartel decisions.
[84] See P. Akman, 'Consumer Welfare and Article 82 EC: Practice and Rhetoric', 32 *World Competition* (2009) 71-90; B. Jedličková, 'One among many or one above all? The role of consumers and their welfare in competition law', 33 *European Competition Law Review* (2012), 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.
[85] G. Monti, 'Article 81 EC and Public Policy', 39 *Common Market Law Review* (2002), 1057-1099.
[86] See recently P. Ibanez Colomo, Market failures, transaction costs and article 101(1) TFEU case law' 37 *European Law Review* (2012), 542, in which the justification for the law is supposed to lie in its use for bringing about these economic goals.

maintaining a sufficient level of deterrence plays a key role in contributing to a legitimate competition law enforcement environment.[87] To the extent that individuals and businesses would effectively be deterred from infringing sufficiently clear and focused EU competition law rules – by virtue of strict rule-application or by the imposition of significant fines or other sanctions –, the enforcement system can be said to attain an effectiveness threshold in terms of output From a deterrence perspective, the ability of enforcement authorities to impose significant fines could for instance be considered to contribute to a more effective law enforcement environment.

Effectiveness goals do not in themselves however completely establish why, how and to what extent enforcement mechanisms should be structured. It has for instance been argued that mere attention to effectiveness benchmarks cannot in itself justify an enforcement system capable of imposing particularly severe sanctions on individuals.[88] These individuals also demand a 'just' environment in which their claims on whether or not practices threaten substantive goals, could be heard and discussed. As a result, the output of a legitimate enforcement system requires a complementary input set of 'justice' or 'due process' standards.[89] These input standards governed the *pre-adoption*, *decision-making* and *post-adoption litigation* stages of EU law application. At the pre-adoption stage, input legitimacy standards seek to address democratic participation, transparency and consultation requirements.[90] At the decision-making stage (both general and individual[91]), input standards aim to guarantee an informed decision following consultation with and hearing of parties concerned.[92] At the post-adoption litigation stage, input standards foresee the availability of independent and impartial judicial review, during which a meaningful debate on the legality

[87] See on the deterrence aspect, K. Cseres, 'The controversies of the consumer welfare standard', 3 *Competition Law Review* (2007), 152.

[88] On the need for a more justice-oriented public enforcement scheme as a corollary to ever increasing sanctioning practices, see R. Nazzini, *The Foundations of European Union Competition Law. The Objective and Principles of Article 102* (Oxford, Oxford University Press, 2012), 6.

[89] The distinction between output as efficiency and input as justice is not entirely aligned to recent legitimacy studies that distinguish input, *process* and output within a wide variety of legitimacy discourses, see C. Lord and P. Magnette, 'E Pluribus Unum? Creative Disagreement about Legitimacy in the EU', 32 *Journal of Common Market Studies* (2004) 183-202; the three-layered legitimacy framework even entered the realm of judicial decision-making, as it supported Advocate General Sharpston's Opinion in Joined Cases C-128/09, C-129/09, C-130/09, C-131/09, C-134/09 and C-135/09, *Boxus, nyr*, judgment of 18 October 2011, para 84.

[90] On democratic enhancements in the European Union as a remedy for this so-called deficit, see V. Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Output, Input and Throughput', KFG Working Paper Series, No. 21, November 2010, *Kolleg-Forschergruppe* (KFG) "The Transformative Power of Europe" Freie Universität Berlin, available at http://userpage.fu-berlin.de/kfgeu/kfgwp/wpseries/WorkingPaperKFG_21.pdf, 11, focusing on the contrast between output and input.

[91] On the relevance of that distinction in EU administrative law, see P. Craig, *EU Administrative Law* (Oxford, Oxford University Press, 2nd Edition 2012) , 298-303.

