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Contents

Editorial foreword

The editorial board is pleased to present the 10th volume of the Yearbook of Antitrust and Regulatory Studies (YARS 2014, 7(10)). Three separate volumes of the Yearbook were prepared in 2014. YARS 2014, 7(9), edited by A. Piszcz, was published in June. It is dedicated to the impact of EU competition law on the national competition law regimes of "new" EU Member States and contains a number of academic papers on the development of competition laws in some CEE countries. The growing internationalisation of the Yearbook continues in the current, special volume (YARS 2014, 7(10)) which contains a selection of contributions from active participants of the 9th Annual ASCOLA Conference. The Conference was organised by CARS and held on the 26–28 June 2014 in Warsaw (http://www.ascola-conference-2014.wz.uw.edu.pl/programme.html). CARS is proud to announce that the year 2015 will start with the publication of a "regular" volume of the yearbook (YARS 2015, 8(11)) edited by A. Jurkowska-Gomułka.

The 9th Annual ASCOLA Conference in Warsaw was devoted to Procedural Fairness in Competition Proceedings and gathered 80 participants from nearly all corners of the world. In order to provide conference participants with an additional platform for the discussion of other relevant issues, a separate Workshop on Competition Policy Developments was also held during the Conference. Most of the papers contained in the current volume of YARS were presented during this workshop. Their publication in the current volume of YARS has been made possible thanks to the generous donation of the Foundation of the National Bank of Poland for which we are very grateful.

The wide diversity of the contributions submitted for the workshop and for this volume shows that academics worldwide deal with a great variety of current competition law developments. Many of the contributions have a national focus, they considering new competition law jurisdictions or key procedural developments in more established systems outside the EU. **K. Smyrnova** considers the overall enforcement of competition rules under Association Agreement between the EU and Ukraine. In her informative paper, **S.Y. Wahyuningtyas** speaks of the continuing challenges in the fight against cartels in Indonesia, 14 years after the introduction of its competition

law. **S. Hayashi** presents a recent amendment to the Japanese Antimonopoly Act with great relevance to procedural fairness issues. **K. Moodaliyar** provides a comprehensive analysis of problems surrounding access to leniency documents in South Africa in light of EU and US experiences.

The rest of the contributions cover a variety of competition law issues, mostly of a widely-defined procedural nature, with a direct connection to the EU. The paper by **S. Oliveira Pais** and **A. Piszcz** provides a dual, Portuguese and Polish, take on actions for damages based on breaches of EU competition rules and collective redress. **E. Beumer** speaks of the interaction between EU competition law procedures and fundamental rights protection on the example of the right to be heard, while **L. Pace** analyses the relationship between parent-subsidiary in EU competition law and the *AEG Telefunken* presumption. **M. Michałek** focuses on fishing expeditions and subsequent electronic searches in the light of the principle of proportionality of inspections, considering primarily Polish and Swiss experiences. **A. Dinev** provides an in depth analysis of the effects of antitrust enforcement decisions in the EU. **P. Congedo** considers the use of the so-called "regulatory authority dixit" defence in EU competition law enforcement practice. **E.D. Sage** demonstrates the increasing use of "negotiated", as opposed to traditionally punitive, instruments of EU competition law enforcement on the example of cases directed at East-Asian companies. The volume also contains an interdisciplinary paper by **M. Maggiolino** which deals with plausibility, facts and the economics in antitrust law.

The editorial board would like to express its heartfelt gratitude to Professor Peter Behrens and Professor Josef Bejček for their invaluable comments provided within the review process of this volume.

Warsaw, October 2014

Ewelina D. Sage, *PhD. (OXON)*
YARS Volume Editor

List of acronyms

INSTITUTIONS:

AMCU – Antimonopoly Committee (Ukraine)
BKA – Bundeskartellamt (Germany)
BWB – Bundeswettberbsbehörde (Austria)
CAC – Competition Appeal Court (South Africa)
CAT – Competition Appeal Tribunal (UK)
CC – Competition Commission (South Africa)
CFI – Court of First Instance
CJEU – Court of Justice of the European Union
CJ – Court of Justice
COMCO – Competition Commission (Switzerland)
EC – European Commission
ECJ – European Court of Justice
ECN – European Competition Network
ECtHR – European Court of Human Rights
GAO – Government Accountability Office (USA)
GC – General Court
JFTC – Japan Fair Trade Commission
Kppu – Commission for the Supervision of Business Activities (Indonesia)
NCA – National Competition Authority
NRA – National Regulatory Authority
SCA – Supreme Court of Appeal (South Africa)
SOKiK – Court of Competition and Consumer Protection (Poland)
UOKiK – Office for Competition and Consumers Protection (Poland)
RegTP – Regulatory Authority for Telecommunications and Post (Germany)

LEGAL ACTS:

AA – Association Agreement
ACPERA – Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (USA)

AMA – Antimonopoly Act (Japan)
APCGP – Act on the Pursuit of Claims in Group Proceedings (Poland)
CPC – Civil Procedure Code (Poland)
EA – Europe Agreement
ECHR – European Convention on Human Rights
FTA – Free Trade Agreement
LCart – Federal Act on Cartels and other Restraints of Competition (Switzerland)
MR – EU Merger Regulation
PAA – Popular Action Act (Portugal)
PCA – Partnership & Cooperation Agreement
SAA(s) – Stabilisation and Association Agreement(s)
TEC – Treaty establishing the European Community
TEU – Treaty on the the European Union
TFEU – Treaty on the Functioning of the European Union

OTHER ACRONYMS:
AG – Advocate General
CEE – Central and Eastern Europe(an)
CIF – Consorzio Industrie Fiammiferi
CLP – Corporate Leniency Programme
CWI – Consolidated Wire Industries
DT – Deutsche Telekom
ECL – European Competition Law
ECR – European Court Reports
EEA – European Economic Area
EFTA – European Free Trade Area
EU – European Union
MLP – Model Leniency Program
NGET – National Grid Electricity and Transmission
OJ – Official Journal
PA – Popular Action
RPM – resale price maintenance
SAP – Stabilisation and Association Process
SEPs – standard essential patents
SMEs – small and medium-sized enterprises

The Interaction between EU Competition Law Procedures and Fundamental Rights Protection: the Case of the Right to Be Heard

by

Elsbeth Beumer*

CONTENTS

* Elsbeth Beumer LL.M. is a PhD candidate at the Europa Institute, Leiden University (email: a.e.beumer@law.leidenuniv.nl). The author would like to thank the reviewers for their valuable comments. All errors are, of course, my own.

Abstract

This paper analyses the jurisprudence of the European Court of Human Rights on the rights of defence as enshrined in Article 6 of the European Convention on Human Rights. In particular, it assesses Strasbourg jurisprudence on the right to be heard and on the right to access documents. The paper considers whether the practice in EU competition law procedures complies with the fair trial standards that follow from Strasbourg judgments. Based on this assessment, the paper provides an answer to the question whether there is an overcompensation or undercompensation of fundamental rights protection in EU competition law procedures.

Résumé

Cet article analyse la jurisprudence de la Cour européenne des droits de l'homme sur les droits de la défense stipulés dans l'article 6 de la Convention européenne des droits de l'homme. Principalement, il fait une évaluation de la jurisprudence sur le droit d'être entendu et le droit d'accès aux documents. L'article considère si la pratique prévue par le droit de la concurrence de l'UE est en conformité avec les normes d'un procès équitable qui découlent de la jurisprudence de Strasbourg. En basant sur cette évaluation, cet article répond à la question s'il y a une surcompensation quant à la protection des droits fundamentaux dans les procédures en droit de la concurrence, ou plutôt le contraire.

Classifications and key words: article 6 ECHR; article 47 Charter; article 41 Charter; fundamental rights as a general principle of EU law; public enforcement; defence rights; right to be heard; right to access documents

1. Introduction

The right to be heard is the cornerstone of fair administrative proceedings and of a fair trial. In the broader sense of the word, the right to be heard includes the right to an oral hearing and the right to access documents. One could even argue that both rights are intertwined as an oral hearing allows parties to develop their arguments (based on the written allegations made against them).

The right to be heard has long since been "deeply entrenched" in the EU legal order as a general principle of law[1]. Since the entry into force of the Treaty of Lisbon[2], the right to be heard has been introduced into the EU legal system as a binding fundamental right. Article 41 of the Charter of Fundamental Rights of the European Union (hereafter: Charter) concerning the right to good administration has been qualified as the "benchmark" for the interpretation and application of the right to be heard[3]. Article 41 (2) (a) stipulates: "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken". With respect to the scope of this right, the Charter requires that it shall be the same as the corresponding provisions of the European Convention on Human Rights, (hereafter: ECHR) and as interpreted by the European Court of Human Rights (hereafter: ECtHR)[4]. This means, in essence, that the minimum standard of safeguarding fundamental rights protection is set by the ECHR. At the same time, however, EU law can offer greater (procedural) protection than the ECHR.

The purpose of this paper is to analyse whether the right to be heard under EU law complies with the ECHR, more particularly with Article 6 ECHR. Although the text of Article 6 ECHR speaks of a fair "trial" (and not of fair "administration"), it will be shown that merely administrative procedures also enjoy the protection of a fair hearing as prescribed by Article 6 ECHR. The

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[1] J. Flattery, "Balancing efficiency and justice in EU competition law: elements of procedural fairness and their impact on the right to a fair hearing", (2010) 7 *Competition Law Review* 54. See e.g. C-32/95 P *Commission v Lisrestal* [1996] ECR I-5387, para 21.

[2] See Art. 6 paras 1 and 2 TEU. The Lisbon Treaty resulted in the Charter becoming equivalent to primary EU Treaties and binding on all EU institutions and in the accession of the Union to the ECHR. Such accession shall not, however, affect the Union's competences as defined in the Treaties.

[3] I. Rabinovici, "The right to be heard in the Charter of Fundamental Rights of the European Union", (2012) 18(1) *European Public Law* 150.

[4] The "conformity clause" in Art. 52 para 3 of the Charter states that "*In so far as the Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection*".

analysis consists of three parts. First, the standard of the ECHR on the right to be heard will be determined. Second, the jurisprudence of the EU judiciary on the right to be heard will be discussed. Third, an analysis will be conducted whether current administrative competition law proceedings comply with the standards set by the Strasbourg Court. In conclusion, the question will be answered on the conformity of the current competition law procedure with the right to be heard. In addition, the question will be addressed whether the application of the different sources of fundamental rights leads to an overcompensation or undercompensation of fundamental rights protection in the EU legal order.

2. The scope of Article 6 ECHR

2.1. The criminal charge qualification

As stated, the minimum level of fundamental rights protection in EU competition law procedures is set by the ECHR. Article 6 ECHR represents the main provision on the right to a fair trial. It applies to two different types of procedures. First, it covers procedures where there is a dispute about civil rights & obligations. Second, it offers protection to procedures leading to criminal charges[5]. The first category, civil rights & obligations, remains under the "sole" protection of Article 6, para 1, ECHR. The second category, involving criminal charges, is at the same time protected by fundamental rights listed in Article 6, paras 2 and 3, ECHR (such as: the right to cross-examine witnesses, the right to be informed about the accusations, etc.).

The ECtHR gives a very broad, autonomous interpretation of the term "criminal". The rationale underpinning this autonomous interpretation is that in a case where the classification of an offence in the law of the contracting parties was regarded as decisive, a state would be free to avoid the Convention's obligation to ensure a fair trial[6]. In the *Engel* case, the ECtHR laid down three conditions for the classification of a charge as criminal under Article 6 ECHR: (a) the classification of the offence as criminal under national law; (b) the nature of the offence; and (c) the degree of severity of the penalty.

[5] Such a distinction can also be found in the Charter. Art. 47 of the Charter, which is equivalent to Art. 6 ECHR, does not make such a distinction. *A contrario,* Art. 48 (presumption of innocence and rights of defense) and Art. 49 (principles of legality and proportionality of criminal offences and penalties), solely apply to a person "who has been charged".

[6] D. Harris, M. O'Boyle, E. Bates & C. Buckley, *Law of the European Convention on human rights*, Oxford OUP 2009, p. 205.

The first condition carries a formal and relative value only. If an offence is criminal under national law, it is also criminal under Article 6 ECHR. But if an offence is not criminal under national law, the domestic classification of the given offence is "no more than a starting point"[7]. Under this condition, it is therefore irrelevant that the EU prescribes that the penalties for competition law infringements shall not be of a criminal nature[8].

In cases where the offence is not classified as criminal in national law, the other two conditions listed above come into play. These two conditions are alternative and not cumulative; a cumulative approach may be adopted where neither condition by itself is conclusive[9]. As to the nature of the offence its purpose must be deterrent, punitive and not compensatory. In addition the offence must have a general application. With respect to the third condition, the ECtHR emphasized the importance of the nature and severity of the possible – not the actual – punishment. Therefore, the "relative lack of seriousness of the penalty" cannot deprive an offence of its criminal nature[10].

In order to enjoy the full protection of Article 6 ECHR, one should also make sure that there is a "charge". According to the jurisprudence of the ECtHR, the charge starts when "an official notification is given to an individual by the competent authority of an allegation that he has committed a criminal offence" or follows from some other act which carries "the implication of such an allegation and which likewise substantially affects the situation of the suspect"[11]. Article 6 ECHR covers the whole of the proceedings, including appeal proceedings and the determination of the sentence[12].

2.2. The Jussila distinction

The conclusion that competition law fines are to be considered criminal under the ECHR is not without problems. The autonomous interpretation

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[7] *Engel v Netherlands* (1976) Series A no 22, para 82.

[8] Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU [2003] OJ L1/1 ("Regulation 1/2003"), Art. 23 para 5.

[9] *Janosevic v Sweden* (2002) 38 EHHR 473, para 67; *Ezeh and Connors v the United Kingdom* (2004) 39 EHRR 1, para 86; *Bendenoun v France* (1994) Series A no 284, para 47; *Lauko v Slovakia* (1998) 33 EHRR 994, para 57; *Garyfallou AEBE v Greece* (1997) 28 EHRR 344, para 33.

[10] *Öztürk v Germany* (1984) Series A no 73, para 54. See also *Lutz v Germany* (1987) Series A no 123, para 55.

[11] *Deweer v Belgium* (1980) Series A no 35, para 46; *Eckle v Germany* (1982) Series A no 51, para 73; *Foti e.a. v Italy* (1982) Series A no 56, para 52; and *Quinn v Ireland* (2000) 33 EHHR 264, para 41.

[12] *Phillips v United Kingdom* (2001) ECHR 2001-VII.

of the notion of a *criminal charge* has underpinned a gradual broadening of the classification as criminal to cases not strictly belonging to the traditional categories of criminal law, for example administrative penalties[13]. Due to the significant enlargement of the area of "criminality" under Article 6 ECHR, the ECtHR made in the *Jussila* case a distinction between hardcore and non-hardcore criminal offences, using competition law as an example of a field of law that falls within the periphery of criminal law[14].

"Notwithstanding the consideration that a certain gravity 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"[15]. Following the ECtHR, the criminal-head guarantees laid down in Article 6 ECHR do not necessarily apply with their full stringency to cases belonging to the periphery of criminal law. The ECtHR used the severity of the sanction and the stigma attached to the offence in order to conclude that certain fields of law, such as competition law, fall outside the hard core of criminal law[16].

In *Jussila*, the ECtHR dealt with the question whether the lack of an oral hearing before the court lead to an infringement of Article 6 ECHR. In this case the difference between hardcore and softcore criminal charges was decisive for the outcome of the case. The ECtHR held here that exceptional circumstances in cases not belonging to the traditional categories of *criminal charges* may justify dispensing of such a hearing[17]: "there may be proceedings in which an oral hearing may not be required, for example where there are

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[13] *Jussila v Finland* (2007) 45 EHRR 39, para 43.

[14] See, *a contrario*, the EFTA Court judgment in a case that concerned a decision of the EFTA Surveillance Authority sanctioning Norgen Poste for an abuse of a dominant position and imposing a fine of EUR 12.89 million. The EFTA Court held therein that fines for competition law infringements belong to hardcore criminal charges. Case E-15/10 *Posten Norge AS v EFTA Surveillance Authority* (EFTA Court, 18.04.2012), para 90. For more on this case see: J. Temple Lang, "Judicial review of competition decisions under the European Convention on Human Rights and the importance of the EFTA Courts: The Norway Post Judgment", (2012) 37 *European Law Review* 464-480.

[15] *Jussila v Finland* (2007) 45 EHRR 39.

[16] Note that this categorization of criminal offences under Art. 6 has no basis in the Convention. See the partly dissenting opinion of Judge Loucaides, joined by Judges Zupančič and Spielmann under the case *Jussila v Finland* (2007) 45 EHRR 39.

[17] The ECtHR considered that a normal criminal trial (i.e. cases falling within the hardcore of criminal law) requires fundamental guarantees in the form of publicity, such as a public hearing. In other cases (i.e. administrative), the ECtHR accepted that the lower instance may not qualify as independent and impartial tribunals and that the hearing before them may not be public. See in this respect also: ECtHR judgment of 5 April 2012 in case *Societe Bouygues Telecom v France* App no 2324/08, para 71.

no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials"[18]. The ECtHR emphasized that national authorities may have regard to the demands of efficiency and economy in deciding whether or not to hold an oral hearing[19].

2.3. Application of the criminal charge criteria to EU competition law proceedings

2.3.1. "Classic" fining procedure

It is not surprising by looking at the *Engel*-criteria that the jurisprudence of the ECtHR has been expanding the scope of criminal safeguards provided in Article 6 ECHR to a wide range of administrative proceedings, such as those concerning competition law. In the *Menarini* case, the ECtHR reaffirmed[20] that competition law proceedings are under the full protection of Article 6 ECHR[21]. In EU competition law procedures[22] this protection starts when the Commission informs the concerned undertakings in writing of the objection raised against them. For Article 6 ECHR to apply, it is therefore not necessary that there is a "trial".

Neither ECHR jurisprudence nor academic literature have so far touched upon the question whether criminal charges are also involved where an undertaking does not get a fine (for example in a commitment procedure[23])

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[18] *Jussila v Finland* (2007) 45 EHRR 39, para 41.

[19] *Jussila v Finland* (2007) 45 EHRR 39, para 42.

[20] See e.g. the decision of the European Commission of Human Rights in case *Société Stenuit v France* (1992) Series A no 232-A.

[21] ECtHR judgment of 27 September 2011 in case *Menarini Diagnostics S.R.L. v Italy* App no 43509/08, paras 40-45. The criminal character of competition law fines has been accepted by EU courts e.g.: C-199/92 P *Hüls AG v Commission* [1999] ECR I-4287, para 150; C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri v Commission* [2005] ECR I-5425, para 202.

[22] In this paper the term "EU competition law procedures" denotes Art. 101 and 102 procedures.

[23] The Hearing Officer of the Commission, Wouter Wils, does however see a fundamental difference between cases where the Commission imposed fines for infringements of Art. 101 and 102 TFEU and cases where one should decide whether or not to accept commitments pursuant to Art. 9 of Regulation 1/2003. According to Wils, it is this difference that makes it legitimate for EU courts to leave the Commission with a broad margin of discretion and endorse the manifest error-test when ruling upon commitment procedure cases. See W.P.J. Wils, "The compatibility with fundamental rights of the EU antitrust enforcement system in which the European Commission acts both as investigator and as first-instance decision maker", (2014) 37(1) *World Competition* 14-16.

or where an undertaking receives a fine reduction (under the settlement procedure or the leniency procedure). It remain unclear whether all of the procedural rights of Article 6 ECHR should apply in their full grandeur with respect to such cases.

2.3.2. Commitment procedures

The first procedure which might fall outside the scope of Article 6 ECHR is the commitment procedure. Article 9 Regulation 1/2003 provides for the adoption of decisions by the Commission whereby undertakings make legally-binding commitments as to their future behaviour. One of the main advantages of this procedure is that the Commission will close its file without making a finding of an infringement. This is a formal procedure that will be initiated by the Commission by sending a "preliminary assessment" of the case (in contrast to a statement of objections) to the undertakings involved. The undertakings have a given period of time to respond and to offer draft commitments[24]. These commitments cannot qualify as criminal charges because they (i) do not have a general application; and (ii) lack the qualification of a deterrent and punitive sanction (the commitments are voluntarily offered by the undertaking).

The commitment can, however, fall under the first category of Article 6 ECHR (civil rights & obligations). The ECtHR held on several occasions that the key determinant in cases involving state actions is whether the right or obligation in question is pecuniary in nature or has pecuniary consequences for the applicant[25]. According to the ECtHR, the right to property is clearly a right with a pecuniary character. This means that a state action which is directly decisive for property rights is determinative of civil rights and obligations, and hence governed by Article 6 ECHR[26]. The same applies to the right to engage in a commercial activity which similarly has a pecuniary character[27]. On the basis of these cases, it can be assumed that commitments, such as the divestiture of assets, have a pecuniary character.

However, in order for Article 6 ECHR to apply there must be a dispute between the undertaking and the state (i.e. competition authority). A dispute may concern a question of fact or a question of the law[28]; it is not necessary that the dispute relates to the actual existence of a right (it may also be related

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[24] R. Which & D. Bailey, *Competition Law*, Oxford OUP 2012, p. 257.

[25] *Editions Periscope v France*, Series A no 234-B (1992); and *Stran Greek Refineries and Stratis Andreadis v Greece*, Series A no 301-B (1994).

[26] D. Harris, M. O'Boyle, E. Bates & C. Buckley, *Law of the…*, op. cit., p. 214.

[27] *Benthem v Netherlands* (1985) Series A no 97.

[28] *Albert and Le Compte v Belgium* (1983) Series A no 58.

to its scope)[29]. Given that the commitment procedure is voluntary, such dispute on the substance of an Article 9 decision it thus unlikely. As a result, the commitment procedure falls completely outside the scope of Article 6 ECHR. Illustrative here is the *Commission v Alrosa* case where the CJ held that Article 9 Regulation 1/2003 procedures are based on considerations of procedural economy[30].

2.3.3. Leniency procedures

The leniency procedure is another procedure to which, possibly, not all procedural safeguards of article 6 ECHR apply. The usage of the phrase "leniency procedure" is, however, somewhat confusing as it is not a different type of procedure (in contrast to the standard fining procedure, commitment procedure and the settlement procedure) – leniency applicants may or may not be involved both in the standard fining procedure and in the settlement procedure[31].

Under the leniency procedure, the Commission will grant immunity from fines to an undertaking that is the first to blow the whistle[32]. An undertaking that does not meet the conditions of the Commission may be eligible to benefit from a fine reduction[33]. One of the conditions to determine whether

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[29] *Le Compte, Van Leeuven and De Meyere v Belgium* (1981) Series A no 43.

[30] C-441/07 P *Alrosa v Commission*, [2010] ECR I-05949, para 35.

[31] See on the leniency procedure i.e. W.P.J. Wils, "Leniency in antitrust enforcement: theory and practice", (2007) 30(1) *World Competition* 25-64; P. Billiet, "How lenient is the EC Leniency Policy? A matter of certainty and predictability", (2009) 30(1) *European Competition Law Review* 14-20; J Sandhu, "The European Commission's leniency policy: a success?", (2007) (28)3 *European Competition Law Review* 148-157; J.M. Griffin & K.R. Sullivan, "Recent Developments in Leniency Policy and Practices in Canada, the European Union and the US", Paper presented at the ABA *Advanced International Cartel Workshop* in San Francisco, 30 January–1 February 2008; D. Arp & C.A. Swaak, "A tempting offer: immunity from fines for cartel conduct under the European Commission's new leniency notice", (2003) (24)1 *European Competition Law Review* 9-18; S. Blake & D. Schnichels, "Leniency following modernization: safeguarding Europe's leniency programmes", (2004) (25)12 *European Competition Law Review* 765-770; and C. Hodges, "Competition enforcement, regulation and civil justice: what is the case?", (2006) 43 *Common Market Law Review* 1382-1407.

[32] Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/11 ("Leniency Notice"), paras 8 (a), 8 (b), 10 and 11. The undertaking applying for immunity must provide the Commission with information (such as a corporate statement) and evidence of its participation in the alleged cartel. Immunity will not be granted if, at the time of the submission, the Commission had already sufficient evidence to carry out an inspection or had already carried out such an inspection.

[33] Leniency Notice paras 23 and 24. In order to qualify for a fine reduction, the undertaking must provide the Commission with evidence that represents "*significant added value*" with respect to that already in the Commission's possession.

a procedure is *criminal* is the nature and severity of the possible punishment. The possible punishment for a leniency applicant is, throughout the whole administrative procedure, the imposition of a fine of maximum 10% of its total turnover[34]. The promise of the Commission to grant immunity is conditional (it depends on the leniency applicant' cooperation during the administrative procedure[35]) and becomes final once the authority adopted its decision[36]. In this respect the position of the leniency applicant equals, as said above, the position of any other (cartel) participants in an administrative procedure.

There are, however, three important differences. One difference relates to the moment starting from which a leniency applicant can enjoy the protection of Article 6 ECHR. Unlike in the standard fining procedure, this moment is not when the Commission sends its statements of objections to the investigated undertakings, but once leniency applicants decide to admit that they had committed the infringement and contact the Commission. From that moment onwards the position of the undertaking (c.q. leniency applicants) is "substantially affected"[37].

The second difference touches upon the fact that the undertaking, whilst applying for leniency, actually admits its participation in the alleged anti-competitive behaviour. For that reason there are no (or substantially less) issues of credibility or contested facts that require the use of certain defence rights[38]. Nevertheless, during the stage of informal discussions with the Commission, leniency applicants have the possibility to hear the allegations of the Commission, the classification of the facts of the case, the gravity and duration of the alleged cartel, etc. These discussions already enable leniency applicants to assert their views and to straighten out certain facts. A reduced application of certain defence rights in leniency procedures seems therefore completely in line with ECtHR jurisprudence where the Strasbourg Court held that a less stringent application of procedural rights is possible when there are no contested facts that demand, for example, an oral hearing[39].

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[34] Regulation 1/2003 Art. 23 para 2.

[35] Leniency Notice para 12 (a).

[36] Illustrative is the *Deltafina* case where the Commission withdrew its (conditional) promise to grant immunity. The practice of the Commission has been confirmed by the General Court: T-12/06 *Deltafina v Commission*, not yet reported.

[37] At that moment the undertakings have "learnt of the investigation or begun to be affected by it". See *Eckle v Germany* (1982) Series A no 51, para 74.

[38] At least from the perspective of the leniency applicant. The other undertakings might want to contest the credibility of the statements by cross-examining the leniency applicant. See for a discussion A.E. Beumer, "The cross-examination of leniency applicants in EU cartel proceedings", (2013) *Concorrenza e Mercato*, 5-26.

[39] See the discussion of the *Jussila* case above.

The third difference concerns the position of the leniency applicants during a possible appeal procedure. In contrast to an "ordinary" appeal procedure where an undertaking appeals the fine imposition, an appeal procedure started by a leniency applicant has lost its qualification as deterrent and punitive when the Commission decided to grant that undertaking immunity from fines. As a consequence, the leniency applicant can no longer rely on the full protection of Article 6 ECHR. A similar conclusion can be drawn with respect to leniency applicants that received a fine reduction. Although undertakings receiving a fine reduction still have to pay a (punitive) fine, one could argue that the conviction became final once the leniency applicant admitted to committing the infringement in order to get lenient treatment. For that reason, it is legitimate to argue that the leniency applicants cannot invoke in an appeal procedure the extended protection provided by Article 6 ECHR.

2.3.4. Settlement procedures

The essence of the settlement procedure is that the undertakings, having heard the objections of the Commission, acknowledge their involvement in the cartel. In exchange, the Commission grants them a 10% reduction in the fine that it would have otherwise imposed upon them[40]. In line with the argumentation presented about leniency applicants that received a fine reduction, one could argue that once the settlement applicant admitted its involvement in the infringement, it can no longer rely on the whole package of legal protection provided by Article 6 ECHR. This applies both to the administrative phase of the procedure as well as to the possible appeal procedure. It is interesting to note in this context that the Commission, unlike in the leniency procedures, provides for certain procedural efficiencies already during the administrative procedure[41]. These procedural efficiencies take place once the settlement discussions are successful and the parties make a formal settlement submission where they admit to their participation in the infringement and waive their further rights to be heard (access to the file and an oral hearing) after the statement of objections[42]. Such a waiver of procedural rights is not a problem

[40] Commission Regulation 622/2008 of 30 June 2008 amending Regulation773/2004, as regards the conduct of settlement procedures in cartel cases [2008] OJ L 171/3 ("Settlement Regulation"). See also Commission Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Articles 7 and 23 of Council Regulation 1/2003 in cartel cases [2008] OJ C 167/1 ("Settlement Notice").

[41] See Commission Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 101 & 102 TFEU [2004] OJ L123/18 ("Regulation 773/2004"), Art. 10(a)(2).

[42] Settlement Notice paras 17-22.

according to ECtHR jurisprudence provided it is voluntary (e.g. there should be no improper compulsion)[43].

2.4. Preliminary conclusions

The three paragraphs above discussed the jurisprudence of the ECtHR on the notion of a criminal charge and applied that jurisprudence to the EU competition law procedure. With the exception of the "classic" fining procedure, it can be concluded that it is not absolutely clear that informal enforcement procedures can be qualified as criminal charges. In addition, it is not obvious that procedural rights fully apply to these procedures. The above analysis showed diverging levels of procedural rights depending on the procedure. The outcome of this analysis can be found in the table below.

Type of enforcement procedure	Level of procedural guarantees: administration	Level of procedural guarantees: trial
Fining procedure	Art. 6 paras 1, 2, 3	Art. 6 paras 1, 2, 3
Commitment procedure	-	Art. 6 para 1
Leniency procedure (immunity)	Art. 6 paras 1, 2, 3 but Jussila	Art. 6 para 1
Leniency procedure (reduction)	Art. 6 paras 1, 2, 3 but Jussila	Art. 6 paras 1, 2, 3 but Jussila
Settlement procedure	Art. 6 paras 1, 2, 3 but Jussila	Art. 6 paras 1, 2, 3 but Jussila

3. The right to be heard under Article 6 ECHR

3.1. The right to a fair hearing of Article 6 ECHR

After concluding on the basis of the Strasbourg jurisprudence that there could be diverging levels of procedural rights protection in EU competition law procedures, it is interesting to execute this model by means of a case study. This paper will use as a case study the right to be heard, which is part

[43] In addition, as mentioned by Wils, the undertaking should be fully aware of the conditions and consequences of a settlement. W.P.J. Wils, "The use of settlements in public antitrust enforcement: objectives and principles, (2008) 31(3) *World Competition* 348-351.

of the wider right to a fair trial provided by Article 6 ECHR. It is important to stress that the right to a fair trial of Article 6 ECHR has an "open-ended, residual quality". A number of specific rights have in fact been read into Article 6 ECHR through the medium of its fair hearing guarantee[44]. One of them is the right to an oral hearing in one's presence[45], which offers protection against arbitrary decisions[46]. The term "oral hearing" is somewhat confusing as it can refer to the right to a public hearing and the right of an oral hearing in one's presence[47]. For the purpose of this paper, discussed will only be jurisprudence on oral hearings (paragraph 3.2) Another right which is not explicitly mentioned in Article 6 ECHR is that of access to one's file (paragraph 3.2).

3.2. The right to an oral hearing

3.2.1. The scope of the right

With respect to criminal procedures, the ECtHR stipulated that there is a general right of the accused to attend the hearing[48]. Although the right to be heard is particularly relevant for criminal procedures (where the witnessing and monitoring of proceedings are of great importance[49]), it also extends to certain kinds of civil procedures. The right to be heard in civil procedures mainly applies to cases where the "personal character and manner of life's

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[44] D. Harris, M. O'Boyle, E. Bates & C. Buckley, *Law of the…*, op. cit., p. 246.

[45] ECtHR judgment of 12 February 1984 in case *Colozza v Italy* Appl no 9024/80, para 27. In this case the ECtHR held: "though this is not expressly mentioned in para 1 of Article 6, the object and purpose of that Article taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing".

[46] *Pretto and others v Italy* (1983) Series A no 71.

[47] Also the ECtHR has sometimes difficulties with making a distinction between those two subrights of the more abstract right to an oral hearing. See e.g. ECtHR judgment of 26 May 1988 in case *Ekbatani v Sweden* Appl no 10563/83; and ECtHR judgment of 21 September 2006 in case *Moser v Austria* Appl no 12643/02.

[48] ECtHR judgment of the 18 October 2006 in case *Hermi v Italy* Appl no 18114/02, para 58; *Lala v the Netherlands* (1994) Series A no 297, para 33; *Poitrimol v France* (1993) Series A no 277, para 35; and ECtHR judgment of 12 February 2004 in case *De Lorenzo v Italy* (dec.) Appl no 69264/01.

[49] D. Harris, M. O'Boyle, E. Bates & C. Buckley, *Law of the…*, op. cit., p. 247. In criminal procedures the right to an oral hearing follows from the rights that are listed in Art. 6 para 3 sub c, d and e ECHR. The ECtHR recalled that the principle of an oral and public hearing is particularly important in the criminal context where the accused must generally be able to attend a hearing at first instance (*Tierce and Others v San Marino* ECHR 2000-IX, para 94.

of the party concerned is directly relevant to the decision"[50], or where the applicant's conduct need to be assessed[51][52].

3.2.2. The exceptions

The right to be heard in civil procedures is not absolute; the question whether the applicant has a right to an oral hearing depends on the nature of the issues to be decided[53]. The ECtHR concluded in several social security cases that due to the highly technical nature of the case, the case was better dealt with in writing than in oral argument[54]. An oral hearing is not required in cases where only non-complex legal questions are being discussed[55], neither it is necessary where oral statements will not present any added-value to the outcome of the case[56].

The right to an oral hearing is limited also in criminal proceedings. The aforementioned *Jussila* case illustrates that an oral hearing may not be necessary in procedures (such as those relating to competition law) belonging to the periphery of criminal law. In *Jussila*, the ECtHR refused to give the applicant the right to an oral hearing because the judiciary was not persuaded that this particular case posed any issues of credibility that required an oral hearing (the contested issues of fact and law could be adequately addressed in, and decided on the basis of, written submissions)[57]. In the aftermath of *Jussila*, the ECtHR not only followed the same line of reasoning[58] but also crystallized its previous jurisprudence by underlining that "the character of the circumstances which may justify dispensing with an oral hearing essentially

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[50] ECtHR judgment of 30 June 1959 in case *X v Sweden* (dec.) Appl no 434/58.

[51] *Muyldermans v Belgium* Series A no 214, para 64.

[52] One exception is the *Georgiadis* case where the ECtHR held that "a procedure whereby civil rights are determined without ever hearing the parties" submissions cannot be considered to be compatible with Art. 6 para 1. See ECtHR judgment of 29 May 1997 in case *Georgiadis v Greece* Appl no 21522/93, para 40.

[53] See for e.g. ECtHR judgment of 8 February 2005 in case *Miller v Sweden* Appl no 55853/00.

[54] ECtHR judgment of 24 June 1993 in case *Schuler-Zgraggen v Switserland* Appl no 14518/89; and ECtHR judgment of 12 November 2002 in case *Döry v Switserland* Appl no 28394/95.

[55] ECtHR judgment of 1 June 2004 in case *Valová, Slezák and Slezák v Slovak Republic* Appl no 44925/98.

[56] ECtHR judgment of 25 November 2003 in case *Pursiheimo v Finland* Appl no 57795/00. See, *a contrario*, the case *Göç* where the "personal nature of the applicant's experience [related to his detention], and the determination of the appropriate level of compensation, required that he be heard". See ECtHR judgment of 11 July 2002 in case *Göç v Turkey* Appl no 36590/97.

[57] *Jussila v Finland* (2007) 45 EHRR 39, para 47.

[58] ECtHR judgment of 17 July 2007 in case *Oy and Karanko v Finland* Appl no 61557/00; Judgments of the ECtHR of 22 July 2008 *Lehtinen v Finland* Appl no 32993/02 and *Kallio v Finland* Appl no 40199/02.

comes down to the nature of the issues to be dealt with by the competent court – in particular, whether these raise any question of fact or law which could not be adequately resolved on the basis of the case file"[59].

The ECtHR concluded in the *Flisar* case, on the basis of the nature of the issue[60], that the local court could not have properly determined the facts or the applicant's guilt without a direct assessment of the evidence at an oral hearing. In this case, the applicant contested the conviction and challenged certain factual aspects of the case, including the credibility of certain police statements concerning his conduct (in contrast to the *Suhadolc* case which concerned evidence obtained by means of an objective method)[61]. This case emphasizes the importance of an oral hearing in criminal procedures when it can put the credibility of given statements or facts to the test[62].

3.2.3. The moment of the oral hearing

A related question is whether, where an oral hearing took place at first-instance[63] (for example during the administrative proceedings), the appeal court should also ensure an oral hearing. The ECtHR approached this question by reiterating that where a public hearing has been held at first instance, its absence may be justified at the appeal stage[64]. This holds particularly for: (1) appeal proceedings involving only questions of law[65]; and

[59] ECtHR judgment of 17 May 2001 in case *Suhadolc v Slovenia* (dec.) Appl no 57655/08. See also ECtHR judgment of 27 March 2003 in case *Berdajs v Slovenia* Appl no 10390/09.

[60] Aside from the nature of the issues, the ECtHR attached importance to domestic regulations concerning the right to an oral hearing. According to the ECtHR, problems under Art. 6 ECHR will arise when the absence of an oral hearing flows from domestic law itself. ECtHR judgment of 3 October 2006 in case *Karahanoğlu v Turkey* Appl no 74341/01, paras 36-39; ECtHR judgment of 6 December 2007 in case *Súsanna Rós Westlund v Iceland* Appl no 42628/04, para 40; and ECtHR judgment of 4 March 2008 in case *Hüseyin Turan v Turkey,* Appl no 11529/02, paras 34-35.

[61] ECtHR judgment of 29 September 2001 in case *Flisar v Slovenia*, Appl no 3127/09.

[62] See also ECtHR judgment of 28 February 2013 in case *Milenovič v Slovenia* Appl no 11411/11, para 32.

[63] An applicant can waive his/her right to an oral hearing, provided that the waiver is made "of his own free will, either expressly or tacitly", is "established in an unequivocal manner", is "attended by minimum safeguards", and does "not run counter to any important public interest". See D. Harris, M. O'Boyle, E. Bates & C. Buckley*, Law of the…*, op. cit., p. 247 and case *Sejdovic v Italy* ECHR 2006-II, para 86.

[64] *Fejde v Sweden* (1991) Series A no 212, paras 27 and 31; and *Kremzow v Austria* (1993), Series A no 268, paras 58-59.

[65] ECtHR judgment of 19 February 1996 in case *Botten v Norway* Appl no 16206/90, para 39. See also *Axen v Germany* (1983) Series A no 72, paras 27-28; *Kremzow v Austria* (1993), Series A no 268, paras. 60-61; and ECtHR judgment 19 February 1998 in case *Allan Jacobsson v Sweden* (nr. 2) Appl no 16970/90, para 49.

(2) appeal procedures where the court has full jurisdiction to examine both points of law and of fact[66]. With respect to situations where the appeal court has full jurisdiction, the ECtHR clarified that an oral hearing might anyway be required when the appeal raises any questions of fact or law which cannot be adequately resolved on the basis of the case file[67].

3.3. The right to access documents

3.3.1. The scope of the right

Like with respect to the right to an oral hearing, the right to access documents is not explicitly included in Article 6 ECHR. The right to access documents follows from the notion of equality of arms and the right to an adversarial procedure[68]. The right to an adversarial proceeding means that parties should have knowledge of, and should be able to, comment on all evidence adduced or observations filed with a view to influencing the court's decision[69]. In a similar context, the principle of equality of arms requires that each party should be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent[70]. Basically, this implies that a party should have access to documents that the opponent filed or to documents which (otherwise) places the opponent at a substantial advantage.

With respect to civil procedures, the ECtHR confirmed that parties have only a limited right to access documents. It can only require disclosure of documents that can actually influence the judgment of the court. In the *Yvon* case, the ECtHR formulated this rule as follows: "In its opinion, the adversarial principle, thus defined, does not require that each party in civil

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[66] *Idem*. See also *Fejde v Sweden* (1991) Series A no 212, para 33.

[67] ECtHR judgment of 29 October 1991 in case *Jan Åke Andersson v Sweden* Appl no 11274/84, para 29; and ECtHR judgment of 1 July 1997 in case *Rolf Gustafson v Sweden* Appl no 23196/94.

[68] The requirements of equality of arms and adversarial procedure apply to criminal and civil procedures, but their actual scope is not exactly the same. The ECtHR stated: "This is borne out by the absence of detailed provisions such as paragraphs 2 and 3 of Article 6 […]. Thus, although these provisions have a certain relevance outside the strict confines of criminal law […] the Contracting States have greater latitude when dealing with civil cases than they have when dealing with criminal case". See *Dombo Beheer v Netherlands* (1993) Series A no 274, para 32. See also *Albert and Le Compte v Belgium (1983) Series A no 58*, para 39; and ECtHR judgment of 23 October 1996 in case *Levages Prestations Services v France* Appl no 21920/93.

[69] ECtHR judgment of 20 February 1996 in case *Vermeulen v Belgium* Appl no 19075/91, para 33.

[70] *Dombo Beheer v Netherlands (1993) Series A no 274*, para 33; and *Brandstetter v Austria* (1991) Series A no 211, para 66.

cases must transmit to its opponent documents which, as in the instant case, have not been presented to the court either"[71].

The right to have access to documents that are in the possession of the court/ administrative authority, and which can influence the outcome of the case, is not absolute (as will be discussed below). An infringement of the right to a fair hearing will take place when a respondent State, without good cause, prevents parties from gaining access to documents in its possession which would have assisted them in defending their case[72].

By contrast to civil procedures, criminal procedures should guarantee a much broader right to access documents, meaning that the right should extend to all incriminating and exculpating documents that are in the file of the prosecutor[73]. According to the ECtHR, unlimited access to documents is a very important safeguard in criminal procedures – it assures "the confidence of the parties of criminal proceedings in the workings of justice"[74]. Whether the judge will (or will not) use these documents in his /her assessment is irrelevant. According to the ECtHR, it is not the task of the prosecutor to assess whether the collected documents are relevant to the outcome of the case[75]. This means that the prosecutor may not decide, on his/her own motion, to withhold documents for or against the accused[76].

3.3.2. The exceptions

As said above, the entitlement to disclosure of relevant evidence is limited; the fact that certain documents are not in the possession of one party will not automatically result in an infringement of Article 6 ECHR. In the *Dowsett* case, the ECtHR reiterated its jurisprudence where it had held that in criminal proceedings[77] public interests may exist (such as: national security, the need to protect witnesses or the need to keep secret police methods of investigating crime) that justify the non-disclosure of evidence. Another legitimate reason to withhold certain evidence from the defence is the preservation of

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[71] ECtHR judgment of 24 April 2003 in case *Yvon v France* Appl no 44962/98, para 38.

[72] ECtHR judgment of 9 June 1998 in case *McGinley and Egan v the United Kingdom* Appl nos 21825/93 and 23414/94, paras 86 and 90.

[73] *Edwards v United Kingdom* (1992) Series A no 247, para 46.

[74] ECtHR judgment of 22 March 2005 in case *M.S. v Finland* Appl no 46601/99.

[75] ECtHR judgment of 31 March 2009 in case *Nautinen v Finland* Appl no 21022/04.

[76] ECtHR judgment of 16 February 2000 in case *Rowe and Davis v United Kingdom* Appl no 28901/95.

[77] With respect to civil proceedings, the ECtHR held that the scope of the right to access documents (including its restriction) depends on the specifics of each case. ECtHR judgment of 27 April 2010 in case *Hudakova and other v Slovac Republic* Appl no 23083/05, paras 26-27; and ECtHR judgment of 15 June 2005 in case *Stepinska v France* Appl no 1814/02.

a fundamental right of another individual[78]. A restriction on the right to access documents is, however, only permitted when (i) it is strictly necessary; and (ii) the difficulties caused to the defense are sufficiently counterbalanced by the procedures followed by the judicial authorities[79]. Regarding specifically the existence of adequate procedural safeguards, the ECtHR rendered several judgments where it had held that the accused should be able to make an objection against the decision to withhold certain documents before a court that will balance the different interests[80]. Only when national law provides for such procedural guarantees might the non-disclosure of documents not violate Article 6 ECHR.

3.4. Preliminary conclusions

The right to a fair hearing provided by Article 6 ECHR contains several sub-rights which are not explicitly mentioned. Two of them are the right to an oral hearing in one's presence and the right to access documents. Both of them are not absolute rights, meaning that domestic practice might deviate from one of these rights in order to protect public interests or fundamental rights of others (in case of a disclosure request) or when the nature of the issue can be assessed on the basis of written materials (in case of an oral hearing). It seems that the ECtHR is specifically lenient with respect to the need of an oral hearing in procedures belonging to the periphery of criminal law. As explicitly mentioned in the *Kammerer* case, it is not excluded that such a differentiated application of procedural safeguards also applies to other procedural issues covered by Article 6 ECHR[81]. With respect to the right to access documents it seems that parties should (as the minimum safeguard) at least receive those documents that are part of the decision of the administrative authority or court.

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[78] ECtHR judgment of 26 June 2006 in case *Dowsett v United Kingdom* Appl no 39482/98, para 41. See also *Doornson v the Netherlands* ECHR 1996-II, para 70.

[79] *Van Mechelen and others v the Netherlands* ECHR 1997-III, paras 54-58.

[80] ECtHR judgment of 16 February 2000 in case *Rowe and Davis v United Kingdom* Appl no 28901/95; *Dowsett v United Kingdom* Appl no 39482/98 (26 April 2003); and ECtHR judgment of 18 November 2003 in case *Chadwich v United Kingdom* (dec.) Appl no 54109/00.

[81] ECtHR judgment of 12 May 2010 in case *Kammerer v Austria* Appl no 32435/06, para 27.

4. The right to be heard under EU law

4.1 The right to an oral hearing

4.1.1 The standard of the EU legal order

The above paragraph illustrates the stance of the ECtHR towards the right to be heard under Article 6 ECHR. The EU right to be heard is spread over several legal sources. Article 41 of the Charter (the right to good administration) is the main provision in this context which states that every person has the right to be heard. In contrast to other provisions in the Charter[82], Article 41 only applies, in principle, to measures taken by EU institutions[83]. However, it is also relevant, as a general principle, when the behavior of Member States falls within the scope of EU law[84]. The provision sets out two conditions for the application of the above right. First, it should concern an "individual measure" – this means that the right to be heard does not apply to legislative or regulatory measure. Second, the measure should "adversely affect" someone (see below)[85].

According to the Explanations, Article 41 of the Charter "is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law which enshrined good administration as a general principle of law". The study of the aforementioned cases shows that when assessing a case under Article 41 of the Charter the European judiciary is usually guided by the general principle of defence (and not of good administration)[86]. With respect to the applicability of the general principle to be heard (sub-category of the right of defence), jurisprudence shows that, in line with Article 41 of the Charter, a person has the right to an oral hearing in administrative proceedings when a proceeding was initiated against him/her

[82] The other Charter provision also applies to national measures that come within the scope of EU law. See e.g. C-671/10 *Akerberg Fransson*, not yet reported.

[83] C-482/10 *Cicala*, not yet reported.

[84] C-277/11 *M.M.*, not yet reported. In this case, one can read an applicability of Art. 41 of the Charter to Member States with respect to the right to be heard in asylum cases. See also case C-604/12 *H.N.,* not yet reported, paras 49-50. See also the opinion of Advocate General Bot of 7 November 2013 in C-604/12, *H.N.*, para 36.

[85] I. Rabinovici, "The right…", op. cit., p. 150.

[86] In the *Kuhner* case, the ECJ distinguished the general principle of good administration from more specific rights of defense. The Court held that only the latter were capable of conferring subjective rights on individuals. See joined cases 33/79 and 75/79 *Kuhner v Commission* [1980] ECR 1677, para 25.

and might adversely affect a person[87]. The right to an oral hearing is, therefore, not limited to sanction proceedings[88]. The right to a hearing requires that the given natural or legal person has the opportunity to make its view known on the truth and relevance of the facts, charges, and circumstances relied upon by the decision-maker[89].

4.1.2. The application of the right to competition law proceedings

The specific requirements of the right may differ depending on the type of proceedings. In competition law cases, the Commission must give the undertakings the opportunity of being heard on the allegations raised by the authority against them. The right to an oral hearing only relates to Commission decisions under Articles 7, 8, 23 and 24 (2) Regulation 1/2003[90]. These provisions concern the finding of an infringement, the imposition of interim measures, the imposition of a fine, and the definitive fixing of a period penalty payment. The undertakings concerned should request an oral hearing in their written submissions[91]. In settlement procedures, parties must agree that they will not request an oral hearing unless the Commission does not reflect their settlement submissions in its statement of objections and the resulting decision[92]. The Hearing Officer, as an independent administrative officer, will organize such an oral hearing[93]. His task is to safeguard the effective exercise of procedural rights throughout the whole administrative procedure[94].

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[87] 17/74 *Transocean Marine Paint Association v Commission* [1974] ECR 1063, para 15; 40/85 *Belgium v Commission* [1986] ECR 2321, para 28; and T-450/93 *Lisrestal v Commission* [1994] ECR II-1177, para 42.

[88] 85/76 *Hoffmann la Roche v Commission* [1979] ECR 461, para 9. In this case, the ECJ limited the right to be heard to persons upon which sanctions may be imposed. This formula is reserved for antitrust cases in which normally sanctions are imposed. See I. Rabinovici, "The right…", op. cit., p. 157.

[89] 85/76 *Hoffmann la Roche v Commission* [1979] ECR 461, paras 9 and 11.

[90] Regulation 1/2003, Art. 27 para 1, Regulation 773/2004 helps to define the extent of this right. See Regulation 773/2004, Arts. 10, 11, and 15. See on the oral hearing: W.P.J. Wils, "The oral hearing in competition proceedings before the European Commission", (2012) 35(3) *World Competition* 397-430.

[91] Regulation 773/2004, Art. 12.

[92] Settlement Regulation.

[93] Decision of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (2011) OJ L 275/59.

[94] See for more information about the role of the Hearing Officer W.P.J. Wils, "The role of the Hearing Officer in competition proceedings before the European Commission", (2012) 35(3) *World Competition*; and N. Zingales, "The Hearing Officer in EU competition law proceedings: ensuring full respect for the right to be heard?", (2010) 7(1) *Competition Law Review*.

4.2. The right to access documents

4.2.1. The standard of the EU legal order

An essential precondition of an effective exercise of the right to be heard is the right to access documents[95]. Article 41 of the Charter includes "the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy". The Charter limits this right to "one's file", thereby excluding access to the files of *other* parties[96]. Third parties that would like to request access to the Commission's file could do so by means of Article 42 of the Charter[97].

4.2.2. The application of the right to competition law proceedings

Undertakings are, in principal, entitled to have access to the Commission's file[98] for the purpose of preparing a representation in their own defence[99]. In competition proceedings, the European judiciary has made it clear that "the purpose of access to the file is in particular to enable the addressees of a statement of objections to acquaint themselves with the evidence in the Commission's file, so that they can express their views effectively, on the basis of that information, on the conclusions reached by the Commission in its statement of objections"[100].

The Commission has thus an obligation to give access to undertakings to all documents, both those in their favour or otherwise, which had been obtained during the course of the investigation. It is up to the undertakings to determine (on the basis of a list of all documents[101]) which documents are

[95] K. Lenaerts & J. Vanhamme, "Procedural rights of private parties in the community administrative process", (1997) 34 *Common Market Law Review* 541.

[96] K. Kanska, "Towards administrative human rights in the EU. Impact oft he Charter of Fundamental Rights", (2004) 10(3) *European Law Journal* 318.

[97] Art. 42 of the Charter provides that any natural or legal person has a right to access documents of EU institutions. See also Regulation 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (2001) OJ L 145/43. However, the legal bases of those rights are different. The general right of access to documents (Art. 42) is derived from the democracy principle, whereas the right to access to one's file is an administrative procedural right. See H.P. Nehl, *Principles of administrative procedure in EC law*, Oxford Hart Publishing 1999, p. 60.

[98] Regulation 1/2003, Art. 27 para 2.

[99] C-310/93 P *BPB Industries and Britisch Gypsum v Commission* [1995] ECR I-865, para 25; T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* [1993] ECR II-389, para 21; and T-161/05 *Hoechst v Commission* [2009] ECR II-3555, para 160.

[100] Case T-24/07 *ThyssenKrupp Stainless v Commission* [2009] ECR II-2309, para 247.

[101] Undertakings are informed of the contents of the Commission's file by means of an annex to the statement of objections that lists all the documents in the file and indicating

relevant. In no case can the Commission exercise discretion in withholding certain documents because it considers them of no interest to the undertakings concerned[102]. A similar policy applies to settlement procedures with the minor difference that the Commission decides when to disclose the documents and the parties only receive access before their settlement submissions have been reflected in the statement of objections[103].