[92] See J. Flattery, note 16, 76.

merits of a particular decision can be conducted in an adversarial context.[93] As complementary standards, justice requirements guarantee a *procedurally sound* framework through which a perception of *fairness* is attached to such efficient outcomes.[94] Fairness necessarily complements, without completely replacing effectiveness considerations. Whereas effectiveness focuses on *substantive enforcement goals*, justice relates to the *procedural framework* accompanying the processes leading to the attainment of those goals. In the abovementioned traditional understanding, effectiveness and fairness are genuinely presented as contrasting and seemingly irreconcilable policy goals that nevertheless require careful balancing on a day to day basis and in order to ensure a workable enforcement environment. Fairness requirements would in that understanding merely provide some kind of 'sweetener', so as to convince investigated parties that competition authorities cannot completely randomly impose sanctions on individuals or businesses.

Manifestations of 'due process' considerations in the CJEU's and ECtHR's recent case law confirm, but also nuance that picture. On the one hand, fairness requirements effectively complement attention to a variety of substantive competition law enforcement policy goals. On the other hand however, the direct and indirect institutional design consequences attached to 'due process' considerations also highlight that fairness and procedural conditions essentially shape the framework within which effective competition law enforcement can come into being. In that understanding, attention to 'due process' serves as a precondition for effective competition law enforcement structures to be designed, giving shape to an *effectiveness through fairness* image underlying the institutional organisation of EU competition law enforcement.

Effectiveness through fairness in this understanding implies that fairness requirements should not merely be considered a complementary and distinct set of benchmarks that potentially affect or frustrate effective competition law enforcement. Rather, those requirements are being *internalised* in discussions of what effective competition law enforcement should amount to. A fair procedural context and institutional frameworks that allow for such context to come to being are thus considered policy goals that determine whether or not a competition law enforcement system should be considered effective. Such environment is not only focused on deterrence, but also on the rule of law; individuals should indeed still be able to be fined for illegal behaviour, but should also be able to benefit from a

[93] See P. Craig, note 91, 294-297.

[94] On fairness and procedural justice in EU law, see in general E. Barbier de la Serre, 'Procedural Justice in European Community Case-law concerning the Rights of the Defense: Essentialist and Instrumental Trends', 12 *European Public Law* (2006), 225-250.

procedural context in which they can at least somehow predict the different stages through which their investigated behaviour will have to be structured. From that point of view, fairness requirements do not frustrate, but rather directly contribute to the effectiveness benchmarks underlying the design of EU competition law enforcement, at least at the national level.

The internalisation of fairness into a more general and operational effectiveness narrative primarily results from the Court of Justice's and the ECtHR's (potential) attention to fair trial requirements as institutional design principles. By effectively demanding – as a matter of EU due process – a segregation between prosecutorial and adjudicative actors within the same antitrust enforcement body as well as by emphasising a case-tailored sufficient review standard that requires a comprehensive assessment of the claims adduced by the parties, the Courts essentially project an image of what they perceive to be an effective competition law enforcement environment. Such an environment not only seeks to achieve substantive enforcement benchmarks (what kind of behaviour could not be justified? What should be prohibited? What kind of penalties should be imposed? How elevated should the amount of fines imposed be in order to be sufficiently deterrent?) in order to be perceived effective, but equally takes the structure and scope of institutional design (segregation of functions, scope of review, availability of procedural safeguards) into consideration as a precondition for what would be considered an effective competition law enforcement regime.

As such, the identification of an effectiveness through fairness narrative directly results from the institutional design effects brought about by fair trial case law. From that point of view, it could be submitted that both Courts have elevated the issue of due process into a constitutive effectiveness issue and have thus extended the 'effectiveness' benchmarks to include also due-process inspired institutional design benchmarks. The effectiveness through fairness narrative acknowledges this evolution by considering fairness to have become a quintessential part of what should be considered effective competition law enforcement. If and to the extent that the Court of Justice – inspired by the ECtHR and on the basis of questions asked – would indeed proceed in outlining those benchmarks and into incorporating the Article 6 ECHR fair trial requirements into institutional design standards as a matter of EU law, the effectiveness through fairness narrative as outlined here could take shape in a more substantiated format. That narrative would thus essentially comprise a construct by the Court of Justice, aimed at due process-oriented fine-tuning of national competition authorities institutional functioning as a matter of EU law. Effectiveness through fairness would directly

and essentially grant the Court of Justice room and space for creating a converging 'due process' focused enforcement environment across diverging national enforcement structures.