The requirement to disclose the file may, however, come into conflict with the confidentiality of certain documents and the obligation of the Commission to keep those documents secret[104]. A clear tension can be seen here between two principles – disclosure versus confidentiality. On the one hand, the Commission should disclose all documents that are collected during its administrative proceedings. On the other hand, it may not disclose confidential information; it is not surprising that competition law files contain a lot of confidential information. EU law accords confidential status to the following categories of documents: confidential documents belonging to third parties (such as business secrets and correspondence between undertakings and their lawyers), internal documents of the Commission, and correspondence between the Commission and NCAs[105]. Business secrets are afforded "very special protection"[106]. In the *Soda-Ash* cases, the General Court made it clear that the Commission must protect the business secrets of an undertaking in such a way as to cause the least possible interference with the right to a hearing, for example, by preparing a non-confidential version of the documents[107]. Third parties may never be given access to documents containing business secrets[108] unless the Commission (or, ultimately, the EU judiciary) decides that the rights of defence and the public interest in the administration of justice outweigh the protection of business secrets[109]. Particularly interesting is the discussion

documents or parts thereof to which they may have access. See Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation 139/2004 (2005) OJ C 325/07 ("Notice on the rules for access to the Commission file"), para 45.

[102] Case T-30/91 *Solvay SA v Commission* [1995] ECR II-1775, para 81; and C-199/99 P *Corus UK v Commission* [2003] ECR I-11177, para 125.

[103] Parties to settlement discussions may be informed by the Commission of its objections to their behavior, the evidence used to determine those objections, non-confidential versions of relevant documents; and the range of potential fines. See Regulation 773/2004, Art. 10(a)(2).

[104] Art. 339 TFEU on professional secrecy.

[105] Regulation 1/2003, Art. 27 para 2.

[106] T. Tridimas. *The general principles of EU law,* Oxford OUP 2006, p. 389.

[107] T30/91 *Solvay SA* v *Commission* [1995] ECR II1775; and T-36/91 *ICI v Commission* [1995] ECR I-1847.

[108] 53/85 *AKZO Chemie v Commission* [1986] ECR 1965, para 28; and 142/84 and 156/84 *BAT and Reynolds v Commission* [1987] ECR I-44787, para 21.

[109] Notice on the rules for access to the Commission file, para 24.

to what extent leniency documents can be protected from disclosure to third parties who wish to use those documents in an action for damages[110]. During such an action a third party could perhaps successfully claim access those documents in light of its general "human" right of defence[111].

4.3. Preliminary conclusion

The general right of defence has long since been part of the EU legal order. The right of defence applies to administrative proceedings which are initiated against a person and which may adversely affect that person. As such, this rule limits the application of the right of defence to the addressees of a Commission's statement of objection. The right to be heard is a sub-right of the right of defence. The right to be heard is limited to infringement decisions; commitment procedures are explicitly excluded from its ambit and settlement procedures have their own procedural framework. The right to access documents is another sub-right of the general right of defence. It applies to all procedures although an exception is provided for settlement procedures.

5. Analysis

The law on the defence rights of undertakings in EU competition law proceedings is still under development. The EU judiciary plays an important role in this context as it must specify the precise contours of the defence rights. Although legislation exists (Article 41 of the Charter), the EU judiciary rely mainly on previous jurisprudence on the general rights of defence. This is in line with the Explanation to the Charter, which explicitly mentions that Article 41 of the Charter is a "mere" codification of existing jurisprudence. Since the EU has the obligation to safeguard the minimum level of protection provided for by the ECHR, it is, however, surprising that the EU judiciary

[110] See on this discussion the following judgments: C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161; and C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and others*, not yet published.

[111] According to the proposed Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM (2013) 404), corporate statements of leniency applicants are, however, documents which are protected from disclosure at all times.

does notassess these cases under Article 6 ECHR[112]. Having the EU judiciary to decide "autonomously" upon the interpretation of fundamental rights is not a problem as long as their interpretation leads to convergence or, perhaps better, progression of fundamental rights protection.

In the second part of this paper, the assumption was confirmed that the level of procedural guarantees should correspond with the level of punishment. Only with respect to the "classic" fining procedure, an undertaking (not leniency applicant) can rely upon the full protection of Article 6 ECHR. This means that an undertaking should have a right to an oral hearing and access to the complete file of the Commission. In EU competition law proceedings undertakings have indeed the right to request an oral hearing. In addition, they can request access to all documents held in the file of the Commission. Exceptions to the right to access documents (confidentiality) differ, however, from ECtHR jurisprudence since the latter only accepts as a legitimate exception (i) the protection of public interests, or (ii) the protection of fundamental rights of others. This means, in essence, that accepting the confidentiality of documents in EU competition law proceedings could run counter to the general right of adversarial proceedings and the principle of equality of arms.

With respect to informal enforcement proceedings (leniency, settlement and commitment), ECtHR jurisprudence shows that a lower level of fair trial protection suffices. Specifically in commitment procedures, the Commission is not obliged to offer an oral hearing or to grant full access to the file. Both are not the case in EU competition law proceedings as an oral hearing is limited to infringement decisions and the right to access documents is limited to those to whom the Commission sends a statement of objections[113]. The Commission may offer a less stringent application of procedural rights (see discussion

[112] In the future, acts of the Commission would be reviewable by the ECHR as undertakings can lodge a complaint with the ECtHR against the EU. There is an on-going debate on whether the EU courts would preserve its responsibility for ensuring the respect of fundamental rights in the EU's legal order. See the debate on the Bosphorus-case where the ECtHR held that the ECJ provided protection for human rights equivalent to that given by the ECtHR: *Bosphorus Airways v Ireland* (2006) 42 EHHR 1. For more on this subject, see: L.F.M. Besselink, *The Protection of Fundamental Rights Post-Lisbon: The interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions* (General Report of the XXV FIDE Congress Tallinn 2012).

[113] In commitments procedures, once the Commission is convinced of the undertakings' genuine willingness to propose commitments, the Commission will send a Preliminary Assessment in which it summarizes the main facts of the case and identifies its competition concerns. The Preliminary Assessment serves as a basis for the parties to put forward appropriate commitments or to better define previously discussed commitments. See F. Wagner-Von Papp, "Best and even better practices in commitment procedures after *Alrosa*: the dangers of abandoning the struggle for competition law", (2012) 49 *Common Market Law Review* 929-970.

of the *Jussila* distinction) in settlement procedures because of demands of procedural efficiency and economy. It is interesting to note that settlement proceedings, with the prospect of achieving procedural efficiencies, already provide for such limited rights of defence[114]. The jurisprudence of the ECtHR does require that a waiver of procedural rights takes places in an unequivocal manner[115].

It is surprising that one cannot find procedural efficiencies in leniency procedures where, similar to settlement procedures, undertakings voluntarily decide to cooperate with the Commission while the latter grants them a fine reduction as a means of compensation. This is even more peculiar as fine reductions in leniency procedures can be much more rewarding than in settlement (10% for settlement versus up to 100% for leniency). In addition, the fact that a leniency application can trigger the start of an investigation (whereas settlement applications are submitted at a later stage of the investigation) does not mean that a leniency applicant needs an oral hearing to "contest the credibility of the facts" (citing *Jussila*). The same applies to the leniency applicant's right to access documents, which can be limited in time (only allowing access until the Commission sends a statement of objection) and in scope (limiting access to the documents that the Commission used to substantiate the infringement).

6. Conclusion

The present-day standards of the right to be heard granted to undertakings in EU competition law procedures complies with the legal standards of the ECHR. Regarding two types of enforcement procedures, the "classic" fining procedures and the leniency procedures, one can observe a potential undercompensation respectively overcompensation of fundamental rights protection. With respect to the "classic" fining procedure one could question the refusal of access to documents for reasons of confidentiality. Here one could, however, rebut this argument by claiming that such a refusal is justified on the ground that it protects the fundamental right of privacy.[116]

[114] As discussed above, assuming that the case does proceed to a settlement, the parties will not seek an oral hearing, nor will they request access to the file after receiving the statement of objections.

[115] See text note 64.

[116] Art. 8 ECHR. In the case *Societe Colas Est* the ECtHR held that Art. 8 ECHR may be construed as including the right to respect for a company's registered office, branches or other premises. See *Societe Colas Est v France* EHRR 2004-17.

The potential "overcompensation" of fundamental rights protection relates to leniency procedures where, in line with the Strasbourg jurisprudence, certain procedural efficiencies could be implemented. Both developments can be problematic. Undercompensation of fundamental rights protection runs counter to the procedural legitimacy of public enforcement of EU competition law and the basic notions of the rule of law. Overcompensation of fundamental rights protection may conflict with the goals of effective enforcement. It is well known that the Commission and the General Court face difficulties to adjudicate cases within a reasonable time frame. Giving leniency applicants the possibility to start interim litigation on alleged infringements of procedural rights will delay the proceedings even more. The latest *Gascogne* and *Kendrion* judgments illustrate that a delay of the "reasonable time requirement" might trigger undertakings to start damage actions against the EU[117]. These judgments touch upon a very delicate question: how to reconcile effective public enforcement with fundamental rights[118]? One way is to interpret the fundamental rights in a more flexible manner (*Jussila!*) and prevent the bestowal of more procedural rights on undertakings than actually required by the ECHR.

[117] 40/12 P *Gascogne Germany*, not yet reported; C-50/12 P *Kendrion*, not yet reported; and C-58/12 P *Gascogne*, not yet reported.

[118] See e.g. A. Scordamaglia-Tousis, *EU cartel enforcement – reconciling effective public enforcement with fundamental rights*, Alphen aan de Rijn 2013.

The "Regulatory Authority Dixit" Defence in European Competition Law Enforcement

by

Pierluigi Congedo*

CONTENTS

Abstract

The European Commission (EC) and the European Courts have being reaffirming in the *Deutsche Telekom* and *Telefónica* cases that guide-prices established by sector regulators upon electronic communications incumbents cannot *per se* exclude that conducts with anticompetitive foreclosure effects, such as margin squeeze, undertaken within the boundaries of those pre-established prices, can be considered abusive under Article 102 TFEU.
The paper aims at showing that the reasoning put forward by the EC and the Courts not only dismantles the defensive reasoning put forward by the incumbents before the EC and on appeal before the Courts but actually reaffirms the centrality of the enforcement activity of the EC. The paper examines the reasoning behind the "regulatory authority's instructions defence" – the argument of the incumbents stating that their actions were justified because they had set their wholesale access prices and retail prices in line with the guidelines imposed by the sectorial regulators. Recalled in this context were also the principles of proportionality, subsidiarity and fair cooperation between the EC and individual Member States.

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The affirmation of the "heliocentric" doctrine that puts the EC at the hearth of competition law enforcement *vis á vis* national regulators and domestic legislation (provided decisions of the regulatory authorities can be considered secondary law sources) should take into consideration the important precedent of *Consorzio Industrie Fiammiferi*. The latter affirms that competition authorities can automatically put aside legislation that goes against Article 101 TFEU. However, they cannot impose pecuniary fines when certain behaviours are imposed by national legislation (while they can impose fines if those behaviours were suggested or facilitated by national legislation).

Résumé

La Commission européenne (CE) et les juridictions européennes ont réaffiré dans les cas de Deutsche Telekom et Telefonica que les prix-guides établis par les organismes de réglementation du secteur sur les titulaires de la communication électronique ne peuvent pas en soi exclure ces pratiques avec des effets d'éviction anticoncurrentielle, tels que la compression des marges réalisée dans le limites de ces prix pré-établi. Les prix-guides peuvent être considérés comme abusifs vertu de l'article 102 du TFUE.

L'article vise à montrer que le raisonnement présenté par la CE et les juridictions européennes ne démonte que le raisonnement défensif avancé par les titulaires auprès de la CE et en procédure d'appel devant les tribunaux, mais réaffirme en fait la centralité de l'activité de l'application accomplie par la CE. L'article examine le raisonnement derrière « la défence des instructions de l'autorité réglementaire» – l'argument des titulaires affirmant que leurs actions étaient justifiées parce qu'ils avaient mis leurs prix d'accès de gros et les prix de détail en ligne avec les directives imposées par les régulateurs sectoriels. Les principes de proportionnalité, de subsidiarité et de coopération équitable entre la CE et les États membres sont également rappelés dans ce contexte.

L'affirmation de la doctrine «héliocentrique» qui place la CE dans le foyer de l'application des lois de la concurrence vis-à-vis des régulateurs nationaux et la législation nationale (à condition que les décisions des autorités réglementaires peuvent être considérées comme des sources secondaires du droit) devrait prendre en considération le précédent important du cas Consorzio Industrie Fiammiferi. Ce jugement affirme que les autorités de la concurrence peuvent automatiquement mettre à côté une loi qui va à l'encontre de l'article 101 TFUE. Toutefois, ils ne peuvent pas imposer des amendes pécuniaires lorsque certains comportements sont imposés par la législation nationale (alors qu'ils peuvent infliger des amendes si ces comportements ont été suggérés ou facilités par la législation nationale).

Classifications and key words: Regulatory authorities, national sector regulators, national competition authorities, electronic communications, proportionality, subsidiarity, cooperation, enforcement, price caps, margin squeeze, wholesale access, retail price

I. Introduction

In two important cases of the last decade, *Deutsche Telekom*[1] and *Telefónica*[2], the European Commission (hereafter: EC or Commission) and European Courts reaffirmed that guide-prices imposed by National Regulatory Authorities (hereafter: NRAs or regulators) upon electronic communications incumbents cannot, *per se*, exclude the realisation that the foreclosing conducts of incumbents (such as those determined by margin squeeze) may be considered abusive under Article 102 TFEU[3].

The purpose of this paper is to show that the reasoning put forward by the Commission and European Courts not only dismantles the defensive reasoning put forward by the incumbents before the EC and, on appeal, before the Courts but actually reaffirms the centrality of the enforcement activity of the Commission.

The position of the EC and European Courts underlines the supremacy of competition law over regulatory measures and sets out some important consequences thereof. On the one hand, the authoritative power of NRAs is restricted, at least at the European level (or where they have enforcement powers[4]), by the reaffirmation of the centrality of the enforcement action of the Commission. On the other hand, the benefits deriving from specialised

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[1] EC decision of 21 May 2003 in case *Deutsche Telekom AG* (Case COMP/C-1/37.451, 37.578, 37.579) [2003] OJ L263/9 (hereafter: EC decision *Deutsche Telekom*). On appeal, judgment of the Court of First Instance (CFI) of 10 April 2008 in case *Deutsche Telekom AG v. Commission* (Case T-271/03) [2008] ECR-II-477, [2008] 5 CMLR 631(hereafter: CFI judgment *Deutsche Telekom*); on appeal, judgment of the Court of Justice (CJ) of 14 October 2010 in case *Deutsche Telekom AG v European Commission* (Case C-280/08) [2010] ECR I-09555, [2010] 5 CMLR 1495 (hereafter: CJ judgment *Deutsche Telekom)*.

[2] EC decision of 4 July 2007 in case *Wanadoo España v Telefónica* (Case COMP/38.784) [2008] OJ C83/6 (hereafter: EC decision *Telefónica*). On appeal, judgment of the General Court (GC) of 29 March 2012 in case *Telefónica and Telefónica de España v Commission* (Case T-336/07) [2007] OJ C269/55 (hereafter: GC judgment *Telefónica*); on appeal, judgment of the Court of Justice (CJ) of 10 July 2014 *Telefónica SA and Telefónica de España SAU v European Commission* (Case C-295/12), available at http://curia.europa.eu/juris/liste.jsf?language=en&num=C-295/12%20P (hereafter: CJ judgment *Telefónica)* as well as opinion of Advocate General (AG) Wathelet in Case C-295/12 delivered 26 September 2013, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-09/cp130117en.pdf (hereafter: AG Wathelet opinion in *Telefónica* Case C-295/12).

[3] W. Wils, "Ten Years of Regulation 1/2003 – A retrospective", presentation at the conference 10 Years of Regulation 1/2003, Mannheim Centre for Competition and Innovation, 7 June 2013, available at http://ssrn.com/abstract=2274013.

[4] For instance, OFCOM has sector specific enforcement powers under the Communications Act 2003 (2003 Chapter 21), available at http://www.legislation.gov.uk/ukpga/2003/21/introduction.

intervention by sectorial regulators seem nullified when the EC's approach diverges from the guidelines provided by NRAs.

A similar trend, reaffirming the leading role of the Commission in enforcing EU competition law, expands beyond the area of the electronic communications sector. In the energy sector, in particular, the EC has already encouraged electricity and gas incumbents to adopt structural remedies to address competition concerns on several occasions. By doing so, it went beyond the scope of sector-specific legislation that foresees less invasive, behavioural remedies. Three recent cases of commitments – E.ON[5], RWE[6] and ENI[7] – go in this direction.

The paper examines the reasoning behind "NRAs' recommended practices defence". It also assesses the incumbents' arguments that they had established their wholesale access prices in line with the guidelines recommended (and, in certain cases, imposed) by their NRAs. Their second line of defence was usually that of recalling the principles of proportionality, subsidiarity and fair cooperation between the Commission and individual Member States, arguing that EC decisions had somehow been undermining the unity of the legal system.

It is useful to look at the relevant cases to see the line of reasoning followed by the Commission and the European Courts.

II. The *Deutsche Telekom* case and the influence of the *Consorzio Industrie Fiammiferi* case

The *Deutsche Telekom*[8] case of 2003 can be considered the leading case of margin squeeze at European level in the electronic communications sector. The German telecoms incumbent, Deutsche Telekom (hereafter: DT), was fined by the EC for exclusionary abuse. The incumbent was found to be dominant in the provision of both wholesale fix telephony network (so called 'local loop') access, and in the downstream market for the provision of retail services to end customers. The retail services included fixed telephony, ISDN and ADSL services. In other words, DT, the provider of wholesale (upstream)

[5] EC decision of 26 November 2008 in case *E.ON* (Case COMP/38.388-38.389) [2009] OJ C36/8.

[6] EC decision of 18 March 2009 in case *RWE (Gas Foreclosure)* (Case COMP/39.402), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39402/39402_576_1.pdf.

[7] EC decision of 29 September 2010 in case *ENI* (Case COMP/39.315) [2010] OJ C352/8.

[8] EC decision *Deutsche Telekom* (Case COMP/C-1/37.451, 37.578, 37.579); CFI judgment *Deutsche Telekom* (Case T-271/03)*;* CJ judgment *Deutsche Telekom* (Case C-280/08).

services for access to the local loop, was also a direct competitor on the retail market of the purchasers of its services.

The EC found that DT had committed an abuse in two different ways in two different timeframes.

The first abuse consisted of DT charging its competitors (from 1998 until 2001) for access to its local network "more for unbundled access at wholesale level than it charged its own subscribers for access at the retail level"[9]. This margin squeeze practice, consisting of a negative spread between the two sets of charges, was evident and did not required any further analysis of costs.

The second form of margin squeeze, put in place from 2002 until the decision was had been made in May 2003, was more subtle. After 2002, the prices charged by DT to its competitors for wholesale access became lower than the retail subscription prices DT charged to its own customers, determining a positive spread. However, the Commission found that the positive spread "was still not sufficient for DT to cover its own product-specific cost for the supply of comparable end-user services"[10] and it still constituted a margin squeeze practice prohibited by Article 102 TFEU.

The EC decision imposed a fine of EUR 12.6 million for DT abusing its dominant position by way of margin squeeze. DT appealed arguing that its wholesale access prices had been set by the German telecommunications regulatory authority – *Regulierungsbehörde für Telekommunikation und Post* (hereafter: RegTP)[11]. On appeal, the European judiciary confirmed that competition law provisions (in particular, the prohibition to put in place exclusionary conduct under Article 102 TFEU) prevail over regulatory obligations (prices-caps)[12].

DT's defence was partly based on the argument that the company's management had no margins of discretion in setting its prices. Indeed, under the German regulatory regime, the NRA established a "price-cap" for local loop interconnection rates, rather than a mere regulatory mechanism. Starting from the cost-orientation principle, the incumbent had a margin to fix the

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[9] See paras 152 and 153 EC decision *Deutsche Telekom*. See also R. Klotz, J. Fehrenbach, "Two Commission decisions on price abuse in the telecommunications sector", (2003) 3 *Competition Policy Newsletter* 8 and; R. Whish, D. Bailey, *Competition Law* 7th edition, Oxford OUP 2012, p 756.

[10] See paras 154-162 EC decision *Deutsche Telekom*. See also R. Klotz, J. Fehrenbach, "Two Commission decisions…", op. cit., p. 9 and; R. Whish, D. Bailey, *Competition Law*…, op. cit., pp. 756–757.

[11] *Regulierungsbehörde für Telekommunikation und Post* (RegTP), the German electronic communications regulator, active since 1 January 1998.

[12] CFI judgment *Deutsche Telekom,* para 70 ff. See also CJ judgment *Deutsche Telekom*, paras 77-96.

price within the threshold of that price cap[13]. DT argued that the Commission should not have intervened to assess whether the "margin" established by DT was infringing competition law principles (in particular, exclusionary practices, as per Article 102 TFEU). The incumbent stated that since the price-cap had been set by the regulator, DT's pricing policy could not be considered abusive[14]. However, the Commission replied that the European Courts "have consistently held that the competition rules may apply where the sector-specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distorts competition. This is particularly so in the case of complaints submitted to the Commission regarding possible violation of the EU competition rules. In such cases the Commission has a duty to investigate, and if necessary to order appropriate remedies"[15].

The Commission argued that the imposition of regulatory tools does not preclude the undertaking from applying the principles of competition law[16]. Therefore, it focused on demonstrating that there was an evident disproportion between wholesale charges and retail charges for access to the local network. Even though the charges in both cases (wholesale and retail) were subject to sector-specific regulation, DT had commercial discretion which allowed it to restructure its tariffs further so as to "reduce or indeed to put an end to the margin squeeze"[17]. The Commission found that having failed to do so, DT had carried out a practice of margin squeeze constituting the imposition of unfair selling prices within the meaning of Article 102 (a) TFEU.

A definition of margin squeeze is provided in paragraphs 106 and 107 of the EC decision where it is said that "there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking

[13] EC decision *Deutsche Telekom*, para 32. With respect to the 2nd margin squeeze practice (period of time: 2002/2003): "Under the German telecommunications charges order, the price cap method is the preferred tariff regulation tool: strict cost orientation is applied to an individual retail service only if that service cannot be allocated to one of the predetermined baskets (39). This means that the firm whose charges are regulated has some discretion to fix its prices on a commercial basis. The price cap system is made up of one price cap decision, laying down the division of services into baskets, the price adjustment guideline and other general terms for a specified period, and other decisions reached on individual applications for adjustments to charges during that price cap period".

[14] EC decision *Deutsche Telekom*, para 53.

[15] Ibid., para 54.

[16] Ibid., para 55 "[…] Given the detailed nature of the ONP rules and the fact that they may go beyond the requirements of Article 86 [now Article 102 TFEU], undertakings operation in the telecommunications sector should be aware that compliance with the Community competition rules does not absolve them of their duty to abide by obligations imposed in the ONP context, and vice versa".

[17] Ibid., para 57.

and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market"[18].

The definition of "anticompetitive pressure" can be found in paragraph 108 of the decision. The Commission states therein that it is "exerted on competitors' trading margins, which are non-existent or too narrow to enable them to compete with the established operator on retail access markets. An insufficient spread between a vertically integrated dominant operator's wholesale and retail charges constitutes anticompetitive conduct especially where other providers are excluded from competition on the downstream market even if they are at least as efficient as the established operator"[19].

The Commission concluded that DT had abused its dominant position in the relevant markets for direct access to its fixed telephone network, as per Article 102 (a) TFEU. Such abuse consisted of, in particular, charging unfair prices for (i) wholesale access services to competitors and (ii) retail access services in the local network. The Commission found that DT was "in a position to end the margin squeeze entirely by adjusting its retail charges. [Later] DT could in any event have reduced the margin squeeze, by increasing the ADSL retail access charges not subject to the price cap system"[20]. However, it did not do so.

The EC decision was appealed before the Court of First Instance (hereafter: CFI) (now the General Court), but it was upheld in its entirety. The CFI considered that DT had had the opportunity to bring to an end, or to reduce, the margin squeeze deriving from the difference between its retail and its wholesale charges, if only the incumbent had applied to the German regulator for a review of these charges. The CFI deemed that in failing to do so, the EC was right to apply Article 102 TFEU to DT's abusive conduct, even in the presence of price caps established by the NRA. The CFI observed that: "decisions of national authorities in respect of Community telecommunications law do not in any way affect the Commission's power to find infringements of competition law"[21].

DT argued before the CFI (para 70 ff) that "[it] did not have sufficient scope to avoid the margin squeeze alleged in the contested decision. [The] Commission itself found that the applicant did not have scope to fix charges for wholesale access. Charges for wholesale access, which are fixed by RegTP, ought to correspond to the cost of efficient service provisions. Therefore, they

[18] EC decision *Deutsche Telekom,* para 107.

[19] Ibid., para 108.

[20] Ibid., para 109.

[21] Press release of the GC No. 26/08 on the CFI judgment in Case T-271/03 (CJE/08/26 of 10 April 2008).

do not need to correspond to the applicant's costs"[22]. Again, the applicant argued that it "did not have scope to fix its charges for retail access either. As regards the period from 1998 to 2001, any abuse by the applicant is precluded by the fact that RegTP alone […] is responsible for the applicant's charges for narrowband connections […]"[23] .

The incumbent admitted that it could have had, after 2002, room to manoeuvre with respect to narrowband connections and so it could have been accused of abuse of its dominant position only after 2002. However, DT argued also that prices of narrowband access would not have caused conducts to be considered margin squeeze captured under what is now Article 102 TFEU[24]. DT expressly stressed how, as far as narrowband connections are concerned, "[…] under German law, all its retail prices had to be examined and approved in advance by RegTP […]. The applicant […] could not depart from the charges thus authorised without incurring a fine – [and] cannot therefore be regarded as having infringed Article [102 TFEU] by applying those charges"[25].

DT was very bold in stating that it could not be blamed for the contested behaviour (in particular, for fixing retail prices for narrowband connections before 2002) simply because the contested prices had been established by RegTP. Furthermore, the incumbent claimed that it could not have departed from those prices without being fined by the NRA[26]. More interestingly, DT stressed the related ruling of the German Court of Justice (*Bundesgerightshof*) delivered on 10 February 2004 that had set aside the judgment of the Düsseldorf court (16 January 2004). DT noted that the *Bundesgerightshof* had agreed with DT's claim that the RegTP usually has to check whether "a charge to which a request for authorisation relates is compatible with Article 82 EC and that responsibility for any infringement of article 82 EC can only exceptionally be ascribed to the undertaking which applied for the charge to be authorised[27]. The applicant observes that RegPT itself has concluded on several occasions since 1998 that there is no margin squeeze to the detriment of the applicant's competitors. Furthermore, the *Bundesgerichtshof* expressly left open the question of the applicant's responsibility under competition law on account of the regulated charges"[28].

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[22] CFI judgment *Deutsche Telekom*, para 70.
[23] Ibid., para 71.
[24] Ibid., para 72.
[25] Ibid., para 73.
[26] Ibid.
[27] CFI judgment *Deutsche Telekom*, para 79.
[28] Ibid.

By contrast, the CFI was adamant in stating that "[…] Articles 81 and 82 may apply, however, if it is found that the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings […]"[29]. Moreover, "[…], if a national law merely encourages or makes it easier[30] for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Article 81 EC and 82 EC"[31]. The CFI expressly recalled here, among various precedents, the *Consorzio Industrie Fiammiferi* (hereafter: *CIF*)[32] case.

Indeed, a few lines before this statement, the CFI had reaffirmed the concept contained in the *CIF* judgment whereby: "[…] Articles 81 EC and 82 EC apply only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Article 81 EC and 82 EC do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings"[33] and "the possibility of excluding particular anticompetitive conduct from the scope of Articles 81 EC and 82 EC, on the ground that it has been required of the undertaking in question by existing national legislation or that the legislation has eliminated any possibility of competitive conduct on their part, has been only partially accepted by the Court of Justice"[34].

The CFI acknowledged therefore that it was first necessary to look at the applicable national legislation to see whether that legislation gave the incumbent any room for manoeuvre[35].

The CFI arrived at the conclusion that "[…]even on the assumption that RegTP is obliged to consider whether retail charges proposed by the applicant are compatible with Article 82 EC, the Commission would not thereby be precluded from finding that the applicant was responsible for an infringement. The Commission cannot be bound by a decision taken by a national body pursuant to article 82 EC (see, to that effect, Case C-344/98 *MasterfoodsandHB* [2000] ECR I-11369, para graph 48)"[36].

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[29] Ibid., para 88.

[30] Emphasis added.

[31] Ibid., para 89.

[32] CJ judgment, Case C-198/01 *Consorzio Industrie Fiammiferi* [2003] ECR I-8055, [2003] 5 CMLR 829, para 67 (hereafter: CJ judgment *CIF*).

[33] CFI judgment *Deutsche Telekom*, para 85.

[34] Ibid., para 86.

[35] Ibid., para 90.

[36] CFI judgment *Deutsche Telekom*, para 120.

Furthermore, the CFI found that DT had a margin of discretion at least with respect to the setting of retail prices in such a way as to avoid engaging in margin squeeze. At para 131, the CFI expressly points out that the incumbent did not use the discretion at its disposal so as to secure an increase in its retail prices, which would have helped to reduce the margin squeeze in the period from 1 January 1998 to 31 December 2001. On the contrary, DT used that discretion to even further lower its retail prices in respect of ISDN lines during that period"[37]. The CFI confirmed therefore the findings of the EC, reaffirming that the German incumbent had indeed abused its dominant position, within the margin of discretion which it still had, within the thresholds (price caps) set by the German regulator.

The DT judgment stressed also the negative effects of the contested practice on the communications market as a whole, saying that margin squeeze "will in principle hinder the growth of competition in the downstream markets. If the applicant's retail prices are lower than its wholesale charges, or if the spread between the applicant's wholesale and retail charges is insufficient to enable an equally efficient operator to cover its product-specific costs of supplying retail access services, a potential competitor who is just as efficient as [DT] would not be able to enter the retail access services market without suffering losses"[38].

In response to DT's claims, the CFI replied that the practice of the European judiciary had consistently gone in the direction of considering Article 101 and 102 TFEU of prevailing weight over national legislation (including the provisions set out by NRAs) when the latter "leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings […]"[39]. If national legislation makes it easier for companies to infringe competition law, they are still subject to Article 101 and 102 TFEU[40]. The CFI argued therefore that it had first to ascertain whether the "German legal framework" (including also the rules set out by the telecom regulator) would have left some margin of discretion to the undertaking or not[41].

DT went further in its defence claiming that the German NRA was obliged, according to national law, to verify and examine the conformity of the requested adjustment of charges "with […] other legal provisions (said by the applicant to include Article 82 EC) […]"[42]. In other words, DT tried

[37] Ibid., para 31.
[38] Ibid., para 237. Emphasis added.
[39] Ibid., para 86 ff.
[40] Ibid., para 89.
[41] CFI judgment *Deutsche Telekom*, para 90.
[42] Ibid., para 112.

not only to justify its conduct with the fact that it had set its behaviour within the range authorised by the German regulator, but also that the latter "had to act", by law, in line with European provisions. However, the CFI correctly recalled in this context the *CIF*[43] case and confirmed the obligation of all organs of the State to respect the provisions of the Treaty. The CFI added that "the national regulatory authorities operate under national law which may, as regards telecommunications policy, have objectives which differ from those of community competition policy (see the Commission's Notice of 22 August 1998 on the application of the competition rules to access agreements in the telecommunications sector – framework, relevant markets and principles (OJ) 1998 C 265, p. 2), Paragraph 13)"[44].

The CFI stressed also how the same NRA found that "the competitors are not so prejudiced with regard to their competitive opportunities[45] in the local network by the slight difference between retail and wholesale prices at to make it economically impossible for them to enter the market successfully or even to remain in the market". It thus somehow confirmed that it was not only DT, but also the German telecoms regulator, that were not fully aware of the anticompetitive consequences of DT's conducts within a theoretically complete legal framework of tariffs designed by that very regulator[46].

In its judgment, the CFI had also to look whether the Commission "has established to the requisite legal standard in the contested decision that the applicant has sufficient scope in the period from 1st January 1998 to 31 December 2001 to [avoid] the margin squeeze […]. In that respect, the Commission stated in the contested decision that the applicant 'was in a position [during that period] to end the margin squeeze entirely by adjusting its retail charges' […]"[47].

The CFI stressed that Treaty provisions (now Articles 101 and 102 TFEU) had to be applied by NRAs. It also confirmed that the Commission was the ultimate guardian of compliance with those provisions by NRAs, indirectly carrying out its own scrutiny over the regulators. Hence, paragraph 140 of the judgment concluded that "the Commission was entitled to find in the contested decision (recitals 164 and 199) that the applicant had sufficient scope during the period from 1 January 1998 to 31 December 2001 to end entirely the margin squeeze complained of in that decision"[48].

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[43] CJ judgment *CFI*, para 67.
[44] CFI judgment *Deutsche Telekom*, para 113.
[45] Emphasis added.
[46] Ibid., para 117. Emphasis added.
[47] Ibid., para 132. Emphasis added.
[48] CFI judgment *Deutsche Telekom*, para 140.

A similar conclusion was reached with respect to the time from 1 January 2002 to the adoption of the Commission decision (May 2003) with respect to the margin squeeze identified in the EC decision by way of increasing DT's charges for its ASL access services[49].

In other words, the DT judgment is fundamental in proving that the position of the European Courts is unequivocally in favour of the Commission's enforcement activity aimed at addressing distortions of competition. This is so even in the presence of *ex ante* measures imposed by NRAs, which do not stop incumbents from adopting prices that ultimately amount to an anticompetitive conduct (margin squeeze in the examined case).

The judgment concluded that "while it is not inconceivable that the German authorities also infringed [EU] law – particularly the provisions of Directive 90/388/EC, as amended by Directive 96/19 – by opting for a gradual rebalancing of connection and call charges, such a failure to act, if it were to be established, would not remove the scope which the applicant had to reduce the margin squeeze"[50].

The judgment of the CFI was upheld in December 2010 by the Court of Justice (hereafter: CJ) which confirmed the correctness of the original conclusion concerning the duty of the incumbent to operate in line with competition law principles, even in the presence of **éspace** *de manoeuvre* established by the NRA. The second instance judgment confirmed that even in the presence of a specific approval by the NRA of wholesale prices proposed by a given incumbent, if the latter has the possibility of bringing to an end an existing margin squeeze, it is obliged to comply with Article 102 TFEU: "According to the case-law of the Court of Justice, it is only if anti-competitive conduct is required[51] of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, that Articles 81 EC and 82 EC do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings. Articles 81 and 82 EC may apply, however, if it is found that the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings"[52].

The CJ recalled in its judgments key jurisprudence showing that even though national provisions may actually induce companies to infringe Articles 101 and 102 TFEU, companies (as well as national legal entities) have a duty

[49] Ibid., para 151.
[50] Ibid., para 265.
[51] Emphasis added.
[52] CJ judgment *Deutsche Telekom*, para 80. Emphasis added.

to comply with Treaty provisions[53]. The CJ stressed here that the fact that DT "was encouraged by the intervention of the national regulatory authority such as REgTP to maintain the pricing practices which led to the margin squeeze of competitors who are at least as efficient as the appellant cannot, as such, in any way absolve the appellant from responsibility under Article 82 EC"[54].

The CJ went a step further in stating that "[a]dmittedly it is not inconceivable, as the appellant observes, that the national regulatory authorities may themselves have infringed Article 82 EC in conjunction with article 10 EC, and therefore that the Commission could have brought an action for failure to fulfil obligations against the Member State concerned"[55]. The CJ (paragraph 105) stressed how DT, in its appeal, reiterated the same arguments put forward before in the first instance, in particular, its "good faith" in complaining with the instructions received from the NRA (not challenged by national courts). However, DT did not provide any further elements to deduct that the first instance court erred in law in claiming that both the NRA and the incumbent are bound by EU competition law (Articles 101 and 102 TFEU) and that the Commission complied with its duties in investigating and finding that the company had abused of its dominant position.

The analysis of the DT case-law shows a coherent line of reasoning. The position was confirmed by the CFI in 2008 and the CJ in 2010, which was already clarified by the CJ in its *CIF* judgment of 2003. Where national provisions leave a margin of discretion, and the management of the undertaking at stake still has the possibility of modifying its line of conduct (in the DT case, to avoid infringing Article 102 TFEU, ending the margin squeeze practice), the presence of regulatory provisions adopted in line with European directives (in the captioned matter, provisions of the national telecoms regulator setting retail and wholesale access prices), does not *per se* preclude the possibility that the incumbent will be fined by the competition authority (Commission).

III. The position of European Courts in the *Telefónica* case

It must be noted that not long before the CFI (now General Court, hereafter: GC) delivered its judgment in the *Deutsche Telekom* case on 10 April 2008,

[53] Ibid., para 81, 82, 83. In particular, the CJ also recalls Case 322/81 *Michelin v Commission* [1983] ECR 3461, para 57, where it stresses that the dominant undertakings have a special responsibility not to allow their conduct to impair genuine undistorted competition on the common market.

[54] CJ judgment *Deutsche Telekom*, para 84.

[55] Ibid., para 91. Emphasis added.

the Commission has decided in July 2007 another case of margin squeeze – the *Telefónica* case[56]. This second decision is interesting not only because the fine imposed on the Spanish incumbent was higher (EUR 151 million), but also because of the relevance given to the *effects on competition* of the margin squeeze. In this decision, the Commission evidently took into consideration the Article 102 TFEU review triggered by the Discussion Paper of 2005.

The *Telefónica* decision relates to the abuse of a dominant position carried out by way of margin squeeze over a significant period of time (five years) with respect to the wholesale broadband access market at the national and regional level (not a local loop unbundling case). The incumbent charged high broadband access rates to its competitors, keeping the access rate very low for its own retail broadband access services, and thus forcing competitors out of the market. This conduct not only damaged competitors in the long term (leading to the severe fine) but also hindered many companies from entering the market, consequently excluding final consumers from having access to broadband services[57].

The Commission pointed out that unless competitors decided to create an alternative network, which was not viable economically, they had no other choice but to deal with the incumbent to get access to its ADSL enabled local loops in order to provide DSL access services[58]. The decision noted that from 2002 onwards, the Spanish regulator mandated wholesale access to the incumbent's network at national and regional level in favour of competitors (paragraphs 289-290). Access rates were set applying the so-called *retail minus price* regime[59], which has a number of positive consequences. The *retail minus price* regime: (i) does not alter recovery of costs of wholesale access; (ii) it should avoid margin squeeze between the incumbent's wholesale and retail prices; (iii) it ensures productive efficiency (a potential entrant enters only

[56] EC decision *Telefónica* (Case COMP/38.784); on appeal, GC judgment *Telefónica* (Case T-336/07); on appeal, CJ judgment *Telefónica* (Case C-295/12); see also AG Wathelet opinion in *Telefónica* Case C-295/12.

[57] Nellie Kroes, former Commissioner for Competition at the European Commission, pointed out that Spanish consumers paid 20% more than the EU-15 average for broadband access, with a rate of penetration 20% below EU-15 average, and a growth 30% lower that of the EU-15. See press release IP/07/1011 of 4th July 2007.

[58] See para 74 of the decision: "An undertaking wishing to provide broadband access to the end-users throughout the Spanish territory has no other option, save the economically not viable roll-out of an alternative nation-wide access network, but to contract one of the wholesale ADSL services available on the market, which are all built on TESAU's access network consisting of ADSL enabled local loops".

[59] Under the retail-minus system, the wholesale access charge is set at the vertically-integrated operator's retail price minus the incremental cost of providing downstream services and any network elements supplied by the access seeker. See W.J. Baumol, J.G. Sidak, "The pricing of Inputs Sold to Competitors" (1994) 11 *Yale Journal of Regulation* 196.

if entry is viable, which occurs only if that entrant is more efficient than the incumbent in the given downstream activity); and (iv) the system preserves the incentives of networks operators (including the incumbent) to invest in their own infrastructure.

Access based on similar price conditions was in line with both the 1998 liberalization regulatory framework[60], and with the electronic communications regulatory package of 2000 (in particular with the Framework Directive[61] and the Access Directive[62]).

The decision at stake is particularly important for the relevance given to *the abuse's exclusionary effects on competition*, in line with the new perspective that forms the basis of the Discussion Paper and Guidance Paper[63]. The decision showed that the margin squeeze "affected Telefónica's competitors' ability to enter into the relevant market and exert a competitive restraint on Telefónica"[64]. As a result of the margin squeeze, Telefónica's competitors, even those as efficient as the incumbent, incurred "unsustainable" losses, being ultimately forced to leave the competition and discouraged from innovating and investing in new infrastructures (impact on growth).

The GC dismissed an appeal against the *Telefónica* decision in March 2012[65]. In its judgment, the GC rejected the claim submitted by the incumbent that the Commission (i) had not taken into consideration that the infringement was committed in part through simple negligence by Telefónica, or (ii) had considered its negligence as "extremely serious". The GC confirmed that the company was dominant in the wholesale markets where the margin squeeze occurred and rejected Telefónica's claim that the Commission had failed to carry out a *margin squeeze test* based on an optimal mix of available wholesale products.

The Court confirmed also the approach kept in the *Deutsche Telekom* case with respect to the balance between application of *ex ante* provisions and

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[60] As confirmed by the judgment given in a preliminary ruling by CJ on 13 December 2001 in Case C-79/00 *Telefónica de España vs. Administración General del Estado* [2001] ECR I-10057.

[61] Art. 8 of the Framework Directive.

[62] Art. 8 of the Access Directive.

[63] EC decision *Telefónica. T*he *Telefónica* decision devotes a large part of the text to the impact assessment of the abusive conduct (para 564 to para 618) showing high interest not only for the mere effects of the margin squeeze on competitors and consumers but also, more generally, on the entire broadband market, the Spanish economy as a whole, and as part of the European construction.

[64] See point 3.3. "Effects of the abuse" of the summary of the ECecision *Telefónica*, in OJ C83/6 of 2 April 2008.

[65] GC judgment *Telefónica.* The GC judgment (Case T-336/07) was confirmed upon appeal on 10 July 2014 by the CJ (Case C-295/12); the operative part of the judgment is available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.315.01.0003.01.ENG.

compliance with EU competition law, stating that the decisions taken by NRAs on the basis of a national regulatory framework do not release dominant firms from their duty to comply with EU competition law[66].

Similarly to the *Deutsche Telekom* case, it must be stressed that the GC made it clear that "Article 82 EC applies only to anti-competitive conducts engaged in by undertakings on their own initiative. If anticompetitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Article 82 EC does not apply"[67]. However, "Article 82 EC may apply if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition"[68]. The same stance was presented by the AG Wathelet[69] in the appeal proceedings before the CJ, position substantially upheld in the CJ judgment delivered on 10 July 2014[70].

The GC also rejected the argument put forward by Telefónica that "the Commission had at its disposal an *ad hoc* formal instrument of intervention resulting from Article 7 of the Framework Directive, which enabled it to intervene in a situation such as that at issue in the present case"[71]. In other words, Telefonica argued that the Commission should have followed a regulatory approach rather than adopting a decision imposing a pecuniary fine. The GC stated clearly, however, that *ex-ante* remedies do not exclude the intervention of the Commission when Article 102 TFEU is infringed: "[t]he existence of that measure [as per Article 7 of the Framework Directive[72]] has no effect whatsoever on the powers which the Commission derives directly from Article 3(1) of Regulation no 17 and, since 1 May 2004, from Article 7(1) of Regulation 1/2003 to find infringement of Articles [101 and 102 TFEU] […]. Thus, the competition rules laid down in the EC Treaty supplement, by *ex post* review, the regulatory framework adopted by the EU legislature for ex ante regulation of the telecommunications markets […]"[73].

The judgment also rejected Telefónica's claims that the Commission would have infringed the principles of subsidiarity, proportionality and legal certainty

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[66] GC judgment *Telefónica*, paras 327 ff.

[67] Ibid., para 328.

[68] Ibid., para 329.

[69] AG Wathelet opinion in *Telefónica* Case C-295/12.

[70] CJ judgment *Telefónica.*

[71] Ibid., para 291.

[72] Between brackets are the references in the above-mentioned judgment to *Deutsche Telekom v Commission.*

[73] GC judgment *Telefónica*, para 293. Emphasis added).

"since [the Commission] interferes without good reason in the exercise of the power of the [Spanish telecommunications regulator]"[74].

However, in particular with respect to the principle of subsidiarity, the GC stated that Article 5 EC provides that the Commission can intervene and take action "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community [the Commission]"[75].

Here the GC confirmed once again, in line with the *Deutsche Telekom* judgments, the Commission's competence in applying and enforcing Articles 101 and 102 TFEU going beyond the range of actions of NRAs. The judgment stated that the Spanish regulator "is not a competition authority and it has never intervened to enforce Article 82 EC or adopted decisions relating to the practices penalised in the contested decision […]. The Commission cannot be bound by a decision taken by a national authority pursuant to Article 82 EC"[76].

The GC also recalled the judgment in the *Deutsche Telekom v Commission*[77] case where the CJ stated "[…] notwithstanding such legislation, if a dominant vertically integrated undertaking has scope to adjust even only its retail prices, the margin squeeze may on that ground alone be attributable to it"[78].

At CJ level, AG Wathelet confirmed in his opinion[79] the principle of unlimited jurisdiction of the European Court, and its possibility to cancel or to confirm a fine, but also to reduce or to increase it[80]. He also confirmed that the EC did not breach the duty of cooperation with the Spanish regulator. He thus reaffirmed the principle that, in line with Regulation 1/2003, the Commission does not have a duty of consultation with NRAs[81]. He spoke for the rejection of Telefónica's appeal claim whereby, according to the incumbent, the EC had breached both the duty of loyal cooperation and good administration. He also argued for the rejection of the claim that the GC failed to take into consideration Telefónica's claim that it had, in good faith,

[74] Ibid., see paragraphs 296 ff.

[75] Ibid., 297.

[76] Ibid., 301. Emphasis added.

[77] CJ judgment *Deutsche Telekom*, para 85.

[78] GC judgment *Telefónica*, para 330.

[79] AG Wathelet opinion in *Telefónica* Case C-295/12.

[80] The AG also stated that the paragraphs of the GC's judgment in *Telefónica* with respect to the calculation of the fines do not contain a genuine analysis and recommended the GC to conduct *ex novo* a full review of the Commission decision with respect to the amount of the fine.

[81] AG Wathelet opinion in *Telefónica* Case C-295/12, para 41.

relied on the conformity of its pricing practices with the scope of Article 102 TFEU[82].

By contrast, with respect to the imposition and effectiveness of fines, AG Wathelet submitted that the GC had not exercised its power of review over the EC decision correctly with respect to the fine. As such, he argued for the annulment of the GC judgment[83].

However, the CJ upheld on 10 July 2014 the GC's judgment[84]. The CJ rejected the claim that the GC "[had] disregarded the principle of legal certainty by accepting that conduct which complied with the regulatory framework may constitute a breach of Article 102 TFEU"[85]. The CJ considered the complaint as "unfounded since, as the Commission, the ECTA and France Telecom correctly observe, the fact that an undertaking's conduct complies with a regulatory framework does not mean that such conduct complies with Article 102 TFEU"[86].

Paragraphs 134 and 135 of the CJ judgment are key in reaffirming the centrality, independence and autonomy of the Commission in ascertaining potential infringements of Article 102 TFEU. Telefónica argued that "the General Court clearly distorted their claims and disregarded the fact that the objectives pursued by competition law and by the regulatory framework are the same. Since those objectives are the same, the General Court should have ascertained whether the Commission's intervention on the ground of infringement of competition law is compatible with the objectives pursued by the Comisión del Mercado de las Telecomunicaciones (Spanish Commission for the Telecommunications Markets, CMT) under the regulatory framework"[87].

However the CJ rejects this argument stating that "it is, in part, inadmissible, in so far as it alleges distortion of the appellants' arguments, since the appellants fail to identify the arguments which they claim the General Court distorted and, in part, unfounded, in so far as it alleges breach of the principle of subsidiarity, since the Commission's implementation of Article 102 TFEU is not subject to any prior consideration of action taken by national authorities"[88].

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[82] Ibid., para 55.

[83] Ibid., para 175.

[84] CJ judgment *Telefónica*.

[85] Ibid., para 132.

[86] Clear on this point is para 128 of the CJ's judgment of 10 July 2014: "It should be recalled in that regard that Article 102 TFEU is of general application and cannot be restricted, inter alia, as the General Court was correct to point out at paragraph 293 of the judgment under appeal, by the existence of a regulatory framework adopted by the EU legislature for ex ante regulation of the telecommunications markets".

[87] CJ judgment *Telefónica*, para 134.

[88] Ibid., para 135. Emphasis added.

This point confirms the approach of European Courts *vis à vis* the role of the Commission with respect to the conduct of dominant undertakings as far as they allege that they have followed the guidelines of NRAs, without being left with a margin of doubt.

The judgments in the *Deutsche Telekom* and *Telefónica* cases are therefore particularly important for the definition and the "reconstruction" of the conduct that may lead to abuse by way of a margin squeeze. They are also quintessential for having clarified the applicability of Article 102 TFEU to conducts that might have been put in place within the boundaries and the limits of regulatory provisions that, *per se*, are not sufficient to exclude an infringement by the incumbent. The position of the Commission and the European Courts (as well as of the AGs) is unanimous in stressing that in analysing the behaviour of companies, the EC is exclusively bound by the Treaty and its provisions (Articles 101 and 102 TFEU). Considered irrelevant are therefore *ex ante* remedies (including the imposition of prices aimed at favouring rather than hindering competition) imposed on those companies at a regulatory level.

Before focusing on the rationale of the *CIF* case, showing the consistency of the last decade's worth of EU jurisprudence, another case of margin squeeze has to be mentioned. *TeliaSonera* is a case referred in 2009 to the CJ by the Stockholm District Court. The CJ expressed serious concerns about the consequences of margin squeeze for end-consumers (preliminary ruling judgment given on 14 February 2011)[89].

The case is relevant because the Commission, somehow departing from its own Guidance Paper, stressed that margin squeeze has to be considered harmful for consumers without passing through the "refusal to supply test", irrespective of whether the abusive practice is carried out in the presence of a pre-existing duty to deal. As stressed earlier, the Guidance Paper considered conduct in the form of margin squeeze under the heading "refusal to supply"[90]

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[89] CJ judgment of 17 February 2011in case *Konkurrensverket v TeliaSonera Sverige* (Case C-52/09) [2011] ECR I-000, [2011] 4 *C.M.L.R.* 982 (hereafter: CJ judgment *Telia Sonera*); see also the Opinion of AG Mazák in this case, available at http://curia.europa.eu/juris/document/document_print.jsf;jsessionid=9ea7d2dc30dbf77499818e064569b96087495a7299e9.e34KaxiLc3qMb40Rch0SaxuLbNn0?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=78688&occ=first&dir=&cid=489105.

[90] See on this point R. Nazzini, *The Foundations of European Union Competition Law – the Objective and Principles of Article 102*, Oxford OUP 2001, pp. 273–274. Nazzini notes that AG Mazák suggested a different approach, with respect to refusal to supply, in particular (i) to look at the margin squeeze as a form of vertical foreclosure tactic similar to that carried out by refusal to supply, (ii) to take into consideration the risk that if there is not a duty to deal, "to impose a duty to charge upstream and downstream prices that allow as efficient downstream firms to compete effectively would reduce the dominant undertaking's investment incentives"

as an indirect form of abuse carried out by a dominant undertaking, which in the particular market has a duty to supply access to an essential facility.

The CJ confirmed its concern for final consumers, irrespective of the existence of all the pre-conditions that were considered fundamental in the Commission's Guidance Paper, in line with existing and well-settled jurisprudence. The CJ stresses in *Telia Sonera* how "the fact that a vertically integrated undertaking, holding a dominant position on the wholesale market in asymmetric digital subscriber line input services, applies a pricing practice of such a kind that the spread between the prices applied on that market and those applied in the retail market for broadband connection services to end users is not sufficient to cover the specific costs which that undertaking must incur in order to gain access to that retail market may constitute an abuse within the meaning of Article 102 TFEU"[91].

More importantly, the CJ underlined that any circumstances may be useful to determine whether margin squeeze is abusive, but certainly "it is necessary to demonstrate that, taking particular account of whether the wholesale product is indispensable, that practice produces an anti-competitive effect, at least potentially, on the retail market, and that the practice is not in any way economically justified"[92].

The analysis of these two cases shows that the doctrine expressed by the *CIF* case in 2003 is still applicable. The *rationale* behind that judgment, given at the dawn of the so called "great enlargement" of the European Union, was that of acknowledging the power (or, rather, the duty) of national competition authorities (NCAs) to "neutralise" any existing pieces of national legislation in breach of a competition law provision (in that specific case, in breach of Article 101 TFEU)[93].

Not all authors are in favour of such an approach. G. Monti noted how there could be a valid reason to argue that "until national regulators can be trusted to act independently of the government and of the incumbent operator, the Commission's ability to use competition law to oversee the markets is necessary to ensure that markets are liberalised and incumbents are not protected by regulators"[94]. However, he also argued that the power of the EC and the application of competition law, in particular when NRAs

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and, most interestingly (iii) to take into consideration an "a fortiori", a very subtle, argument: if the duty to deal is not a pre-condition, and the company in theory could refuse to supply, "why can it not harm them by charging upstream and downstream prices that make it difficult for them to compete?"; R. Nazzini, *The Foundations…*, op. cit., p 274.