It should be remembered however that only bits and pieces of this narrative can presently be identified throughout the case law and that a full-fledged effectiveness through fairness body of case law is not yet available. Two elements contribute to this incompleteness and scarcity of cases. First, the fair trial requirements emerge from a case by case assessment of particular institutional conditions underlying particular competition authorities. Even though the Courts have been able to extract and impose particular 'institutional design' requirements in the name of due process and thus shape new effectiveness benchmarks, they cannot do so on a general and ex ante basis. As such, courts have only been able to foster the integration of fairness requirements into effectiveness benchmarks, without however properly delineating and structuring them. Second, the impact of Article 6 ECHR is momentous in this regard. As a result, *national competition authorities* are subjected to a much wider degree to fair trial inspired institutional design requirements to a significantly larger extent than the European institutions, where the Court of Justice has proven to grant significant deference to the peculiar institutional set up of the Commission's competition law enforcement mechanism. Since the European Court of Human Rights has no jurisdiction (yet) directly to assess the compatibility of the supranational enforcement framework with Article 6, its institutional design principles only directly affect the organisation and structure of national competition authorities. As a result, the Court of Justice did not as such – also in the absence of potential external fundamental rights oversight by the ECtHR – proceed in imposing institutional design adaptations onto the Commission enforcement framework. At the national level however, the Court did appear willing to project such adaptations in its very specific *Vebic* judgment, yet has since not been invited once again to engage in additional meaningful institutional adaptation conversations. The large body of Article 6 ECHR case law combined with the Court of Justice's willingness and reasoning in *Vebic* nevertheless highlight that the latter institution could develop and extend a judicially structured effectiveness through fairness narrative as a matter of EU law, directly targeted at national competition authorities applying that law. As such, a combined reading of the Court of Justice's posture in *Vebic* and the ECtHR's extensive Article 6 case law would guide the format and scope of a judicially elaborated effectiveness through fairness narrative.

3.2. Limits of a judicial 'effectiveness through fairness' narrative

The Court of Justice's and the ECtHR's case law could be understood effectively to promote and sustain the internationalisation of 'due process' requirements as constitutive

elements of effective national competition law enforcement. In doing so, judges confirm the important role they play in overseeing, influencing and even shaping the boundaries within which (national) institutional design templates can take shape. As a result, national institutional autonomy in this realm is effectively dependent upon and structured by the institutional design requirements read into the fair trial standards of Article 6 ECHR and – to a so far much lesser extent – potentially also Article 47 of the Charter. At the same time, the narrative puts judges partially in charge of overseeing and restructuring the institutional design of national competition authorities. That in itself is obviously problematic from a legitimacy point of view, as competition law enforcement fundamentally emerges from political choices and is supposedly accountable at the political as well as the judicial level. Should an 'effectiveness through fairness' narrative as identified in this section continue to be developed and sustained by the Court of Justice in relation to the institutional design of national competition authorities applying EU law, three particularly dangerous evolutions should be taken into account.

First, the development of a judicially steered effectiveness through fairness narrative risks transforming institutional design of competition authorities into a narrowly formulated due process endeavour, rather than a political or administrative process it is commonly perceived to be.[95] By identifying and imposing positive institutional obligations on national competition authorities, the Court of Justice would be able to draw the boundaries within which Member States remain free to design competition authorities. To the extent however that the Court would indeed carve out the institutional design conditions in a more detailed fashion, it can be feared that the autonomy granted to national legal orders to experiment with different types of EU-compatible structures that aim to achieve particular effectiveness objectives will entirely be considered from the point of view of the compatibility of those structures with case-by-case and judge-made 'fairness' conditions.[96] To the extent that the Court would indeed frequently strike down particular institutional design choices made at the national level in the name of due process, due process will become the main driving force of institutional experimentation and reform, rather than one of the tenets of effective competition law enforcement. A set of clear-cut *ex ante* due process standards would therefore result in a more legally certain institutional design environment than a judicially established effectiveness through fairness narrative. As long as such standards are lacking however, the Court would be

[95] See for a grasp of the political discussions in that regard – as well as their translation into institutional design formats – A. Ottow, note 74.
[96] As the Court's approach in *Vebic* would seem to promote, see P. Van Cleynenbreugel, , note 17, 311-312

able to strike down institutional design choices in the name of vague and case –specific due process standards, as seemed to have been the case in *Vebic*.