[91] CJ judgment *Telia Sonera*, para 115 (conclusion). Emphasis added.

[92] Ibid., para 115.

[93] CJ judgment *CIF*.

[94] G. Monti, "Managing the Intersection of Utilities Regulation and EC Competition Law", (2008) 4(2) *Competition Law Review* 125f.

act according to normative schemes set up by EU law in regulated sectors, should encounter a reasonable limit in line with a wider interpretation of the principles of subsidiarity, proportionality, legal certainty and loyal cooperation (all principles recalled by Telefónica's lawyers in the CFI appeal). Indeed, for G. Monti, there might be circumstances in which the Commission should be more "deferential" to the regulators, in particular when reasons of public interest may suggest that actions undertaken or proposed by the regulators may turn to be more apt to address long-term concerns, as for instance, the imperative of ensuring stable growth and innovation[95].

The Italian NCA had adopted a more cautious approach, arguing that in principle the investigated company could have acted against the general principles of competition law since national legislation "authorised" it. By contrast, the CJ was adamant in saying that the duty of the NCA to neutralise national legislation contradicting EU law provisions, was in line with the general principle of the primacy of European Law[96]. The European judiciary here drew a line between breaches of competition law before the date of the adoption of the NCA's decision, and breaches committed after that date. The need to preserve legal certainty for the Court led to a conservative interpretative approach of the conducts put in place before the NCA's decision, therefore excluding the imposition of administrative or criminal sanctions for conducts imposed by national legislation.

To quote P. Nebbia, "the law continues to constitute, for the period prior to the decision to disapply it, a shield for the undertaking concerned against all the consequences of an infringement of Article 81 and /or 82 [now Art. 101 and 102 TFEU] vis-à-vis both public authorities and other economic operators"[97]. Of course once the NCA had adopted a decision (with definitive effects) imposing the disapplication of national, anticompetitive provisions, from that moment on "the 'shield' no longer protects them for future infringements: their future conduct is therefore liable to be penalized"[98].

The approach of the *Deutsche Telekom* and *Telefonica* margin squeeze cases is slightly different, but reaches a similar conclusion.

The most important inference emerging from the analysis of these two cases is that when national legislation (and provisions of NRAs) sets prices as guidelines to be followed by undertakings in a dominant position, the competition authority (and, *a fortiori*, the Commission) will look at the

[95] Ibid., 131.

[96] See one of the first articles published on the judgment by P. Nebbia, Case C 198-01, *Consorzio Industrie Fiammiferi (CIF) v Autorita' Garante delle Concorrenza e del Mercato*, judgment of the Full Court of 9 September 2003, (2004) 41 *C.M.L.R.* 843ff.

[97] Ibid., 844.

[98] Ibid.

nature of those provisions more than at the position adopted by the NCA with respect to those provisions. The NCA and the Commission will look whether the provision imposes or merely facilitates anticompetitive conducts that the dominant undertaking can modify in order to avoid exclusionary anti-competitive conducts.

It is worth recalling here also the conclusions reached by the *CIF* judgment. If a (past) national provision *imposed* a specific conduct (in this case, prices-cap), the competition authority "may not impose penalties in respect of past conduct on the undertakings concerned […]"[99]. By contrast, and more importantly, the *CFI* case made it clear also that conducts merely facilitated by national provisions but conflicting with competition law, would have been subject to scrutiny by the NCAs as well as fined (the NCA "may impose penalties on the undertakings concerned in respect of past conduct where the conduct was merely facilitated or promoted by the national legislation, whilst taking due account of the specific features of the legislative framework in which the undertakings acted"[100]).

IV. Reference to the energy sector. Similarity of approach

Dr Koch (deputy head of unit at the DG competition, in charge of the energy sector) reaffirmed in a presentation given in Athens in June 2013 the primacy of competition law over the activities of regulators. Though he did not expressly refer here to the possibility that NRAs establish price-guides that may "mislead" energy incumbents (as argued by DT and Telefonica in their defences), he nevertheless stressed the importance of creating a competitive energy market in Europe through the cooperation of regulators and competition authorities. He pointed out how, where regulators do not adopt measures that prevent or deter abuse such as refusal to supply, excessive prices or margin squeeze, competition authorities have to take action through their enforcement activity[101]. In other words, he very clearly confirmed the

[99] Ibid., conclusion, point 1.

[100] Ibid. For a reconstruction of the perception of the primacy of the European provisions over national law and the role played by the NCA in the year following the mass enlargement of 2004, see A. Kaczorowska, "The power of a national competition authority to disapply national law incompatible with EC law-and its practical consequences", (2004) 9 *European Competition Law Review* 591 ff.

[101] Dr Oliver Koch (deputy head of unit at DG Energy, European Commission), "Creating competitive energy markets through joint enforcement of energy regulators and competition authorities", conference held in Athens on the 5 June 2013, available at http://www.energy-community.org/pls/portal/docs/2106186.PDF.

supremacy of European competition law over regulatory activity, also in terms of remedies (behavioural as well as structural) that can be adopted to create a "level playing field" for competition. Reference to the recent E.ON[102], RWE[103] and ENI[104] commitments decisions is self-explanatory here where the EC accepted commitments meant to adopt structural measures going beyond the scope of European and national legislation authorising mere behavioural remedies to enhance competitiveness. He stressed how it may happen that regulators (for instance, in the energy sector, but similar conclusion can be drawn with respect to communications) may have insufficient competencies or independence. By contrast, competition law could be more efficient, applied faster and with stronger investigative powers.

The most important consequence from this reasoning, in favour of the supremacy of competition enforcement over the activities of NRAs, is that the Commission can also use the tools established by Article 7 of Regulation 1/2003. Hence, not only fines or behavioural remedies, but also structural remedies would be applicable under EU law.

V. Conclusion

The analysed judgments have confirmed the unity of the European legal system over the last decade, through the joint actions of the European Commission, NCAs and European Courts. This is true, in particular, in regulated markets such as electronic communications, though the same conclusion can be reached with respect to energy markets. With respect to the latter, the EC has adopted pro-competitive remedies in a number of commitments decisions already (E.ON, RWE and ENI) that go beyond existing regulatory provisions. It has shown that when the enforcement authority is called to recreate a pro-competitive environment, it has a wider "room of manoeuvre" at remedial level than the same regulatory provisions, both at European and national level.

The paper's conclusion is meant to show how *Deutsche Telekom* and *Telefónica* are in line with the *Consorzio Industrie Fiammiferi* (*CIF*) judgment. Both confirm the existence of a limit for the enforcement activities of the

[102] EC decision *E.ON,* available at http://ec/europa.eu/competition/antitrust/cases/dec_docs/39388/39388_2796_3.pdf.

[103] EC decision *RWE (Gas Foreclosure)*, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39402/39402_576_1.pdf

[104] EC decision *ENI*, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39315/39315_3019_9.pdf.

EC in applying Article 101 and 102 TFEU when national legislation requires specific anticompetitive behaviours (see on this respect the position of the GC in *Telefonica* where it expressly states "[…] Article 82 EC applies only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Article 82 EC does not apply. In such a situation, the restriction of competition is not attributable, as that provision implicitly requires, to the autonomous conduct of the undertakings […]"[105], but also *de facto* confirming the non-applicability of the "regulatory authority *dixit"* defence where the dominant undertaking had the possibility of adopting upstream or downstream (retail) prices that would not have driven competitors from the market.

[105] GC judgment *Telefónica*, para 328 ff.

The Effects of Antitrust Enforcement Decisions in the EU

by

Anton Dinev*

CONTENTS

Abstract

In the complex procedural aftermath of Regulation 1/2003, a more systemic approach to antitrust enforcement by various authorities – EU and national, judicial and administrative – could supplement existing cooperation mechanisms with a truly integrated system of rules and decisions. This is the core argument of this article, as it examines the effects of antitrust enforcement decisions in the EU from three different but related angles.

* PhD Candidate, Dauphine University in Paris. I would like to thank Prof. Joël Monéger of Dauphine University for his constant guidance and support to my research work, and for encouraging me to present this paper at the 9th Annual ASCOLA conference in Warsaw, 26–28 June 2014. All views, errors and omissions are, of course, solely those of the author.

Résumé

Vu la complexité procédurale depuis l'entrée en vigueur du règlement N° 1/2003, une approache plus systématique concernant la mise en œuvre du droit antitrust européen par une multitude d'autorités – européennes et nationales, judiciaires et administratives – pourrait compléter les mécanismes de coopération actuels avec un système plus cohérent de règles et de décisions. C'est un argument principal de cet article, qui ainsi examine successivement, sous trois angles différents, les effets que peuvent avoir les décisions antitrust dans l'UE.

Classifications and key words: EU law; antitrust; Regulation 1/2003; ECN; judicial review; *ne bis in idem*; private enforcement; damages claims

Introduction

Complexity is generally perceived as a rather negative feature since it often leads to actual or potential conflicts in a given political, social or economic system. While this is also true for any legal system, including antitrust law, necessary complexity is perhaps the most appropriate term for a neutral description of the enforcement system of rules and authorities that has developed across the European Union (EU) over the past decade. The fundamental procedural reform of 2004 certainly reinvigorated the activity of national competition authorities (hereafter: NCAs), bringing it closer than ever before to the model of decentralized, indirect administration already foreseen in the founding Treaty of Rome. At the same time, the present enforcement framework has revealed a significant diversity of approaches at the national level to basic issues of common concern that require, in turn, accordingly consistent uniform solutions at the EU level. Moreover, some fundamental principles of EU remain virtually unchanged since they were first considered in the formative jurisprudence of the European Court of Justice.

Therefore, in order to draw more attention to this need for a systemic approach to individual cases where key rules and underlying principles of EU antitrust enforcement are to receive a uniform normative construction, it seems fitting (and timely) to address a topic that appears to have been fairly overlooked at the time of drafting Regulation 1/2003[1]. Indeed, a number of recent cases, EU and national, as well as landmark rulings of the Court of Justice, invite reconsideration, from a broader perspective, of the effects that

[1] Council Regulation (EC) No. 1/2003 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ [2003] L 1/1).

may have enforcement decisions made by either the European Commission or the NCAs. These enforcement decisions can actually be approached from different but related angles, depending on their nature and their intended addressees, and yet each of them reveals at some point imperfections or deficiencies that might call into question the proper functioning, in light of the underlying enforcement goals, of the current antitrust system in the EU. Thus, the immediate purpose of this paper is to provide some insight and indicate possible steps to eventually piece together the fractured procedural landscape of decisions enforcing Articles 101 and 102 TFEU.

The suggested systemic approach can be justified for at least one of several reasons. First and foremost, it is common ground that a single antitrust harm that occurs within any geographic market in the EU should receive equally uniform substantive analysis and an appropriate remedy by the competent authority. However, this consistency goal is hardly an absolute one as it faces important procedural caveats stemming both from the territoriality principle under public international law and from the EU principle of national institutional and procedural autonomy in implementing and applying European law. Second, time is a key factor from the standpoint of defining the scope of antitrust enforcement either by the Commission or the NCAs when acting upon the same facts. Time is important also because it provides a clear divide between past and present proceedings regarding similar cases as well as between definitive decisions and those still under review, especially with respect to the primacy enjoyed by EU judicial and administrative decisions over their national counterparts. Third, another source of complexity is the increasing role of private enforcement and the corresponding need for its synchronization with the predominantly administrative public enforcement that has played a leading role in designing the conceptual frame of EU antitrust.

Accordingly, dealing with the complexity of EU antitrust requires that several variables be dully taken into account in order to properly examine the effects of decisions enforcing Articles 101 and 102 TFEU. That is why the meaning of an antitrust enforcement decision for the purposes of the present article needs to be broad enough, but not all-inclusive. Since only EU law is discussed here, antitrust enforcement is understood here as excluding merger control (unlike the taxonomy under U.S. antitrust). Furthermore, as the very term "anti-trust" indicates (again regardless of its American legal background), protecting competition in a free market economy has always been essentially about weighing its importance against the underlying freedom of commerce and contract. EU antitrust enforcement is therefore basically about setting some (reasonable) limits to that fundamental freedom and hence applying a certain number of prohibitions. Each of these prohibitions, namely Articles 101 and 102 TFEU, is part of a repressive regime. Failure to comply with them

could eventually lead to pecuniary sanctions of a criminal nature within the meaning of the European Convention on Human Rights (hereafter: ECHR). Nevertheless, one should not confuse sanctions, or any other remedy for that matter, with the essence of antitrust enforcement – that is, whether or not there has been a breach of a controlling prohibition. Answering this question brings up another important distinction, one that is between: i) applicability, which determines *ratione materiae* and *ratione loci* jurisdiction, and ii) application, which deals with the substantive conditions for giving effect to the prohibition in question. Thus, decisions finding a prohibition inapplicable *or* stating that it has not been violated are equally enforcing EU antitrust rules as decisions that establish applicability *and* find an infringement of those rules. On the other hand, for the sake of clarity, decisions that include no definitive assessment on the merits will not be considered here, even though remedies like commitments have become a valuable enforcement tool especially for the NCAs.

Unfortunately, these two distinctions – applicability/application and applying/ remedying – are more often than not left without due consideration by the EU antitrust authorities at both national and European levels. But had these distinctions been thoroughly considered on a regular basis, one could easily identify a three-dimensional framework for a systemic approach to and study of the effects of antitrust enforcement decisions across the EU. First, an antitrust enforcement decision may determine the outcome of subsequent proceedings before one and the same competition authority, depending on whether the initial decision becomes definitive prior to or upon judicial review (**I**). Second, subsequent or simultaneous proceedings may take place before several competition authorities, in which case antitrust enforcement may have vertical or horizontal effects, respectively, between the Commission and one or several NCAs, or between the NCAs alone (**II**). Finally, a third line of effects delimits the impact of public enforcement on private enforcement, which varies considerably according to a previous finding of antitrust infringement or absence of such an infringement (**III**).

I. Proceedings before one and the same competition authority

A first setting that illustrates the need for a systemic approach to antitrust enforcement decisions is where a competition authority, the Commission or an NCA, commences or continues proceedings against undertakings that have already been investigated by this same competition authority with respect to the application of Articles 101 and 102 TFEU. This could be the result of

a subsequent complaint or an *ex officio* motion, whether or not a previous decision has established lack of jurisdiction or an infringement of the relevant prohibition. Should this new proceedings be allowed and, if so, to what extent? The answer is of course largely dependent upon the strict identity of the cases, old and new. Even, however, if they were completely identical as to their subject-matter and parties, there could still be some room for debate about the scope and nature of the effects the previous decisions may have regarding the subsequent proceedings. This uncertainty is evidenced by the case-law of the EU judicature which tends to treat alike different situations by providing increasingly similar solutions, respectively, for definitive decisions (appealed or not) that apply antitrust rules (**A**) and annulled decisions following judicial review (**B**).

A. Effects of definitive decisions applying antitrust rules

While proceedings before the Commission and the judicial review of its decisions follow procedures that remain confined to the EU level, it is also true that the approach of the EU courts to a given issue may impact, directly or indirectly, national authorities and procedures as well. This impact is direct where, in addressing a reference for a preliminary ruling, the Court of Justice redefines the principle of national institutional and procedural autonomy by transposing to the Member State level existing solutions regarding the Commission. More often, however, the influence is indirect (*par ricochet*) insofar as the General Court and, eventually, the Court of Justice confirm the legality of Commission decisions that interfere to a certain extent with powers and duties of the NCAs provided by Regulation 1/2003. But whether defined directly or indirectly, the effects of definitive decisions enforcing antitrust rules need not be amalgamated depending on issues of either jurisdiction or application of the substantive criteria in a controlling prohibition.

First of all, delimiting overlapping jurisdiction between EU and national law has proved to be of utmost importance, essentially for procedural reasons[2]. On the other hand, clarifying the scope of the respective Commission and NCA powers is crucial for ensuring consistent public enforcement of EU antitrust. There is, in effect, a sort of mutual dependence or a correlation between the Commission and NCA proceedings. It is based on the general duty of sincere

[2] See e.g. Judgment of the French Supreme Court No. 200 FS-P+B, Joined Cases No J09-72.655, M09-72.657, P09-72.705, Z09-72.830, U09-72.894, 1.03.2011, *Total Réunion* e.a.; A. Dinev, "The French Supreme Court clarifies the appreciable effect on trade concept contained in Art. 101 and 102 TFUE (Jet Fuel Cartel)" *e-Competitions*, n° 35149.

cooperation and also highlighted by Regulation 1/2003[3]. It results in the need for the national authorities to duly establish their EU jurisdiction in order to allow potential control by the Commission pursuant to Article 11(6) of the Regulation. Nevertheless, the EU judicature seems reluctant to recognize *expressis verbis* a formal obligation similar to that in merger control, where the NCAs must first ascertain lack of EU jurisdiction in order to proceed under national law. That reluctance is indeed justified in light of the multi-agency system of parallel enforcement set up by the Regulation; otherwise, the obligation in question would give rise to corresponding individual rights for complainants that seek relief from a particular competition authority[4]. Consequently, from the EU standpoint, both the Commission and NCAs should retain comparable latitude as to commencing antitrust enforcement through the European Competition Network (hereafter: ECN). This includes instances in which they first dismiss a complaint for lack of jurisdiction but later re-open the case against the same undertakings and alleged practices, either *ex officio* or acting upon another complaint. At the same time, that means disregarding national legislations whereby, given the principle of procedural autonomy, some NCAs lack equally broad discretion as the Commission when handling complaints and must instead issue a reasoned decision justifying they have no EU jurisdiction. Accordingly, one may hesitate whether such decisions would not have the effect of preventing further investigation or re-opening of the case, inasmuch as the duty to apply Article 101 and 102 TFEU where applicable has also been supplemented with an increased protection of legitimate expectations.

In contrast to issues related to antitrust jurisdiction, the effects of application *stricto sensu* have been considered more thoroughly by the EU judicature and were eventually construed more favorably to prosecuted undertakings. These can now invoke and rely on a supposed auto-binding nature of the findings made by the Commission and the NCAs. Actually, strengthening the self-binding effects of antitrust enforcement decisions derives from the principle of legal certainty, which has shaped well-established jurisprudence on the so-called Commission "soft law" in competition matters, typically on issues related to sanctioning[5]. A more recent trend, however, is to extend, somewhat mechanically, that jurisprudence to also include the substantive assessment in individual cases before the NCAs. This approach builds upon the view

[3] See Recitals 8 and 17 of the preamble to Regulation 1/2003 and Case C-375/09 *Tele2 Polska* [2011] ECR-I 270, para 26.

[4] For a discussion see Case T-339/04 *France Télécom* [2007] ECR-II 521.

[5] Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri* [2005] ECR I-5425, paras 211 and 213, and recently, Judgment of the General Court (hereafter: GC) of 21 May 2014 in Case T-519/09 *Toshiba Corp*.

that, where the Commission states in advance its course of action in future cases, it cannot depart from such a rule of conduct unless it provides good reasons for the contrary. The self-binding effect of such rules of conduct is of course limited to those parts of guidelines and notices that contain a genuine Commission decision pursuant to its enforcement discretion, and not just a restatement of existing case-law that is binding by virtue of its own *res judicata* (decisional) and/or *res interpretata* (jurisprudential) authority.

Likewise, it has been held that "precise assurances" by a competent NCA could eventually provide an undertaking with legitimate expectations as to the *application* of EU antitrust or the *sanctioning* of illegal conduct[6]. Of course, application in this case is understood solely as the formal finding of an infringement[7], even though such a finding is just a possible outcome of applying the substantive conditions for prohibition. This means, *a contrario* that a finding of non-infringement is also possible, regardless of whether it is stated with sufficient precision as grounds for a no-further-action decision or as a clause in the operative part of a formal non-infringement decision. In any event, it seems unclear whether finding an infringement, as such, without it leading to imposing a penalty[8], could still be relied upon by the undertakings concerned when seeking to block subsequent proceedings against them before the same competition authority, administrative or judicial, unless of course there is new evidence. An affirmative answer, however, might be quite problematic from a systemic perspective, including the underlying close cooperation between the Commission and NCAs.

Indeed, given that the ECN has been designed as a dynamic system of close cooperation, actions and decisions of the several competition authorities cannot remain isolated from one another. They need instead to be considered all together inasmuch as the Commission and the NCAs may enjoy different degrees of discretion in either applying antitrust or establishing their EU jurisdiction. This means in practice that self-binding effects opposable to the Commission could also impact enforcement at the Member State level, and *vice versa*, such that self-binding effects preventing a case to be re-opened before the same NCA could also block preemptive action by the Commission. The latter scenario is illustrated by the *Expedia* case in which the Court of Justice recognized that, provided with good reasons, an NCA may depart from a soft-law rule of conduct that already binds the Commission[9]. However, this ruling appears to disregard the difference between application and jurisdiction

[6] Judgment of the Court of Justice (hereafter: CJ) of 18 June 2013 in Case C-681/11 *Schenker*, para 41.

[7] Ibid., para 42.

[8] Ibid., para 50.

[9] Judgment of the CJ of 13 December 2012 in Case C-226/11 *Expedia*, para 31.

as well as the latter's procedural consequences, since the *de minimis* thresholds in question determine the scope of application by the Commission while their French counterparts delimit subject-matter jurisdiction of the French NCA. Consequently, it seems unlikely that the Commission could still intervene pursuant to Article 11(6) of Regulation 1/2003 when a case it had already bound itself not to investigate eventually ends up in the ECN through the broadened jurisdictional discretion of NCAs. Conversely, the need to ensure effectiveness of Article 11(6) has led the Court in *Tele2 Polska* to consider, arguably in light of the *ne bis in idem* principle[10], that possible self-binding effects of non-infringement decisions issued by NCAs might block a preemptive action of the Commission in the same matter[11]. Beyond the apparent contradiction between those two rulings, but in line with *Schenker*, it can be argued that final decisions of administrative NCAs might have been given "negative effects" that resemble, at least functionally, those of judicial *res judicata* authority. Perhaps, this view could also explain the EU judicature's stance on the effects of annulling Commission decisions following judicial review.

B. Effects of annulling decisions upon judicial review

The extent to which the Commission is allowed to re-adopt a decision that has been annulled by a reviewing court offers a useful perspective on the respective effects of administrative and judicial public enforcement of EU antitrust. In this regard, the concept of "*chose décidée*", which has been suggested as a sort of administrative equivalent to the judicial "*chose jugée*", need not be given a meaning it does not bear. As the very term *autorité de chose décidée* indicates, this concept has its roots in French administrative law and has been conceived to describe the immediate effects of administrative decisions concerning their addressees, also known as "*privilege du préalable*". In other words, administrative decisions have the authority to unilaterally change the legal situation of individuals without or prior to judicial review. The same authority characterizes Commission decisions as well, and appeals against them do not suspend their execution. Nevertheless, one should still have regard for the crucial distinction between the findings of infringement and their corresponding remedies, such as injunctions or sanctions. Only the latter actually have the capacity to introduce a legal change, and the former merely declare an already existing situation by virtue of the applicable law,

[10] Case C-375/09 *Tele2 Polska* [2010] Opinion of Advocate General (hereafter: AG) Mazak, para 30.

[11] Judgment of the CJ of 3 May 2011 in Case C-375/09 *Tele2 Polska* [2011] ECR-I 03055, para 28.

namely, that its rules have or have not been broken. By contrast, *res judicata* covers precisely such findings of law and makes them binding upon the parties. Departing from this difference of principle, current jurisprudence on *ne bis in idem* in EU antitrust appears to consider that annulling a Commission decision has virtually the same effects regarding the competition authority in either review of legality or unlimited jurisdiction contexts.

Typically, Commission decisions are reviewed on the ground of legality – that is, whether they have lawfully proved the existence of an antitrust infringement and have imposed sanctions according to the applicable rules, standards and soft-law provisions[12]. This does not mean, however, that judicial review is only on points of law or entirely differential. On the contrary, it has been made clear that challenges before the General Court may lead to a scrutiny of both fact and law, provided it does not interfere with the Commission's assessment of complex economic matters[13]. Therefore, at first instance, the issue or cause of action is whether the relevant facts – as authoritatively construed by judicial interpretation of the applicable rules – are correctly established and proved to the requisite standards by the Commission. Consequently, *res judicata* of General Court judgments consists either of confirming or infirming the challenged decision's *a priori* legality, without judging on the merits, i.e. whether or not antitrust laws have been violated. From this standpoint, it seems dubious that both finding an infringement and controlling the legality of such a finding could equally trigger the *ne bis in idem* prohibition[14] since these are different issues and only the latter is covered by *res judicata*.

Moreover, given that review of legality may not deal *ipso jure* with all points of law and fact[15], as these are determined *inter partes*[16], it would not make a difference when an enforcement decision is annulled for procedural reasons or because of unlawful appraisal of substantive criteria and relevant facts, including insufficient evidence. Neither would qualify as an acquittal in criminal matters[17] where *res judicata* of meritorious judgments is either

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[12] Art. 263 TFEU. See also e.g. Case C-272/09 P *KME Germany* [2011] ECR-I 12789, para 106; and Judgment of the CJ of 6 November 2012 in Case C-199/11 *Otis*, para 63.

[13] Judgment of the CJ of 24 October 2013 in Case C-510/11 P *Kone Oyj*, paras 25 and 27; and Case C-386/10 P *Chalkor* [2011] ECR-I 13085, para 62.

[14] Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P, C-254/99 P *Limburgse Vinyl Maatschappij (PVC II*) [2002] ECR I-8375, para 60.

[15] Ibid., para 47.

[16] Case C-510/11 P *Kone Oyj*, op. cit., para 30; Case C-386/10 P *Chalkor*, op. cit., para 64.

[17] Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P, C-254/99 P, *Limburgse Vinyl Maatschappij (PVC II)*, op. cit., para 62, in which the Court held that an annulment decision which had been reached without any ruling on the substance of the facts alleged could not be regarded as an acquittal giving rise to the application of the *ne bis in idem* principle.

conditional upon the confirmation by a review court or where that same review court re-decides the merits of the case, after which its own findings would produce *res-judicata* negative effects. Conversely, where the EU judicature simply annuls a Commission decision on the ground of illegality without itself ruling on the substance of the infringement or on the penalty, the competition authority may re-open the procedure at the stage at which the illegality was found to have occurred and exercise again its power to impose penalties[18].

The second standard for judicial review of decisions enforcing EU antitrust is the so-called "unlimited jurisdiction", which has been the object of numerous debates, including before the European Court of Human Rights (ECtHR). At the EU level, the unlimited jurisdiction allows the General Court, in addition to examining the legality of a fine imposed by the Commission, to substitute its own appraisal for that of the Commission and thereby reduce or even increase the total amount of the contested penalty[19]. By contrast, at the Member State level some review courts are empowered to not only adjust the amount of the fines but, even more importantly, also to re-decide the merits of the case before them[20]. Although more conform to the principle of *nulla poena sine crimine*, meaning that reforming a sanction implies the power to re-decide the substance as well, the second type of unlimited jurisdiction is actually not indispensable for ensuring effective judicial protection in EU antitrust[21]. Proceedings before administrative competition authorities may indeed vary in more than one respect from strictly criminal enforcement while applying the same procedural guarantees pursuant to Article 6(1) ECHR[22]. Nevertheless, the issues related to unlimited jurisdiction appear in a different light against the background of the *ne bis in idem* prohibition, at least as it is understood by the EU courts. Since altering the amount of a fine presupposes that the Commission has lawfully established a violation of antitrust laws, but does not itself rule on liability, then it would be virtually impossible that, at the EU level, unlimited jurisdiction results in a meritorious finding with *res judicata* effects opposable to re-opening the case before the competition authority. On the other hand, such meritorious findings, especially "acquittals" within the meaning of the ECHR, are not to be ruled out at the national level. In the end it is, therefore, questionable whether the EU judicature's interpretation of the

[18] Ibid., para 693.

[19] Art. 31 of Regulation 1/2003 and Art. 261 TFEU. See also e.g. Judgment of the CJ of 10 April 2014 in Joined Cases C-247/11 P and C-253/11 P *Areva*, para 171, Judgment of the GC of 27 February 2014 in Case T-128/11 *LG Display*, para 255, and Case C-501/11 P *Schindler* [2013] ECR-I 522, para 36.

[20] See e.g. Judgment No. 148 of the Paris Court of Appeal of 23 September 2010 in Case No.2010/00163, *Orange Caraïbe*.

[21] Case C-510/11 P *Kone Oyj*, op. cit., para 22; Case C-386/10 P *Chalkor*, op. cit., para 64.

[22] Judgment of the ECtHR of 27 September 2011 in Case 43509/08, *Menarini*, para 62.

ne bis in idem principle could apply equally to judicial review of Commission and NCA decisions.

The above uncertainty about the effects of annulling antitrust enforcement decisions only highlights some of the risks associated with mechanically transposing to the NCAs solutions that have been tailored for the Commission and its practice. As already seen, the two levels of antitrust enforcement, European and national, are largely interdependent, and a specific approach to one should not dismiss possible spillover or *par ricochet* effects on the other. Moreover, both the Commission and the NCAs are bound to observe the same procedural guarantees that investigated undertakings may invoke either as general principles of EU law[23] or pursuant to the Charter of Fundamental Rights (hereafter: CFR)[24]. Accordingly, although the Commission has been the institutional model for the vast majority of NCAs, the discussion and construction of procedural standards and concepts in review proceedings against Commission decisions need to integrate the likely interferences with national procedural autonomy as a source of potential complexity or reduced effectiveness of the system. This is all the more important where the same case ends up before several competition authorities.

II. Proceedings before several competition authorities

Effective close cooperation had been the underpinning rationale for setting up the ECN. The proper functioning of the network depends heavily, first, on avoiding conflicting competence to deal with a given case and, then, on ensuring consistency between the enforcement decisions of several competitions authorities. While the former has been clarified in a "soft-law" instrument[25], supplemented by a mutually binding common declaration[26], the latter goal is pursued by a directly applicable provision – Article 11(6) of Regulation 1/2003. However, neither text can be invoked by investigated undertakings in ongoing proceedings[27]. The *ne bis in idem* principle, on the other hand, may be

[23] Art. 6(3) TEU establishes that fundamental rights, as guaranteed by ECHR, shall constitute general principles of EU law.

[24] Art. 52(3) of the Charter requires rights contained in the Charter, which correspond to rights guaranteed by the ECHR, to be given the same meaning and scope as those laid down by the ECHR.

[25] Commission Notice on cooperation within the Network of Competition Authorities (OJ C 101/43), p. 43-53.

[26] Joint Statement regarding the Commission Notice on Co-operation within the Network of Competition Authorities, Doc. 15435/02 ADD 1.

[27] Case T-339/04 *France Télécom* [2007] ECR-II 526, para 85.

relied upon and, actually, has also served as a procedural device for regulating overlapping competence between competition authorities in the EU, even before the ECN[28]. Yet the network itself seems to have been designed without integrating the *ne bis in idem* parameter in every possible configuration of intra-system cooperation. As a result, the ambiguity surrounding the scope of *ne bis in idem* in Commission proceedings could also amplify the risks of inconsistent enforcement. Such inconsistency risks may occur either vertically, with respect to the effects of Commission decisions regarding the NCAs (**A**), or horizontally, concerning the effects of NCA decisions regarding other NCAs (**B**).

A. Effects of Commission decisions regarding NCAs

Given the pyramidal structure of the ECN, antitrust enforcement by the Commission is supposed to set a leading example for national competition authorities. In order to achieve this essential goal, the whole system has been set up so that the Commission could: i) choose, with fairly unlimited discretion, what cases to investigate, typically those having a EU dimension; ii) control enforcement at the national level by revoking, where necessary, cases belonging to a NCA following compulsory notification pursuant to Article 11(4) of Regulation 1/2003; and finally, iii) adopt enforcement decisions that bind the NCAs as regards the outcome of the proceedings. On the other hand, it has been made clear that preemptive action by the Commission may only put on hold, but does not permanently deprive, the NCAs of their competence under national law[29]. Nevertheless, parallel enforcement of two sets of antitrust prohibitions, national and European, is not without consequences from a *ne bis in idem* perspective, especially in case of an "acquittal" by the Commission. Thus, another viewpoint reveals a somewhat hidden discrepancy between the consistency provision of Article 16(2) and the convergence rule in Article 3(2) of Regulation 1/2003.

Regulation 1/2003 sought to codify the case-law on the binding effects that antitrust enforcement by the Commission may have upon private litigation

[28] Case C-17/10 *Toshiba* [2011] ECR-I 552, Opinion of AG Kokott, para 106, referring to the Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings presented by the Commission on 23 December 2005 (COM[2005] 696 final). On the other hand, the *ne bis in idem* principle resolves conflicts of jurisdiction only in "a limited, sometimes an arbitrary, way", as pointed out by AG Sharpston Case C-398/12, *M.*, (Opinion of 6 February 2014), para 51.).

[29] Case C-17/10 *Toshiba* [2012] ECR-I 72, paras 75 and 79.

before national courts[30]. A similar consistency mechanism has also been provided for situations where a single case is being decided simultaneously by the Commission and NCAs. It should be noted, however, that the scope of Article 16 depends on the respective competences for applying EU and domestic antitrust in either public or private enforcement proceedings. The powers of courts in private actions to apply both Articles 101 and 102 TFEU and their national equivalents are by no means affected by public actions in parallel[31], subject of course to the principle of legal certainty and the duty of sincere cooperation with the EU authorities[32]. By contrast, NCAs are said to be effectively deprived of their competence to apply the Treaty antitrust rules following a Commission action pursuant to Article 11(6) of the Regulation; they may, however, resume enforcement of domestic rules once a final decision has been issued at the EU level[33]. Apparently, such a solution derives from a supposedly reciprocal applicability of EU antitrust and its national counterparts[34], but it also overlooks the meaning of "application" in what would qualify as a final decision in order to comply with Article 16(2). Indeed, the fact that lack of jurisdiction implies no powers to apply substantive antitrust rules does not mean that the contrary is equally true so that lack of powers would be a necessary consequence of having no jurisdiction under Articles 101 and 102 TFEU; actually, it is precisely because the Treaty provisions are applicable that they cannot be applied by the NCAs as long as the Commission is about to enforce them instead. Therefore, according to Article 16(2), a final decision on the merits at the EU level is to determine residual enforcement at the national level[35], but it remains unclear to what extent the *ne bis in idem* principle might come into play.

Should enforcement of EU and national antitrust be mutually dependent, as a logical consequence of the view that action pursuant to Article 11(6) not only deprives NCAs of their EU powers but also (at least temporarily) of their powers under domestic rules[36], and possibly *vice versa*, then resuming proceedings under national law once the Commission has decided the case would most likely not be possible without the NCAs applying afresh Articles 101 and 102 TFEU[37]. On the other hand, such a subsequent application

[30] Case C-344/98 *Masterfoods* [2000] ECR-I 1412, para 52.

[31] Ibid., para 47 *in fine*, Case 127/73 *BRT I* [1974] ECR 52, para 20.

[32] Ibid., paras 49 and 51, Case C-234/89 *Delimitis* [1991] ECR-I 977, paras 47 and 53.

[33] Case C-17/10 *Toshiba*, op. cit., para 80.

[34] Ibid., para 77.

[35] Ibid., para 86 *in fine*.

[36] Ibid., para 78.

[37] For a discussion, see A. Dinev, "The European Court of Justice rules on parallel enforcement under Regulation 1/2003 while declining to redefine ne bis in idem within the ECN (Toshiba)" *e-Competitions*, n° 49475; available at www.concurrences.com.

following a Commission enforcement decision could trigger the *ne bis in idem* prohibition, inasmuch as this fundamental procedural safeguard has been construed in a fairly broad manner by the ECtHR and, hence, could apply irrespective of the legal provisions that are being applied[38]. In other words, since new investigation against the same undertakings concerning the same allegedly anti-competitive conduct is to be banned as such, it would not matter if the NCAs are to apply either or both EU and national antitrust laws. For this reason, in addition to redefining the *idem* part of the *ne bis in idem* principle, it has been suggested that Article 16(2) needs to be understood broadly as not requiring full identity of fact and offender for the NCAs to comply with its consistency provision[39]. However, this interpretation risks blurring the line between consistency and convergence, especially where only the operative part of a Commission decision is to be considered as "EU law" within the meaning of Article 3(2) of the Regulation. It is therefore likely that, on the one hand, observing a previous Commission decision becomes a preliminary step to complying with the convergence rule. On the other hand, however, this could undermine the rationale behind the convergence rule governing unilateral conduct where, in particular, Article 102 TFEU is declared inapplicable pursuant to Article 10 of the Regulation. Moreover, it appears that, from an NCA standpoint, the convergence rule not only prevents normative conflicts between substantive rules but may also impact the decision-making powers under Regulation 1/2003 and national procedure, respectively. Finding no infringement of EU antitrust could thus eventually lead to a formal non-infringement decision concerning domestic antitrust.

The potential discordance between Articles 16(2) and 3(2) of Regulation 1/2003 was, actually, predictable given the mechanical substitution of mutually exclusive enforcement under the initial proposal by a system of parallel enforcement under the current procedural framework, without however calculating possible outcomes of applying in parallel both substantive and procedural rules. Indeed, contrary to the original system that did not need any convergence rules at all, complexity is currently much greater and requires, accordingly, consistency in several settings. Consistency is thus necessary: i) first, a) between proceedings before different authorities, Commission and NCAs, and b) between the application of different sets of substantive laws, EU and national; ii) but also, a) between different or partially similar (as subject-matter) cases, and b) cases of completely identical facts and offender(s). However, a delicate balance resides at the heart of this four-dimensional

[38] Judgment of the ECtHR of 10 February 2009 App. n° 14939/03 *Zolotoukhin*, para 83 *in fine*, Judgment of the ECtHR of 4 March 2014 Apps n° 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 *Grande Stevens*, paras 220 and 224.

[39] Case C-17/10 *Toshiba*, op. cit., Opinion AG Kokott, para 87.

enforcement configuration of consistency and convergence. That balance should not be tipped in either direction so that close cooperation between the Commission and the NCAs could eventually foster a "positive" convergence beyond the "negative" one, which merely prohibits divergence[40]. Such a "positive" convergence, meaning in practice an ever increasing harmonization of national laws and their consistent normative construction, could prove essential for the overall effectiveness of public and private enforcement of EU and national antitrust. It will also minimize possible shortcomings of regulating the effects of NCA decisions regarding other NCAs.

B. Effects of NCA decisions regarding other NCAs

Perhaps the most notable innovation in the general scheme of EU antitrust enforcement was that, in addition to more classical vertical cooperation, the ECN also set up the first instance of a horizontal cooperation at the national level between the NCAs. While this additional dimension proved particularly useful and well-suited for collecting and exchanging evidence abroad, it remains to be seen to what extent it might determine the outcome of opening and/or closing enforcement proceedings by several NCAs regarding the same facts and undertakings. On the one hand, as it was already pointed out with respect to cases dealt with by a single NCA, Regulation 1/2003 provided for broadening the enforcement discretion of NCAs in so far as they have to apply EU antitrust. But this harmonization only sets out a minimum standard; national rules may provide for even broader discretion, regarding both national and EU antitrust prohibitions, inasmuch as that does not affect adversely the effectiveness of EU antitrust enforcement. On the other hand, there is no harmonization as to the scope of the *ne bis in idem* principle that would build upon the distinction between finding and sanctioning an infringement, especially where final decisions enjoy *res judicata* status and effects.

Mindful of national procedural rules that could limit the enforcement discretion of NCAs, especially when acting upon complaints, the drafters of Regulation 1/2003 included a specific provision whereby NCAs may reject a complaint or suspend proceedings on grounds that the same case is being or has been dealt with by another NCA. This provision in Article 13 has been said to establish a strictly optional power for the NCAs insofar as the application of Articles 101 and 102 TFEU is concerned[41]. It seems however that, as with Article 16(2), no attention has been given to a situation where domestic

[40] Ibid., para 87 *in fine*.

[41] Case C-17/10 *Toshiba*, op. cit., para 90 and Case C-17/10 *Toshiba*, op. cit., Opinion AG Kokott, para 89.

antitrust is enforced in parallel. Should or must application of national law be dismissed or suspended as well? If yes, on what grounds?

Unlike national courts in private actions or the Commission, NCAs are not bound among themselves by the duty of sincere cooperation, seeing as the latter only governs the vertical relations between national authorities and the EU institutions. On the other hand, compliance with the convergence rule could be seriously jeopardized if NCAs are to avoid so easily enforcement of EU antitrust and still proceed with the application of national rules. It is therefore necessary to distinguish existence of EU jurisdiction or competence from its exercise. Indeed, somewhat contrary to the view that Article 3(1) of the Regulation applies solely to parallel enforcement, it is instead more appropriate to consider this provision as related to the existence of EU competence and the corresponding duty to apply Articles 101 and 102 TFEU as long as interstate trade is affected to an appreciable extent. The exercise of that competence, however, may be subject to other provisions, like the convergence rule in Article 3(2) and of course Article 13 of the Regulation. Accordingly, rejecting a complaint or staying proceedings pursuant to Article 13 is without prejudice to Article 3(2), which would result in practice in the obligation to also stay the exercise of domestic competence until another competent NCA decides the case in its application of EU antitrust. This is yet another example of the procedural implication of the convergence rule, but it remains unclear whether or to what extent it would be possible in such a situation to resume enforcement given the *ne bis in idem* prohibition.

In fact, perhaps even more important than its possible vertical dimension within the consistency mechanism for preventing conflicts between Commission and NCA decisions, the *ne bis in idem* principle is also applicable horizontally to parallel enforcement of EU antitrust by two or more NCAs at a time. Thus, in order to avoid paralyzing the whole system of trans-national cooperation and mutual assistance, it is indispensable to be more precise about the conditions that could trigger the *ne bis in idem* prohibition. A recent discussion before the Court of Justice placed more weight on the *idem* part and suggested to reconsider the required three-fold identity of fact, offender and protected legal interest by removing the latter[42]. In *Toshiba*, the Court did refer to a given conduct's anti-competitive effects within a relevant market as part of the *idem* condition[43], but refrained from discussing the *bis* condition. Nevertheless, the latter is indispensable for deciding what would be a second investigation against the same undertakings for the same facts, irrespective of the applicable law.

[42] Ibid., paras 122 and 123.

[43] Case C-17/10 *Toshiba*, op. cit., para 99.

A closer look at the cases, not only in competition matters where the *ne bis in idem* principle has been considered either by the EU judicature or the ECHR, could support the view that, a material criterion – that is, the nature of the final decision in the first proceedings – matters more than the organic criterion – that is, a subsequent prosecution by *another* authority[44]. There is, in effect, a crucial difference between administrative and judicial enforcement decisions that emerges from the comparison of "condemnation" and "acquittal" decisions. Where a previous infringement decision imposes a penalty, then another administrative NCA need only take into account that penalty and its territorial reach determined by the respective *imperium*. There is nothing to prevent it however from formally finding again that Articles 101 and 102 TFEU have been violated[45]. By contrast, judicial findings on the merits enjoy *res judicata* authority[46], which reflects the *juridictio* determined by the scope of the applicable law. That authority could, as such, trigger the *ne bis in idem* prohibition, especially where no infringement has been found. Therefore, given the diversity of NCAs, there may be some concerns about the level-playing-field enforcement of EU antitrust by national authorities alone.

In light of the above, it appears even clearer that the ECN and close cooperation within it have been designed as if all its members would be administrative authorities like the Commission and would have similar powers. Although most of the NCAs are indeed a close match to the Commission in terms of powers and organization, there are still Member States where antitrust enforcement decisions are adopted by courts, and thus have the status of *res judicata*. Furthermore, even in countries where administrative authorities are in charge of antitrust enforcement, subsequent judicial review may also include the power to re-decide the case on the merits, in which event the very finding that antitrust violations have or have not occurred would bear *res judicata* authority. In both of these cases, meritorious decisions by courts or tribunals are not subject to the cooperation and consistency mechanisms of the ECN that allow the Commission to step in and revoke the case; otherwise, they will no longer be considered as courts or tribunals for the purposes of referring

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[44] Concerning Art. 54 of the Convention implementing the Schengen Agreement (CISA): Judgmetn of the CJ of 5 June 2014 in Case C-398/12 *M.*, paras 30, 31 and 40; Case C-491/07 *Turansky* [2008] ECR-I 11039, paras 34 and 35; Case C-150/05 *Van Straaten* [2006] ECR-I 9350, para 61; Case C-469/03 *Miraglia* [2005] ECR I-2009, para 30. *Adde*. ECtHR *Zolotoukhin*, op. cit. para 83.

[45] Case 14/68 *Walt Wilhelm* [1969] ECR 1, para 11.

[46] ECtHR *Grande Stevens*, op. cit. para 222, in which the Court pointed out, in line with *Zolotoukhin*, that it is the moment of acquiring *res judicata* that determines whether one has already been finally acquitted or convicted within the meaning of Art. 4 of Protocol n°7. At the EU level, AG Sharpston took the view that so far the ECJ's approach has not been dissimilar from that of the ECtHR (Case C-398/12 *M.*, para 35).

preliminary questions to the ECJ[47]. On the other hand, not only can the *res judicata* of such enforcement decisions trigger the *ne bis in idem* prohibition and paralyze simultaneous or subsequent proceedings before several NCAs, but it may also call into question the ongoing efforts to synchronize public and private enforcement of EU antitrust where the parties to competition proceedings are also defendants in damages actions before civil or commercial courts.

III. Proceedings before competition and judicial authorities

It is now well established that from its inception the procedural reform introduced with Regulation 1/2003 aimed at giving more weight to private enforcement of Articles 101 and 102 TFEU. A decade later, the long awaited EU legislation on damages claims arising out of antitrust violations is about to become effective law[48]. As expected, one of the main concerns, which is now a key objective of the new harmonized rules, has been the balance between a largely dominant public enforcement and a still underdeveloped private enforcement[49]. Seeking complementarity rather than opposition or duplication between proceedings with different purposes[50], the Draft Directive provides for procedural economy by decidedly easing proof of infringements before competent civil or commercial courts across the EU[51]. In so doing, it combines different approaches and solutions already existing in various legal instruments, such as the Regulation on judicial competence[52] or the

[47] Case C-53/03 *Syfait*, [2005] ECR-I 4638, paras 34 and 36.

[48] Based on the Commission proposal of 11 June 2013 for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM(2013) 404 final, "Commission Proposal"), the European Parliament and the Council agreed upon an amended text, which was adopted by the Parliament on 17 April 2014, pending final approval by the Council (A7-0089/2014, "Draft Directive").

[49] Recital 6 in the preamble to the Draft Directive. See also para 1.2 of the Explanatory Memorandum to the Commission Proposal.

[50] See White Paper on Damages actions for breach of the EC antitrust rules (COM(2008) 165 final), p. 3, Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules (SEC(2008) 404), paras 18 and 21.

[51] Recital 31 in the preamble to, and Art. 9 of the Draft Directive.

[52] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12/1). This Regulation has been replaced by Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351/1) which for the most part will enter into force on 10.01.2015.

Regulation on obtaining evidence abroad[53] and of course Regulation 1/2003. Accordingly, the intensity of the effects of NCA enforcement decisions on private proceedings may vary, to a different extent, by comparison to those of Commission final decisions. Moreover, the Draft Directive considers all together public enforcement of both national and EU antitrust in order to delimit the binding authority of NCA decisions, which is a considerable extension of the scope of a consistency mechanism that had originally been designed solely for public enforcement of EU law. As a result, some of the problems discussed in the previous section are likely to reappear under the newly harmonized rules for damages claims, all the more so as these only regulate the effects of infringement decisions (**A**) to the exclusion of those of non-infringement decisions (**B**).

A. Effects of infringement decisions

The underlying reason for making final infringement decisions binding upon civil or commercial courts has been to improve the level-playing field for potential plaintiffs in private actions, while still ensuring consistent enforcement. This dual goal reflects the role of private enforcement in the EU, which transcends simple compensation for antitrust harm and seeks effective judicial protection of rights stemming from direct-effect provisions of EU law. The latter would indeed be seriously jeopardized without proper interaction with competition authorities. In addressing this need, both EU and national law provide mechanisms for assistance (allowing preliminary references and *amicus curiae* submissions) as well as for coherence (compelling national courts to observe the meritorious findings of public enforcement decisions). This observance, however, varies depending on the competition authority concerned. According to the Draft Directive, Commission and "national" NCA decisions, without or upon judicial confirmation, share essentially the same preclusive effect as to further re-decision on the merits, with the notable exception that, at the national level, this effect may also cover enforcement of domestic antitrust. On the other hand, unlike the Commission Proposal[54], "non-national" NCA decisions may only constitute *prima facie* evidence of antitrust infringement on any market within the EU. This includes instances

[53] Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174/1).

[54] Art. 9 of the Commission Proposal provided for the same territorial scope of binding effect of NCA decisions as already suggested in the White Paper, see Staff Working Paper, para 162.

where they do not survive judicial review and the case is re-decided on the merits with *res judicata* effects.

Building upon the seminal ruling in *Masterfoods*, first Article 16(1) of Regulation 1/2003 and now Article 9(1) of the Draft Directive prevent national civil or commercial courts from reconsidering the very finding of an infringement in a decision that apply Articles 101 and 102 TFEU. But the new Directive takes a step further in two respects. First, its latest version makes it clear that NCA enforcement decisions merely establish an irrefutable presumption that an antitrust violation had occurred. Second, this presumption is to apply in actions for damages under both EU *and* domestic antitrust when enforced in parallel[55]. Such a harmonized rule leaves, nonetheless, some room for uncertainty about the scope and the nature of the effects given to infringement decisions.

It should be recalled that on the one hand, national courts also have a duty to apply EU antitrust, like the NCAs, as long as a private action under domestic law is brought against alleged anticompetitive behavior that may affect interstate trade. However, in a follow-on context it seems obvious that EU law already applies, irrespective of how many of the defendants are also addressees of an infringement decision. Consequently, there can be no action for damages harmonized by the Directive-to-be without prior public enforcement, and plaintiffs would typically invoke either a Commission or an NCA decision. Yet, in cases dealt with in parallel by the Commission and a given NCA, the discrepancy discussed above between Articles 16(2) and 3(2) of the Regulation might result in a differentiated, although not conflicting, enforcement of Article 102 (and its national equivalent) to the same set of facts. Indeed, since the NCAs must only avoid a decision that would run counter to the Commission's findings, they could eventually likewise adopt an infringement decision by applying stricter domestic rules to the conduct at issue. That would, arguably, not be without consequences for issues such as causation, which generally falls outside the scope of the Draft Directive, except for harm caused by cartel infringements[56]. Therefore, it is not unlikely that, in hearing actions for damages under both EU and domestic abuse-of-dominance prohibitions, national courts encounter a sort of non-harmonized gap between

[55] Recital 10 *in fine* in the preamble to the Draft Directive: "The provisions of this Directive should not affect damages actions for infringements of national competition law which do not affect trade between Member States within the meaning of Article 101 or 102 TFEU."

[56] Recital 42 of the preamble and Art. 17(2) of the Draft Directive. In addition, the CJ has recently established that national legislations may not exclude, categorically and regardless of the particular circumstances of the case, the existence of a direct causal link between so called "umbrella pricing" and alleged antitrust harm of cartel infringement (Case C-557/12, *Kone*, para 33). By contrast, on causation and binding effects in an Art. 82 EC case, see. UK case *Enron Coal v. English Welsh & Scottish Railway*, [2011] EWCA Civ 2.

the binding effect of Commission decisions pursuant to Regulation 1/2003 and similar effects of applying national law. At the same time, this example highlights the evidentiary nature of the effects in question.

It should be noted that, regardless of possible approximations, the authority of Commission decisions within the ECN and their binding effect upon national courts are actually substantially different. Unlike the former, the latter is not intended to develop a certain antitrust policy throughout the EU. Instead, it is meant to reduce asymmetrical access to and use of evidence since competition proceedings are particularly complex and fact-intensive[57]. From this angle, it is more appropriate to consider as identical the effects of public enforcement upon damages claims, while their magnitude may vary according to the competition authority concerned. In other words, both the "preclusive effect" of Commission and "national" NCA decisions, on the one hand, and the "effect of prima facie evidence" of "non-national" NCA decisions, on the other hand, have strictly the same evidentiary nature or "probative effect"[58], which is also suggested by the use of a legal presumption[59] instead of a specific rule that controls the outcome of applying the law[60]. The difference, however, resides in the extent to which defendants, or even some plaintiffs, in actions for damages are allowed to incidentally challenge the findings of a competition authority, given that private enforcement derives from the direct effect of Articles 101 and 102 TFEU.

Thus, in light of the principle of effective judicial protection, parties to proceedings before national civil or commercial courts who were not the addressees of the given infringement decision of the Commission may request a reference to the Court of Justice in order to re-examine the legality of that decisions[61]. Similar mechanisms for extraordinary judicial review exist at the Member State level as regards enforcement decisions of "national" NCA. By contrast, where findings of an infringement of EU antitrust are relied upon in another Member State, such decisions of "non-national" NCAs may not be challenged incidentally; hence, they could only be considered *at least* as prima facie evidence, according to the Draft Directive. While it is true that the new rules provide for minimum harmonization, it remains to be seen how this minimally intensive effect of prima facie evidence will contribute to a more level playing field for private actions sought in the

[57] Recital 13 of the preamble to the Draft Directive.