Second, a common critique in this regard is that too much attention to due process frustrates the deterrent enforcement and sanctioning environment EU competition law wishes to create. That situation remains equally problematic in an 'effectiveness through fairness' narrative as it was in a situation where effectiveness and justice were considered two complementary pillars of the EU competition law enforcement system. The particular problem associated with an effectiveness through fairness narrative is that the Court of Justice would now implicitly be balancing due process and other effectiveness considerations, almost naturally giving precedence to due process considerations. As a result, attention to effectiveness and deterrence would grow completely subordinate to due process considerations read into 'effectiveness' requirements by the Court of Justice. The latter, intervening on a case by case basis, would thus be able to undermine the deterrence-focused effectiveness benchmarks in the name of seemingly more important due process effectiveness benchmarks.

Third and above all, the emerging effectiveness through fairness narrative fundamentally exposes the limits of a step-by-step, case-by-case judicial assessment of the due process compatibility of national competition authorities. Whereas effectiveness through fairness serves as an instrument to attain and structure convergence among EU and national enforcement frameworks, the institutional design adaptations it proposes generally take shape in the absence of broader – democratically oriented – debates on the overall desirability and effectiveness of fairness requirements and on the scope of protection attributed to undertakings having infringed EU competition law. In assuming that fairness contributes to more effective EU competition law enforcement, the CJEU and the ECtHR implicitly project an image where judges are called upon to structure and streamline the requirements of effective competition law enforcement through the lenses of fairness. In doing so however, judges gain more extensive institutional design powers than their traditional mandate would seem to entrust them with. A maturing 'effectiveness through fairness' narrative would therefore increasingly result in the Court of Justice taking over debates on the institutional organisation of national competition authorities. Those debates are essentially a part of national institutional autonomy protected by EU law. By intervening in those debates, the Court risks overstepping the boundaries of its constitutional mandate, in accordance with which it can legitimately oversee and intervene in Member States' legal systems. To the extent that the Court wants to retain its legitimacy as a due process standard setter and

institutional designer in that regard, it should at least leave some autonomy to the Member States when setting up due process-tailored and effectiveness-oriented national competition authorities.

4. Towards a workable judicial 'effectiveness through fairness' test

In order to avoid judicial illegitimacy concerns from materialising in cases where the narrative would further be engaged upon by the Court of Justice, the development of a clear set of 'due process' inspired institutional design elements – preferably in the format of a Commission guidance notice – could be advocated for. That guidance notice would then compile and summarise all relevant case law on the matter and could equally serve as a benchmark in accordance with which national authorities should be structured. The notice could equally form a background framework in accordance with which the Court would have to structure its 'effectiveness through fairness' interventions. At the same time however, a notice compiling previous case law on the matter would not in itself offer a more developed guidance framework that reflects the importance and role of 'due process' and 'effectiveness through fairness' as essentially contributing to the more general benchmarks of an effective competition law as such. Recently, effective competition law has come to be equated with a 'modernised' interpretation of the EU competition provisions. In conceptualising the Court's future 'due process' interventions in this field, it is therefore necessary to relate 'effectiveness through fairness' to the substantive modernisation of EU competition law as such.

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.[97] 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.[98] A 'more economic approach' was not only considered necessary, it was equally presented as a shift from legalistic formalism to an 'effects'-oriented approach.[99] Over time, that shift pervaded other domains of EU competition law. Guidance papers or communications have been developed in relation to Article 102 TFEU[100], horizontal

[97] 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.
[98] 'Green Paper on vertical restraints in EC competition policy' (97/C 296/05).
[99] 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.
[100] 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.

agreements[101], mergers[102] and State aid[103]. In addition, guidelines on vertical agreements have been updated and upgraded and translated into new block exemption Regulations.[104] 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.