[58] Para 4.3.1 of the Commission Proposal.

[59] A technique that only presumes the existence of a given fact and does not determine, as such, the authority of final judicial or administrative decisions.

[60] Such as Art. 16(2) of Regulation 1/2003 and the *res judicata* and *res interpretata* authority of CJ rulings.

[61] Case C-128/92 *H. J. Banks* [1994] ECR-I 1209, Opinion AG Van Gerven, para 60.

Commission's proposal. Alternatively, it might introduce an incentive for forum shopping in countries such as Germany whose procedural rules, respectful of the equivalence principle, already recognize as binding the findings of "non-national" NCAs[62].

The German example is also interesting as it draws heavily upon the Commission's analysis in previous public consultations, but ultimately departs from the Draft Directive by differentiating the effects of judgments reviewing the legality of NCA decisions from the effects of judgments re-deciding the case on the merits in lieu of an NCA. Indeed, first the definitions governing the new harmonized rules refer to "infringement decision" as a decision of a competition authority or review court that finds infringement of competition law[63]. Second, "review court" is to be understood irrespective of whether that court has the power to find an infringement of competition law[64]. Finally, both the binding effect and that of *prima facie* evidence are equally applicable to, respectively, "national" and "non-national" review court judgments[65]. As a result, the evidentiary nature of the two effects as well as the binding authority of Commission decisions are somewhat assimilated to the *res judicata* of meritorious judgments. This is also supported by the view that not only the operative part but also its supporting grounds are to be observed by the courts in actions for damages, which is a direct reference to the scope of judicial *res judicata*.

Nevertheless, what should not be overlooked is that the *res judicata* authority is not evidentiary in nature but a defining characteristic of the judgment as an act of exercising *jurisdictio*. Likewise, it should not be confused with the *sui generis* binding effect of Commission decisions, which is the result of a specific provision, intended to preserve the primacy of EU law. Otherwise, should binding effects and *res judicata* be considered as interchangeable, it would be, instead, even more difficult to see why judicial findings of non-infringement need not be taken into account in follow-on actions, inasmuch as review courts are not part of the ECN and that no harmonization in this respect has been contemplated by the Draft Directive.

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[62] §33(4) GWB: "Where damages are claimed for an infringement of a provision of this Act or of Article 81 or 82 of the EC Treaty, the court shall be bound by a finding that an infringement has occurred, to the extent such a finding was made in a final decision by the cartel authority, the Commission of the European Community, or the competition authority or court acting as such in another Member State of the European Community. The same applies to *such findings* in final judgments resulting from appeals against decisions pursuant to sentence 1" (emphasis added).

[63] Art. 4(11) of the Draft Directive.

[64] Art. 4(10) of the Draft Directive.

[65] Recital 31 of the preamble to the Draft Directive.

B. Effects of non-infringement decisions

That non-infringement decisions are not given any consideration in the new Directive-to-be on damages claims is not surprising in light of *Toshiba*. According to that judgment, finding Articles 101 and 102 TFUE inapplicable in individual cases remains exclusively with the Commission pursuant to Article 10 of Regulation 1/2003 while NCAs may only state no grounds for action by virtue of Article 5(2) thereof[66]. It could thus appear rather superfluous to set out common rules for the effects non-infringement decisions might have upon courts and private parties in follow-on actions[67]. Nevertheless, unless NCA decisions are to be reviewed merely on grounds of legality or even re-decided on the merits but only to find an infringement, it would not be uncommon for defendants in damages claims to invoke and rely on judgments of review courts that hold, with *res judicata* opposable to plaintiffs, that no violation of EU antitrust had occurred. In fact, such *res judicata* findings of non-infringement are even more likely where a court acts as the decision-making body of the NCA. It is therefore not quite clear why applying the prohibitions in Articles 101 and 102 TFEU, by formally finding that they have not been breached, would jeopardize the proper functioning of cooperation under Regulation 1/2003 seeing as the latter does not include public enforcement by judicial authorities. Besides the *ne bis in idem* argument, which could hardly apply to such findings by administrative NCAs, there seems to have been a confusion between non-infringement and inapplicability decisions which is even more visible in light of the respective effects these two types of decision may have on private enforcement. While both raise similar issues as to the exact scope of their authority upon subsequent determination of liability for antitrust damages, inapplicability decisions are given strong binding effects whereas non-infringement decisions remain purely declaratory.

The personal reach of infringement decisions is of course important but does not itself determine the outcome of subsequent private actions. By contrast, a binding decision by a competition authority that declares Articles 101 and 102 TFEU either inapplicable or that their prohibitions have not been violated in a given case, effectively bars further discussion of alleged personal liability for antitrust damages or any other civil claim for that matter. Accordingly, the exact scope of such enforcement decisions (which clearly benefit potential defendants in follow-on private claims) is most likely to be the focal point of the debate before civil or commercial courts. As a general rule, administrative

[66] Case C-375/09 *Tele2 Polska*, op. cit., para 30.

[67] Likewise, the White Paper did not consider non-infringement decisions, Staff Working Paper, para 152.

decisions, including those of the Commission, are binding in their entirety upon whom they are addressed to in the operative part[68]. On the other hand, considering a given anticompetitive behavior as such could place more weight on subject-matter findings of fact, and thus widen protection against claims for damages.

The issue has already appeared at the national level under the procedural framework prior to Regulation 1/2003[69] and cannot be ruled out at present as well, even though the Commission has not issued an Article 10 decision yet. That is because both inapplicability and non-infringement decisions share essentially the same evidentiary effects regarding private enforcement as infringement decisions: whether or not a relevant fact has been established for the purposes of proving a follow-on claim. However, where facts are found inexistent or not proven to the requisite standards, limiting the reach of the evidentiary effects of such findings by making them opposable *inter partes* also reveals potential inconsistency risks from a broader policy perspective. It is this perspective that, actually, draws the line between inapplicability and non-infringement decisions, depending on their binding authority as regards the competent civil or commercial courts.

As it is apparent from recital 14 of the preamble to Regulation 1/2003, Article 10 decisions are meant to be an *ex ante* means for ensuring consistency throughout the EU with respect to novel issues related to agreements or practices that, exceptionally, need not be prohibited any longer[70]. Accordingly, they are to be issued solely at the Commission's discretion, either *ex nihilo* or by revoking an NCA case which would otherwise find an infringement of Articles 101 and 102 TFEU. The latter scenario also suggests that, in addition to their *ex ante* authority, inapplicability decisions may as well contain an *ex post* declaration about the lawfulness of the conduct at issue. That *ex post* finding has the same declaratory nature as a formal finding of non-infringement; in both cases, administrative decisions merely state the law as it stands. As such, they could only produce binding evidentiary effects *inter partes*, had there been a provision, European or national, similar to Article 16 of the Regulation or Article 9 of the Draft Directive that would regulate the effects upon private litigation of non-infringement decisions by the NCAs.

By contrast, the Commission's inapplicability decisions are also – and most notably – oriented *ex ante* where Article 16(1) of Regulation 1/2003 will have

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[68] Art. 288 TFEU.

[69] *Inntrepreneur Pub Company e. a. v Crehan* [2006] UKHL 38; *Crehan v Inntrepreneur Pub Company* [2004] EWCA Civ. 637.

[70] Case C-375/09 *Tele2 Polska* [2010] ECR-I, Opinion AG Mazak para 37. *Adde*., Commission Staff Working Paper accompanying the Report on the functioning of Regulation No. 1/2003 (SEC(2009) 574 final).

the effect of extending their authority by making them binding upon the competent courts as to the very outcome of a private litigation. This *ex ante* focus relates to sufficiently similar *ratione materiae* but not identical *ratione personae* cases in the future, that is, those concerning the same markets and/or comparable agreements and practices. Arguably, in such cases deference to Article 10 decisions would appear quite like observing an *ad hoc* block exemption, including in abuse-of-dominance cases, which could also raise questions about the scope and applicability of the convergence rule in Article 3(2). On the other hand, NCA findings of non-infringement remain purely declaratory since defendants in private litigation to whom they are opposed but who were not parties to the original public enforcement proceedings are generally entitled to challenge incidentally their legality. From this angle, the procedural regime of non-infringement decisions is evidently closer to that of decisions stating no grounds for action[71] (where NCAs are to issue a reasoned decision in every case upon an admissible complaint) than to that of the Commission declaring Articles 101 and 102 TFEU exceptionally inapplicable to a given type of conduct on the market[72].

More generally, however, the Court of justice's differentiated approach to inapplicability and non-infringement decisions could be said to reflect a remnant of the initial enforcement framework for the Treaty antitrust provisions. In other words, it seems to reflect the classical vertical line of cooperation between the Commission and the national competition and judicial authorities, as opposed to the current horizontal line of coordination between public and private enforcement. Making the latter a workable model of complementary and mutually effective application of Articles 101 and 102 TFEU cannot take place without genuine decentralization of public antitrust enforcement since private enforcement takes place solely at the national level.

Accordingly, NCAs need not be prevented or discouraged to apply the Treaty antitrust provisions in their entirety by thoroughly examining their substantive conditions and unequivocally declaring them violated or not. This is supported *a fortiori* by the fact that judicial authorities may already make the same findings with *res judicata* effects in both public and private actions. Therefore, formal non-infringement decisions not only better guarantee the rights of complainants in administrative proceedings but also add to further synchronization of antitrust enforcement by agencies and courts in order to give full effect to the legal

[71] See e.g., in the context of Regulation 17/62, Case T-24/02 *First Data*, [2005] ECR II-4122, para 50.

[72] See, to that effect, A. Dinev, "The Bulgarian Supreme Administrative Court upholds an NCA decision finding no infringement of Art. 102 TFEU in a case involving concurrent application of competition rules and communications regulation (BTC Cable Ducts)", *e-Competitions*, n° 38336; available at www.concurrences.com.

exception system, introduced with Regulation 1/2003. That is all the more important as the Commission has concentrated its efforts on prosecuting large-scale cartels that could not possibly qualify for an exemption.

Conversely, apart from block exemption regulations, Article 101(3) TFEU is set to be applied chiefly by national authorities and courts. They are also the natural fora for the vast majority of Article 102 cases. As a result, in spite of lacking expertise in conducting complex economic assessments, civil or commercial courts in stand-alone actions remain better placed to rule on the existence or not of an antitrust infringement than all the administrative NCAs across the Union. That is so because NCAs' final decisions on the merits, may only, in view of the Court of Justice, find an infringement, no matter the appraisal of alleged objective justifications or Article 101(3) conditions. Decidedly, asymmetrical powers to enforce equally applicable provisions could eventually lead to disproportionate incentives for either follow-on or stand-alone private claims at the expenses of a more consistent approach to antitrust as a system of rules and decisions.

Conclusions

In guise of conclusion, the effects of antitrust enforcement decisions in the EU are naturally multi-dimensional in the complex procedural aftermath of Regulation 1/2003. They could also, however, call into question the effectiveness of EU antitrust. There are more or less obvious deficiencies in the procedural framework for applying Articles 101 and 102 TFUE in a consistent manner throughout the Union, regardless of either the temporal or geographical scope of enforcement or its public or private nature. From a public enforcement perspective, reciprocal influences between proceedings, as well as the mutual interdependence of EU and national rules, may adversely impact the dynamics of either subsequent or simultaneous single- and multi-agency actions. That negative impact may go to an extent that reduced network efficiency of the ECN and significantly increases the risk of inconsistency. But consistency is likewise at risk by non-ECN public enforcement within judicial review of administrative NCA decisions. Ultimately, the challenges before the ECN could be decisive for striking a workable balance between public and private enforcement as long as the former is to set the tone for applying Articles 101 and 102 TFEU in actions for damages. In any event, however, the evolving procedural landscape of EU antitrust over the past ten years has been a useful example of how a complex system interacts with its environment, legal and economic, in order to foster a truly European competition culture.

A Study on the 2013 Amendment to the Antimonopoly Act of Japan
– Procedural Fairness under the Japanese Antimonopoly Act

by

Shuya Hayashi*

CONTENTS

Abstract

The 2013 Amendment to the Japanese Antimonopoly Act, promulgated on 13 December 2013, abolished the current Hearing Procedure System for administrative appeals administered by the Japan Fair Trade Commission. However

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the New Amendment raises a number of problems concerning procedural issues, including independence of the Japan Fair Trade Commission, limitations of judicial review, and exclusive jurisdiction of the Tokyo District Court. This paper reviews related discussions regarding these issues and points out additional possible grounds for the criticism of the 2013 Amendment.
In addition, following the abolition of the Hearing Procedure System, the 2013 Amendment sets out new provisions on hearing procedures under the Antimonopoly Act. This paper thus makes a detailed comparison between the newly enacted provisions on hearing procedures under the Antimonopoly Act and the relevant provisions under the Administrative Procedure Act, which is Japan's main law on administrative procedures. By comparing these provisions, the author examines to what extent procedural fairness is accomplished under the Antimonopoly Act.

Résumé

L'amendement de 2013 à la Loi antimonopole japonaise, promulgué le 13 Décembre 2013, a aboli le système actuel de la procédure d'audience en cours d'appel administratif gérés par la Commission japonais du commerce équitable (Japan Fair Trade Commission (JFTC)). Toutefois, le nouvel amendement soulève un certain nombre de problèmes concernant les questions procédurales, y compris l'indépendance de la JFTC, la limitation du contrôle judiciaire, et la juridiction exclusive de la Cour de la région de Tokyo. Cet article examine les discussions sur ces questions et souligne d'autres motifs possibles pour la critique de l'amendement de 2013. Suite à l'abolition du système de la procédure d'audience, l'amendement de 2013 contient également des nouvelles dispositions relatives à la procédure d'audition en vertu de la Loi antimonopole. Cet article permet ainsi une comparaison détaillée entre ces dispositions nouvellement adoptées et les dispositions pertinentes de la Loi sur la procédure administrative, qui est la loi principale du Japon sur les procédures administratives. En comparant ces dispositions, il est examiné à quel point l'équité procédurale est réalisée sous la Loi antimonopole.

Classifications and key words: the 2013 Amendment to the Japanese Antimonopoly Act; procedural fairness; abolition of the Hearing Procedure System; exclusive jurisdiction of the Tokyo District Court; inspection and transcription of evidence

I. Preface and Summary of the Amendment to the Antimonopoly Act of 2013

This paper presents a study on the 2013 Amendment[1] (hereafter: the New Amendment), to the Japanese Antimonopoly Act[2], which abolished the current Hearing Procedure System for administrative appeals[3] administered so far by the Japan Fair Trade Commission (hereafter: the JFTC). The New Amendment was promulgated on 13 December 2013, and will be put in force in 2014 or 2015. Nevertheless, as many economic law scholars point out[4], the New Amendment raises a number of problems concerning procedural issues in particular. These problems constitute the focus of the following analysis.

The New Amendment can be summarized in three following main points. First, 1) the existing Hearing Procedure System for administrative appeals administered by the JFTC will be abolished[5]. Moreover, several provisions of the current AMA will also be abolished. They include: Article 85 item (i)[6] which provides for appellate jurisdiction of the Tokyo High Court over the JFTC's administrative orders; Article 80[7], which sets out the substantial evidence rule that dictates that fact findings made by the JFTC is binding on

[1] The full text of the 2013 Amendment in Japanese is available at http://www.sangiin.go.jp/japanese/joho1/kousei/gian/185/pdf/s031830721850.pdf (28.08.2014).

[2] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 14 April 1947) (hereafter: AMA).

[3] It can be understood as an administrative tribunal system within the competition authorities.

[4] *See*, *e.g.*, C. IKEDA, et al, "A formal opposition to the abolition of the Hearing Procedure System", *Hōritsu Jihō* vol. 82 no. 4, p. 73 (2010).

[5] The relevant provisions are to be found from Art. 52 to 68 and in other relevant provisions of the current AMA.

[6] Art. 85 item (i) of the current AMA provides: " The jurisdiction of the first instance over any action or suit falling under any of the following items shall lie with the Tokyo High Court: (i) Action for the judicial review of an administrative disposition defined in Article 3, paragraph (1) of the Administrative Case Litigation Act in connection with decisions of the Fair Trade Commission (excluding action defined in paragraphs (5) to (7) included in the same Article)."

[7] Art. 80 of the current AMA provides: "(1) If a finding of fact made by the Fair Trade Commission in an action provided for in Article 77, paragraph (1) is based on substantial evidence, it is binding on the court. (2) The court shall decide whether or not the substantial evidence provided for in the preceding paragraph exists."

the court if established by substantial evidence and; Article 81[8] imposing limits on submitting new evidence[9].

Second, 2) according to Article 85, 86 and 87 of the New Amendment, the Tokyo District Court will have exclusive jurisdiction over appeals against cease and desist orders issued by the JFTC for violations of the AMA. Moreover, trials and judgments will be held by a panel of three or five judges. Such provisions are meant to ensure judicial expertise of the reviewing court.

Third, 3) changes are made to the hearing procedures which the JFTC conducts prior to issuing a cease and desist order. In order to enhance administrative procedures prior to the issuance of a final administrative order, the New Amendment contains relevant provisions on presiding hearing officers, explanations of the content of an anticipated cease and desist order, and on the inspection and transcription of evidence of facts found by the JFTC.

With respect to the reform of hearing procedures presided over by designated officers[10], the following five points should be noted. First, regarding a presiding officer in charge of a hearing procedure[11], the New Amendment provides that a hearing procedure should be presided over by an officer (a designated officer; the so-called "procedural officer") designated by the JFTC for each case. Second, regarding explanations by investigators[12], the New Amendment provides that the designated officer should have investigators, and other officials engaged in the case, provide explanations of the content

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[8] Art. 81 of the current AMA provides: "(1) A party may offer the court new evidence relevant to the case only provided that the reason for which a party offers new evidence in connection with a facts found by the Fair Trade Commission must fall under either of the following items:
(i) that the Fair Trade Commission failed to adopt the evidence without justifiable grounds;
(ii) that it was impossible to present the evidence at the hearings of the Fair Trade Commission, and there was no gross negligence on the part of the party in failing to present such evidence.
(2) Concerning the offer of new evidence provided in the conditions of the preceding paragraph, the party seeking to introduce the evidence must prove that the evidence falls under any of the items of the preceding paragraph.
(3) If the court finds there to be grounds for a party to offer new evidence as provided in the condition of paragraph (1) and it is necessary to examine such evidence, the court shall remand the case to the Fair Trade Commission and order it to take appropriate measures after examining such evidence."

[9] It stipulates that a party may present the court new evidence relevant to the case where the JFTC failed to adopt the evidence without justifiable grounds.

[10] Art. 49 et seq. of the New Amendment.

[11] Art. 53 of the New Amendment.

[12] Art. 54(1) of the New Amendment.

of an anticipated cease and desist order[13] for a party attending the hearing[14]. Third, regarding the appointment of a representative[15], pursuant to the New Amendment the party concerned may appoint a representative during hearing procedures. Fourth, regarding the statements of opinion and inquiry of investigators at the hearing[16], the party concerned may attend the hearing, state his/her opinions, submit evidence, and, with the permission of the designated officer, question investigators[17]. Fifth, regarding the preparation of records and reports by the designated officer[18], the New Amendment provides that the designated officer should prepare a written record of the minutes of the hearing, including statements of opinion by the party attending the hearing. The officer should also prepare a report listing the contentious issues pertaining to the hearing. The written record and report should be submitted to the JFTC. The JFTC should, pursuant to the New Amendment, take both of these documents into proper consideration before making a decision on the cease and desist order.

Next, with respect to the inspection and transcription of evidence of facts found by the JFTC[19], the following two points should be noted. First, regarding the inspection of evidence, the party concerned may inspect the evidence establishing the facts of the case found by the JFTC during the period from the time the party received the hearing notice until the end of the hearing. Second, regarding the transcription of evidence, among the evidence subject to the inspection, the party may request a transcript of the material submitted by the party itself, and that of recorded statements provided by the party's employees.

To better understand the preceding explanations, refer to the diagram below.

[13] It should include the content of anticipated cease and desist orders, facts found by the JFTC, application of applicable laws and regulations to such facts, and main evidence.

[14] It means the anticipated recipient of the cease and desist order.

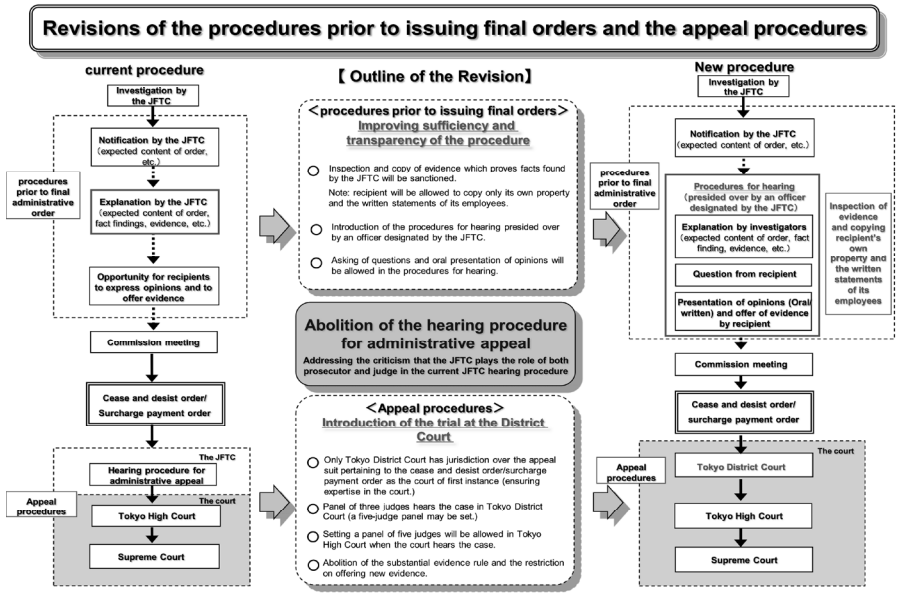
[15] Art. 51 of the New Amendment.

[16] Art. 54(2) of the New Amendment.

[17] The party may choose to present written statements and evidence instead of attending the hearing.

[18] Art. 58 and 60 of the New Amendment.

[19] Art. 52 of the New Amendment.



Source: JFTC's website, http://www.jftc.go.jp/en/pressreleases/yearly-2013/Dec/individual131209.files/Attachment2.pdf

II. Abolition of the Hearing Procedure System for administrative appeals

1. Discussions on procedural fairness under the AMA in Japan

Current discussions on the possible revisions of the JFTC's Hearing Procedure System can be roughly divided into three categories. First, 1) the so-called "argument for the abolition of the JFTC's Hearing Procedure System," which is meant to abolish the JFTC's Hearing Procedure System and to have complaints against the JFTC's administrative orders be filed to, and considered by, a court in litigation. Second, 2) the so-called "argument for the return to the *ex ante* Hearing Procedure System", which supports the re-adoption of the *ex ante* Hearing Procedure System[20]. Three, 3) the so-called "argument for the maintenance of the current system," which asserts that the current *ex post* Hearing Procedure System[21] works fine and needs no changes.

[20] It means a hearing procedure held prior to the issuance of the JFTC's recommendation.

[21] It means a hearing procedure may be held afterward in order to review the JFTC's order issued to a party dissatisfied with the order and appeals to the JFTC.

First, 1) the "argument for the abolition of the JFTC's Hearing Procedure System,"[22] is based on the objection that the JFTC plays a dual role therein, as both prosecutor *and* judge. The System is also criticized because there may be a problem of lacking "procedural fairness". This argument suggests that the JFTC's Hearing Procedure System should be abolished, and the JFTC's administrative orders should be appealed directly to the court of 1st instance. The New Amendment follows this line of argumentation.

Second, 2) the "argument for the return to the *ex ante* Hearing Procedure System" asserts that, in the *ex ante* Hearing Procedure System, the JFTC would hear statements from entrepreneurs prior to issuing an order. This system allows the JFTC to apply its specialized knowledge so as to make prudent and sophisticated decisions. Besides, compared to the *ex post* system, the *ex ante* system provides more extensive protection of procedural rights. The *ex ante* Hearing Procedure System is supported in an official report (26 June 2007, the Cabinet Office), published by the round-table conference on the basic issues of the Antimonopoly Act held by the Chief Cabinet Secretary[23]. In addition, many competition law scholars and practitioners support this argument.[24]

Third, 3) the "argument for the maintenance of the current system"[25] mainly follows two aspects. One is that the current *ex post* system allows the JFTC to issue orders more rapidly than the *ex ante* system, and that it also contributes to the decline in the number of hearing cases. The second important issue here is that maintaining the Hearing Procedure System has the advantage of allowing the JFTC to apply its specialized knowledge under the hearing procedure.

In addition to the above arguments, the Japan Federation of Bar Associations brings forward a proposal[26] relating to a new system whereby a party may selectively choose to initiate a hearing procedure *or* directly file a lawsuit with the court when it wants to file a complaint against the JFTC's order. This proposal, though as a possible solution, has potential problems.

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[22] *See*, *e.g.*, KEIDANREN (the Japan Business Federation), *Towards the Abolition of Hearing Procedure System administered by the Japan Fair Trade Commission and Procedural Fairness in its investigation procedures* (2009); available at https://www.keidanren.or.jp/japanese/policy/2009/086.html (28.08.2014).

[23] The Advisory panel on basic issues regarding the Antimonopoly Act, *Report Issued by the Advisory Panel on Basic Issues Regarding the Antimonopoly Act*, the Cabinet Office of Japan (2007); available at http://www8.cao.go.jp/chosei/dokkin/archive/kaisaijokyo/finalreport/body.pdf (28.08.2014).

[24] *See supra* note 4.

[25] *See supra* note 23, pp. 23–30.

[26] The Japan Federation of Bar Associations, *Opinion on the Report Issued by the Advisory Panel on Basic Issues Regarding the Antimonopoly Act* (2007), pp. 8–9; available at http://www.nichibenren.or.jp/library/ja/opinion/report/data/070823_2.pdf (28.08.2014).

One of the anticipated problems is that, if such administrative review system was adopted, it would be likely that some entrepreneurs might file a lawsuit to the district court, while other entities engaged in the very same case might choose to initiate the JFTC's hearing procedure. As a result, the decision rendered by the district court might differ from that issued by the JFTC, though both decisions would relate to the same case. Such inconsistency is likely to result in considerable confusion regarding the discovery of the facts in the case. It would also present a potential danger that, though both parties filed an objection against the order, one might be granted relief from the order while the other might not. Another problem is that administrative affairs would become more complicated and entangled if the lawsuit and the hearing procedure proceed simultaneously. This might have adverse effects on the JFTC's investigation and might delay its hearing procedure.