At the same time, the modernisation dynamics resulted in a more profound reflection on the *goals and ends* of competition law.[105] Whereas competition law traditionally served as a tool to ensure *market integration* and *economic freedom* across an integrated European market[106], 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.[107] Undoubtedly inspired by insights from the U.S. Chicago School that influenced antitrust law[108], the Commission and the General Court appear to have accepted consumer welfare as at least *one* of the goals EU competition law should protect.[109] The Court of Justice confirmed that consumer welfare should never be *the* only goal that requires protection, but

[101] 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.
[102] 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.
[103] 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.
[104] 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?', 6 *The Competition Law Review* (2010), 183-201.
[105] 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', 6 *European Competition Journal* (2010), 339-376.
[106] See for that analysis, R. Wesseling, *The Modernisation of EC Antitrust Law* (Oxford, Hart, 2000), 80-83.
[107] See P. Akman, 'Consumer Welfare and Article 82 EC: Practice and Rhetoric', 32 *World Competition* (2009) 71-90; B. Jedličková, 'One among many or one above all? The role of consumers and their welfare in competition law', 33 *European Competition Law Review* (2012), 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.
[108] 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', 4 *European Competition Journal (2008), 221-241*.
[109] See Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission,* [2006] ECR II-2969 and the position of the Commission adopted in that case.

did not completely exclude attention paid to overall welfare throughout competition analysis.[110] 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 competition authorities as (quasi-)adjudicative bodies having to entertain claims on the basis of such economic efficiency considerations.

Seeking to acknowledge the CJEU's important role as a due process safeguard and as responsible for the continuous development of a more streamlined and effectively operating modernised and decentralised EU competition law enforcement environment, it will be submitted that the Court should tailor its interventions to creating a playing field within which such modernised competition law claims can be developed more readily. Such a system, it will be argued, requires the promotion and extension of a more developed *public enforcement adversarial* enforcement context across different national competition authorities and at the level of the European Commission.

Adversarialism emphasises the incentives reflected in EU law 'to create justiciable rights and to empower *private parties* to serve as enforcers of EU law'.[111] Justiciable rights allow private parties to invoke EU law in their disputes with fellow private parties.[112] 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.[113] Adversarialism has indeed served as a major guidance principle for the development of so-called *private enforcement* standards by the Court of Justice. The Court of Justice in that regard particularly refers to the need for effective competition law enforcement as a benchmark to enable or facilitate private damages, restitution or other remedial claims at the national level.[114] In this area, the Court essentially confirmed that national legislation should not stand in the way of developing EU law claims in a national judicial setting. National legal systems cannot categorically exclude particular types of claims, but should at the very least allow such claims to be developed and

[110] Case C-501/06 P, *GlaxoSmithKline Services Unlimited v Commission*, [2009] ECR I-9291, para 62-65.
[111] R. D. Kelemen, note 82, 8.
[112] See also W. Van Gerven, 'Of Rights, Remedies and Procedures', 37 *Common Market Law Review* (2000), 502.
[113] See Case C-199/11, *Otis*, [2012] ECR I-0000, para 43.
[114] Case C-557/12, *Kone*, [2014] ECR I-0000, para 26 and para 32.

contested in a court of law.[115] Both claimant and defendant should thus be able to offer and develop their points of view on the existence of fault, damages and causality. EU law thus clears the road for such privately granted damages rights to be developed in national court settings. National or procedural rules that seek to limit such claims are to be disapplied as a result.[116] In so holding, the Court essentially acknowledged that national courts should enable the development of full-fledged adversarial debates, on the basis of which the competent national judge should render its final judgment.

Although the same evolution has not yet as explicitly been addressed in relation to public enforcement, the adversarial posture reflected equally applies in relation to public authorities enforcing EU competition law. Adversarialism in that understanding empowers 'private actors to assert their rights' against public authorities called upon to take stock of those rights.[117] The recognition of fundamental rights constraining administrative authorities' decision-making powers essentially contributed to that aim.[118] Public enforcement adversarialism 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.[119] In the realm of EU competition law, fundamental 'due process' rights have 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. 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.[120] The resulting 'rights revolution' in the realm of public enforcement therefore also contributed to the emergence of a more adversarial enforcement context. The developing 'effectiveness through fairness' narrative equally confirms that image, at least in the context of *Vebic*. In that case, the Belgian competition authority – or a part of it – was required to participate (in principle) in review proceedings against its own decisions.[121] Fairness criteria

[115] Case C-557/12, *Kone*, para 31.
[116] Case C-557/12, *Kone*, para 33.
[117] R. D. Kelemen, note 82, 6; P. Craig, note 91, 446, referring to fundamental rights as essential in that image.
[118] See for that image already F. Bignami, note 4, 258-292.
[119] For that argument grounded in the rights-approach, see
[120] See Case C-439/08, *Vebic*, para 63.
[121] Case C-439/08, *Vebic*, para 64.

were in that understanding relied upon to enable and facilitate a truly adversarial setting to come into being.

Building upon the foregoing, a more developed judicial *fairness in the service of adversarial public enforcement* could be proposed as a limit on EU judges intervening as 'institutional design' actors. In accordance with that test, the Court should only explicitly intervene whenever parties risk to be unable effectively to defend their competition law claims in a truly adversarial setting that creates a playing field between the enforcement authority and the defending undertaking. Due process requirements should in that understanding principally ensure that parties can develop their substantive competition law claims in an administrative or judicial environment that allows for such claims to be developed and contested. 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 institutional 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 and imposed. Whilst such boundaries cannot of course be imposed on the Court, the latter could nevertheless explicitly accept those limits and confine itself to creating a public enforcement adversarialism playing field. Doing so would create more clarity on and enhance the predictability of otherwise potentially wide due process interventions in national legal orders tasked with the application of EU competition law provisions.

To the extent that an emerging 'effectiveness through fairness' narrative is indeed taking shape in the Court's judicial approach to national institutional autonomy in the realm of EU competition law enforcement, attention to the boundaries of that narrative are more than ever necessary. If – just like in the realm of private enforcement – the Court of Justice is indeed committed to shaping a converging due process playing field in which parties can fully develop more 'economics'-grounded competition law claims, due process requirements and institutional adaptations resulting therefrom should directly contribute to the establishment of an adversarialism-enhancing enforcement space. Such space better aligns with the

substantively modernised competition law regime that has been set up over the past two decades.

5. Conclusion

This paper explored the increasingly constitutive 'institutional design' role played by 'due process' requirements in the organisation of decentralised EU competition law enforcement. Whereas 'due process' considerations have traditionally provided only a corrective mechanism to mitigate the monolithic enforcement structure developed at the supranational level, the decentralisation of EU competition law enforcement elevated due process corrections to constitutive elements underlying the structuring of effective decentralised competition law requirements. Guided by the ECtHR's case law on Article 6 ECHR, the Court of Justice is potentially able significantly to restructure and organise national competition authorities' functioning in the light of due process conditions. As a result, the Court's potential intervention framework allows for a more developed 'effectiveness through fairness' narrative underlying decentralised EU competition law enforcement to come into being.

The 'effectiveness through fairness' narrative is not entirely unproblematic however, as it would seem to pose no meaningful limits on the Court's 'due process' inspired interventions in national competition authorities' functioning. Seeking to overcome legitimacy problems envisaged in that regard, this paper proposed a more nuanced judicial intervention test, whereby the Court would limit the scope of its 'due process' oversight to situations that effectively relate to creating a truly adversarial enforcement context where investigated parties can develop their (economics-supported) argumentation, effectively responding to claims made by the enforcement authority. It was submitted that in doing so, the Court would additionally ensure that the modernised procedural setting in that image effectively aligns with the aims of substantively modernising EU competition law.