After discussions, it was decided that the New Amendment will abolish the JFTC's Hearing Procedure System. The decision drew severe criticism from the business community[27] arguing that the JFTC's hearing procedure lacks procedural fairness because, under the current *ex post* Hearing Procedure System, the JFTC has to determine the appropriateness of its own orders by itself, due to the inherent limitation of the *ex post* Hearing Procedure System. Relevant here is also the political background of the New Amendment. Article 20(1) of the supplementary provisions of the Amendment to the Antimonopoly Act of 2009[28] provides that: "Concerning the provisions relating to the current Hearing Procedure System, the Government of Japan shall undertake an overall review of the System, and conduct a study within the fiscal year 2009. Necessary measures shall be taken based on the result of the study." Furthermore, the supplementary resolution attached to the preceding Amendment to the Antimonopoly Act of 2009 states[29]: "Concerning the provisions relating to the Hearing Procedure System, the supplementary provisions of the Amendment to the Antimonopoly Act of 2009 provide that the Government of Japan shall undertake an overall review of the System, and take necessary measures based on the result of the study conducted within the fiscal year 2009. As to the result of the study, it indicates two possible options: one is to continue adopting the current Hearing Procedure System without amendment, and the other is to amend the Hearing Procedure

[27] *See*, *e.g.*, the Japan Chamber of Commerce and Industry and the Tokyo Chamber of Commerce and Industry, *Opinion on the Summary of Issues Concerning the System for Deterring Undertakings from Engaging in Violations Against the Antimonopoly Act* (2006), p. 3; available at http://www.jcci.or.jp/nissyo/iken/060908dokkinho.pdf (28.08.2014).

[28] Act No. 51, 2009.

[29] The House of Representatives' Committee on Economy, Trade and Industry, 24 April 2009; the House of Councilors' Committee on Economy and Industry, 2 June 2009.

System drastically, without returning to the *ex ante* Hearing Procedure System before the 2005 Amendment." Besides, the Democratic Party of Japan, the ruling party at that time, urged for the abolishment of the Hearing Procedure System in its political manifesto. In response to these political changes, the New Amendment is intended to abolish the JFTC's Hearing Procedure System and grant jurisdiction over appeals against the JFTC's administrative orders to the courts, aiming to address the criticism regarding the fairness of the current procedure. Nevertheless, the New Amendment faces fresh criticism that the JFTC's loss of quasi-judicial authority is likely to jeopardize the *raison d'être* of the JFTC, the latter being an independent administrative commission whose independence in exercising its authority is guaranteed by law.

2. The JFTC's independence in exercising its authority and the necessity thereof

Originally, the grounds for making the JFTC an independent authority could be found in the following three points.

First, a high level of political neutrality is required for the enforcement of the AMA. This point was clearly stated in the reply given by the Director-General of the Cabinet Legislation Bureau, Yoshikuni Ichiro, in the House of Councillors' plenary session held on 27 June 1975[30]. According to his reply, "the JFTC's authority is concerned with professional areas, and requires fairness as well as neutrality. Therefore, it should not be affected by political concerns. Such nature of the JFTC's authority accounts for the reason why Article 28 of the AMA provides for the JFTC's independence with respect to the exercise of its authority[31][32]."

The second point lies in the highly-specialized nature of the knowledge required for the enforcement of the AMA. Needless to say, the AMA, also known as "the Constitution of economic law", is a fundamental law establishing basic rules of economic activities in the free market society. Besides, the AMA comprises many highly abstract provisions. Professional and specialized knowledge of law and economics is thus indispensable when such provisions are applied to specific cases. In addition, as regards the enforcement of the AMA, there is a vital need to avoid the risk of arbitrariness. Occasionally, the

[30] *See*, Katsuo AOKI, "The Japan Fair Trade Commission and Constitutional Law of Japan – Focusing on the Debate in the Diet", (1975) *Jurist* no. 596, p. 150.

[31] Art. 28 of the current AMA provides: "The chairman and commissioners of the Fair Trade Commission exercise their authority independently."

[32] This argument was once put forward as a refutation against the argument questioning the constitutionality of the JFTC.

AMA and competition policy are inevitably concerned with the government's economic policy. Hence, it is deemed appropriate that a strained but healthy relationship should be maintained between law enforcement by the JFTC and the intentions of the government. Similarly, the JFTC should adopt a collegial system consisting of economic and legal experts in its decision-making process so as to enforce the AMA fairly and prudently. Consequently, independence is necessary for administrative organizations adopting a council system in their decision-making process.

The third point relates to the fact that the JFTC is a quasi-judicial body. According to the official report published by the round-table conference on the basic issues of the Antimonopoly Act[33], independence and neutrality are important factors in the enforcement of the AMA. It should be particularly noted that the fact that the JFTC is an independent administrative commission has been substantially contributing to the establishment of competition policy. Quasi-judicial functions performed by the JFTC are one of the main grounds for the acknowledgement of the JFTC's independence. Specifically speaking, the AMA is designed to regulate private rights and benefits of undertakings by way of the JFTC's administrative orders, which are strictly required to be issued under proper procedures. As a result, the JFTC's administrative hearing procedures are designed to apply *mutatis mutandis* to court proceedings with respect to administrative affairs regarding the issuance of orders. Considering that the nature of quasi-judicial functions, as performed by the JFTC, inherently collides with the direction and supervision by higher level administrative bodies (in the JFTC's case, the Cabinet Office), it is deemed essential to provide quasi-judicial authorities with independence in exercising their powers and functions.

Accordingly, the JFTC's loss of quasi-judicial authority accompanied by the abolition of the Hearing Procedure System may carry the risk of jeopardizing the *raison d'être* of the JFTC as an independent administrative commission. Despite the above criticism, there are some independent administrative bodies in Japan with no administrative tribunals, such as the Japan Transportation Safety Board and the Japan Consumer Commission. On the other hand, some Japanese administrative bodies are not independent and yet they have administrative tribunals such as the Japan Radio Regulatory Council, the Japan Patent Office, the National Tax Tribunal, and the Japan Financial Services Agency. There is no strict correlation, therefore, between the existence of administrative tribunals and whether administrative bodies should be independent or not.

[33] *Supra* note 23.

3. Limitations of judicial review in terms of administrative discretion in decision-making

In addition to the risk of jeopardizing the *raison d'être* of the JFTC as an independent administrative commission, the New Amendment is problematic for two additional reasons. First is the concern that a shift from the Hearing Procedure System to actions for the revocation of administrative orders may lead to the undesirable consequence that the party concerned will be only allowed to claim in court that the order constitutes an abuse or excess of the JFTC's discretion, but will not be given the opportunity to contest the appropriateness of any other aspect of the order. This is because actions for the revocation of administrative decisions are regulated by the Japanese Administrative Case Litigation Act as follows: "The court may revoke an original administrative decision made by an administrative body at its discretion only in cases where the decision has been made beyond the bounds of the body's discretionary power or through an abuse of such power[34]."

As regards the appropriateness of administrative orders, an order is generally speaking not subject to actions for the revocation of administrative orders as long as it is within the discretion of the administrative body in charge. Many precedents[35] also provide that an order should be ruled illegal only if it contains no findings of fact supporting its decision, or evidently lacks appropriateness according to social norms, and is thus deemed to be an abuse or excess of administrative discretion. By contrast, under the Hearing Procedure System, the JFTC may examine a wide range of factors involved in an order including whether the JFTC has exercised its discretion "correctly" of (*i.e.*, whether or not the order is appropriate for the restoration of competition), even if the order is deemed to be within the discretion of the JFTC. On this account, the JFTC may modify part of the content of the original order in its tribunal decision[36].

Following the abolition of the Hearing Procedure System, relevant special provisions will be abolished as well such as the substantial evidence rule. Under

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[34] Art. 30 of the Administrative Case Litigation Act.

[35] *See*, *e.g.*, Saikō Saibansho [Sup. Ct.] Jul. 30, 1954, 8 no.7, Saikō Saibansho Minji Hanreishū [Minshū] 1463, 1510; Saikō Saibansho [Sup. Ct.] Jul. 19, 1974, 28 no. 5, Saikō Saibansho Minji Hanreishū [Minshū] 790; Saikō Saibansho [Sup. Ct.] Dec. 20, 1977, 31 no. 7, Saikō Saibansho Minji Hanreishū [Minshū] 1101; Saikō Saibansho [Sup. Ct.] Oct. 4, 1978, 32 no. 7, Saikō Saibansho Minji Hanreishū [Minshū] 1223; Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 50 no. 3, Saikō Saibansho Minji Hanreishū [Minshū] 469.

[36] Art. 66(3) of the current AMA provides: "(3) If there are grounds for the hearing request, the Fair Trade Commission shall issue a decision to rescind or modify all or part of the original order after the hearing proceedings have been completed."

the New Amendment, proceedings applying to actions for the revocation of decisions made by other administrative bodies (in usual administrative cases) should also apply to actions for the revocation of orders issued by the JFTC, including its cease and desist orders. Without being subject to legal constraints such as the substantial evidence rule, the court may thus review the facts on which the order is based, the application of applicable laws and regulations to such facts, and examine whether the JFTC has violated any procedural law or regulation when issuing the order. In such case, even if the order is deemed to be within the discretion of the administrative body, such an order may still sometimes be revoked by the court in the action for its revocation. More specifically, as is the case in reviewing a decision made by an administrative body at its discretion in ordinary circumstances, the court may find that the JFTC's order constitutes an abuse or excessive use of its discretion. The court may thus revoke it as it violates the law, in the event that 1) the order lacks significant findings of fact supporting its decision because, for example, the order is based on an erroneous finding of a fact pivotal to the case, or that 2) the order evidently lacks appropriateness according to social norms because, for example, the application of the law to the fact findings is apparently unreasonable. In the case of discretionary decisions, the first decision made by an administrative body is usually held in high regard and judicial review of such a decision by the court is generally limited and restrained. Cease and desist orders under the AMA, similarly to other administrative decisions, are thus merely subject to the principles of judicial review of discretionary decisions, such as whether they are based on erroneous findings of fact, and whether they violate general legal principles, including the principle of equality, the principle of proportionality, and the principle of good faith.

Additionally, it can hardly be expected that abundant evidence would be submitted to the court, unlike that submitted under the Hearing Procedure System. Even granted that the court issues an order of explanations, the JFTC, as the administrative body issuing the original order, is requested to submit only "the materials that clarify … the facts constituting the cause of the original administrative decision … and other grounds for the original administrative decision[37]." This potential deficiency in evidence is also problematic.

[37] Art. 23-2(1) item (i) of the Administrative Case Litigation Act.

4. Problems in relation to the exclusive jurisdiction of the Tokyo District Court

The second reason why the New Amendment is problematic is because after the abolition of the Hearing Procedure System, only the Tokyo District Court will have exclusive jurisdiction to review cease and desist orders of the JFTC in 1st instance. Is it possible, however, for the Tokyo District Court to deal perfectly with the violations of the AMA, the assessment of which requires professional and specialized knowledge as well as flexibility?

Under the New Amendment, 1st instance jurisdiction over actions for the revocation of the JFTC's cease and desist orders should be vested exclusively with the Tokyo District Court in order to ensure its expertise in proceedings regarding violations of the AMA. Consequently, it is expected that the Tokyo District Court will progressively develop such specialized expertise. Moreover, focusing on the need to ensure extra prudence when examining the AMA cases, the New Amendment also regulates the applicable composition of the Tokyo District Court. Trials and judgments in such cases should hence be delivered by a panel of three judges, and, if necessary, may be delivered by a panel of five judges. In normal circumstances, and as a general rule, a single judge hears and adjudicates on cases at the level of a district court[38]. There are indeed no other examples of legal provisions, except the New Amendment, where civil or administrative district courts of 1st instance should hear and adjudicate on cases with a panel of judges. Moreover, with respect to the Tokyo High Court as the relevant court of appeals in the AMA cases, the New Amendment provides that trials and judgments should be delivered by a panel of three judges in general, and by a panel of five judges if necessary. It can be thus understood that the New Amendment does take into account the need to ensure that courts must be able to make professional judgments under the AMA.

As to jurisdiction under the Administrative Case Litigation Act, an action for the revocation of an administrative decision is heard by the court that has jurisdiction over the location of the defendant (*i.e.*, the location of the administrative body) so far. Importantly however, pursuant to the Amendment to the Administrative Case Litigation Act of 2004, the court having jurisdiction over the location of the administrative body retains, in principle, its jurisdiction over an action for the revocation of its administrative decisions. Nevertheless, the plaintiff may alternatively choose to sue the defendant in the district court which has jurisdiction over the location of the high court that has jurisdiction

[38] Art. 26(1) of the Court Act.

over the location of the plaintiff[39]. Such a legal provision is meant to reduce burdens placed on plaintiffs and provide individuals with the convenience of bringing actions to a nearby court.

However, from this perspective, the New Amendment is contrary to the above- mentioned aims. Concerning this issue, the Japan Federation of Bar Associations has issued a written opinion saying that, "although it is unavoidable to concentrate the jurisdiction in the Tokyo District Court as a temporary measure, it should be further examined in the future that other courts should have the jurisdiction to deal with these cases as well"[40]. Also the Osaka Bar Association has stated in its announcement that, "from the viewpoint of protecting the rights of local citizens and entrepreneurs, we strongly demand for the New Amendment to be re-amended to include the district courts which have jurisdiction over the location of the high courts (at least the Osaka District Court)"[41]. In other words, there is still doubt about the Tokyo District Court having exclusive jurisdiction under the New Amendment.

It is worth conducting a comparison here with jurisdiction rules under other laws. For example, pursuant to the general rules under the Code of Civil Procedure, jurisdiction over intellectual property right (hereafter: IPR) litigation used to be with the district court that had jurisdiction over the location of the defendant (entrepreneurs). These rules covered lawsuits over patent rights, utility model rights, layout-design exploitation rights (mask work rights) and copyright of computer programs. However, the Amendment to the Code of Civil Procedure of 1996 allowed IPR cases to be under the concurrent jurisdiction of the Tokyo and the Osaka District Courts. Considering that IPR cases require specialized expertise, and their large number, this amendment was meant to ensure prompt, full, and substantial trial by, as far as practicable, concentrating jurisdiction over IPR cases in the Tokyo and Osaka District

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[39] Art. 12(4) of the Administrative Case Litigation Act provides: "An action for the revocation of an administrative decision against the State or an independent administrative agency prescribed in Article 2, paragraph (1) of the Act on General Rules for Independent Administrative Agency (Act No. 103 of 1999) or any of the juridical persons listed in the appended table may also be filed with the district court that has jurisdiction over the location of the high court that has jurisdiction over the location of the plaintiff's general venue (hereafter referred to as a "specified court with jurisdiction" in the following paragraph)."

[40] The Japan Federation of Bar Associations, *Opinion on the Procedures Prior to the Issuance of Administrative Order Under the Antimonopoly Act After the Abolition of the Hearing Procedure System (Shifting to Actions for the Revocation of Administrative Orders)* (2010), p. 5; available at http://www.nichibenren.or.jp/library/ja/opinion/report/data/100205.pdf (01.09.2014).

[41] The Osaka Bar Association, *the President's Announcement About Extension of Jurisdiction under the Antimonopoly Act* (2010), p. 1; available at http://www.osakaben.or.jp/web/03_speak/seimei/seimei100430.pdf (1.09.2014).

Courts, which have the know-how and expertise in hearing and adjudicating such cases. Furthermore, the Code of Civil Procedure was amended again in 2003 with the aim of addressing issues concerning IPR litigation. Accordingly, the Tokyo and the Osaka District Courts now have exclusive jurisdiction over IPR litigations in the 1st instance; the Tokyo High Court has exclusive jurisdiction in the 2nd instance. In comparison with jurisdiction for IPR litigation, there seem to be no convincing reasons for concentrating 1st instance jurisdiction for the AMA in the Tokyo District Court only.

Nevertheless, three plausible grounds can be listed for concentrating jurisdiction in the Tokyo District Court over actions for the revocation of the JFTC's cease and desist orders. First, it is necessary to ensure that professional judgments can be made by the court. Second, it is necessary to ensure that cases involving multiple entrepreneurs engaged in the same anti-competitive activities, such as cartel and bid-rigging, will be determined by the same court so as to achieve uniformity in decisions. Third, the JFTC's Hearing Procedure System for administrative appeals, which functions in practice as the court of 1st first instance, was basically conducted at the JFTC's tribunal in Tokyo. Therefore, concentrating jurisdiction in the Tokyo District Court may not cause any more inconvenience to entrepreneurs than the present solution.

However, these are not sufficient grounds to support exclusive jurisdiction of the Tokyo District Court. First, if professionalism in ruling on violations of the AMA is necessary, a special division for that purpose can be established in the Osaka District Court as well, as is the case for IPR litigation. Moreover, other options are available from the viewpoint of legislation also. For example, similarly to, again, IPR litigation, the latter is under the joint jurisdiction of the Tokyo and the Osaka District Courts in the 1st instance, but under the exclusive jurisdiction of the Tokyo High Court in the 2nd instance. Whatever the case may be, the need for professional expertise and uniformity in decisions cannot be a reasonable ground for sticking to the exclusive jurisdiction of the Tokyo District Court. Second, if uniformity in decisions regarding the AMA is so necessary, it can be ultimately achieved by the decision of the Supreme Court, which is also the principle of judicial review in Japan. Third, the JFTC's Hearing Procedure System for administrative appeals used to be conducted in the JFTC Kinki Regional Office in Osaka City (the so-called "visiting tribunal"). This undeniable fact proved that there is an ongoing (although sporadic) need to conduct the hearing procedure in the JFTC's Regional Office at short notice so as to examine witnesses efficiently. It undeniably raises concerns that, by concentrating jurisdiction in the Tokyo District Court, entrepreneurs might be more inconvenienced than under the current system. To sum up, the concentration of jurisdiction in the Tokyo District Court under the New Amendment is unavoidable *for the moment*, in order to accumulate

know-how and improve the professionalism of judges. However, in view of the convenience of the parties concerned, it is necessary to consider the possibility to amend the AMA once again to extend jurisdiction to other district courts (such as the Osaka District Court) in the future.

III. Hearing procedures pertaining to the JFTC's administrative orders, including cease and desist orders

1. Introduction

Following the abolition of the Hearing Procedure System, the final decision made by the JFTC will be shown in its cease and desist order. It is thus necessary to further enhance current administrative procedures applicable prior to the issuance of the JFTC's cease and desist orders. In response to this need, the New Amendment provides for relevant hearing procedures under the AMA in accordance with the protection level set out in the provisions for hearing procedures under the Administrative Procedure Act[42], Japan's main law on administrative procedures. Specifically speaking, the JFTC should designate an officer to preside over the hearing procedures for its orders, including cease and desist orders, in order to enhance administrative procedures taking place prior to the issuance of its orders[43][44].

The duty of the procedural officer includes: 1) presiding over the hearing procedure, having investigators provide explanations of the content of an anticipated cease and desist order and of the main evidence, and adequately directing the entrepreneurs to inquire questions of investigators; 2) hearing the entrepreneurs' statements of opinion; and 3) preparing a written record of the minutes of the hearing procedure and a report listing the contentious issues based on the statements of opinion and evidence presented in the hearing. This way, the procedural officer, as the presiding officer in charge of the hearing procedure, shoulders the responsibility for guaranteeing procedural fairness during the whole hearing procedure, starting from the stage of the investigator's explanation and ending with the entrepreneur's statements of opinion. In light of the general rule that hearings shall be in principle closed to the public[45], the New Amendment stipulates that the JFTC's hearing

[42] Art. 15–28 of the Administrative Procedure Act.

[43] Art. 53(1) of the New Amendment.

[44] The designated officer presiding over the hearing procedure is hereafter referred to as "the procedural officer".

[45] Art. 20(6) of the Administrative Procedure Act.

procedures are not open to the public either[46]. This is due to the consideration that the explanations provided by the investigators in the beginning of the hearing procedure, as well as the arguments between the parties concerned and the investigators, may include the parties' trade secrets, trade secrets of their clients, and private information of the parties' employees.

2. Differences with the Administrative Procedure Act

The hearing procedure under the New Amendment is basically at the same level of procedural protection as that set out in the provisions of the Administrative Procedure Act. Among these provisions, several specific ones may be worth noting. First, a party concerned may appoint a representative. Second, a party concerned may inspect relevant evidence. Third, officials of the administrative body should explain the content of an anticipated decision, facts found by the administrative body, and the application of relevant laws and regulations to such facts. A party concerned may question investigators of the administrative body and state its opinion orally at the hearing (or present written statements of opinion). Fourth, officers presiding over the procedure should prepare a written record of the minutes of the procedure as well as a report. They must submit these documents to the administrative body in charge.

On the other hand, some differences with the Administrative Procedure Act also exist. Take the following points for example. First, whereas the transcription of evidence is not permitted in hearings held under the Administrative Procedure Act, it is allowed (the party's documents and objects retained or seized by the JFTC, or the recorded statements provided by the party's employees) under the hearing procedure provided in the AMA. Second, when officials provide explanations of the facts found by the administrative body, they do not have to explain the evidence in the hearing held under the Administrative Procedure Act. By contrast, investigators of the JFTC must explain main evidence when clarifying the facts found by the JFTC under the hearing procedure provided in the AMA. Third, as to the provisions not prescribed in the Administrative Procedure Act, the AMA provides that the JFTC's officials engaged in the investigation of the given case, such as the investigators in charge, cannot be designated as the procedural officer presiding over the hearing procedure. Fourth, the Administrative Procedure Act states that the officer presiding over the procedure should prepare a written report addressing his/her opinion as to whether or not the party's assertion is justified. By contrast, the AMA

[46] Art. 54(5) of the New Amendment.

provides that the procedural officer should prepare a written report listing the contentious issues with respect to the case in question under the hearing procedure.

3. Inspection and transcription of evidence under the hearing procedure

It is worth mentioning that it can also be argued that in order to further enhance procedural fairness, the party should be allowed to inspect or request full disclosure of all evidence held by the JFTC. Article 52 of the New Amendment provides that the party is allowed to inspect or transcribe the evidence that establishes the facts found by the JFTC[47].

The "notifying and hearing" procedure prescribed in the Administrative Procedure Act stipulates that, prior to the issuance of a decision, the administrative body should inform the party (the anticipated recipient of a decision) of the content of the decision and its grounds and then hear the party's opinion. Assuming that the hearing procedure under the AMA can be understood as such "notifying and hearing" procedure, then the inspection of evidence establishing the facts found by the JFTC under the AMA can be considered as a rule that provides the same level of procedural protection as "the inspection of … other materials which prove the facts upon which the anticipated unfavorable decision will be based" prescribed in Article 18 of the Administrative Procedure Act[48]. In such a case, the purpose of the inspection

[47] Article 52 of the New Amendment provides: "With respect to a case under the hearing procedure, a party concerned may submit a request to the Fair Trade Commission to inspect or transcribe the evidence establishing the facts found by the Fair Trade Commission, during the period from the time it received the notice pursuant to Article 51 paragraph (1) until the hearing procedure is concluded. (With respect to transcription, among all the evidence, the evidence subject to transcription is limited to the evidence prescribed by the Rules of the Fair Trade Commission, including the evidence submitted by the party or the party's employees, and the recorded statements provided by the party or the party's employees; the same applies hereafter in this article.) In such a case, the Fair Trade Commission may not refuse to allow the person to inspect or copy the records of the case in question unless this is likely to harm the interests of a third party or unless there are any other justifiable grounds."

[48] Art. 18(1) of the Administrative Procedure Act provides:" (1) Parties and interveners whose interests would be harmed by a particular unfavorable decision (referred to in this Article and in Article 24, paragraph 3 as "parties, etc.") may, between the time when notice of a hearing is given and the time when the hearing is concluded, request from the administrative body concerned the inspection of records indicating the results of investigations on the matter in question and other materials which prove the facts upon which the anticipated unfavorable decision will be based. In this case, administrative bodies may not reject inspection requests unless there is a risk that the interests of third parties would be harmed or unless there is some other justifiable grounds."

of evidence establishing the facts found by the JFTC will be to enhance and substantialize the hearing procedure by informing the party which evidence constitutes the grounds for the anticipated order that will be issued by the JFTC.

As mentioned, some justifications exist for Article 52 of the New Amendment. It is desirable, however, to enforce this provision in a more circumspect and flexible manner. More specifically, the purpose of this provision cannot be achieved if by saying that "the scope of the inspection should be determined by the administrative body's discretion at first" the JFTC's officer in charge sticks to the rules literally and informs the party of neither the grounds for the anticipated order nor the substantial part of the evidence on which the order is based. Are these concerns groundless? Certainly, the party will not request to inspect all evidence but flexible enforcement is still desirable from the viewpoint of ensuring the party's procedural defense right. Even though in the action for the revocation of an administrative decision an interested party may file a petition to the court for an order to submit documents pursuant to Article 220 of the Code of Civil Procedure, this would be nothing more than the *status quo*, provided that the hearing procedure under the AMA lost its substance and became an empty shell.

IV. Remaining Issues

Article 16 of the supplementary provisions of the New Amendment provides that, "the Act shall be reviewed from the viewpoint of achieving consistency with other administrative procedures in Japan, and of ensuring that a party can adequately enforce its defense right. The Government of Japan aims to reach a conclusion of the review one year after the Act is promulgated, and will take necessary measures when found necessary." It is scheduled that the following two issues will be discussed thoroughly and in a neutral manner from now on: how to strike a balance between the JFTC's fact-finding functions and the protection of the defence right of parties concerned, and how to guarantee consistency with other domestic administrative investigation procedures. This is based on the Policy Council's document "Basic Policy on the Amendment to the Antimonopoly Act" published on 9 December 2009[49], which provides as follows: "Third Discussions on the procedural fairness under administrative investigation procedure. The Government of Japan should undertake a review

[49] JFTC, *Basic Policy on the Amendment to the Antimonopoly Act* (2009), p. 2: available at http://www.jftc.go.jp/houdou/pressrelease/h21/dec/091209seisakukaigi.files/091209seisakukaigi-shiryo1.pdf (2.09.2014).

of the measures taken to ensure the party's adequate defence right, including the right to legal counsel and the attorney-client privilege, in a neutral manner on the basis of the supplementary resolution attached to the Amendment to the Antimonopoly Act of 2009. The conclusion of the review should, in principle, be reached within one year since the commencement of the review". Besides, the Supplementary Resolution of the Amendment to the Antimonopoly Act of 2009[50] also provides the basis for such a review. "For the purpose of allowing parties to effectively enforce their defence right when the JFTC conducts an interrogation or a voluntary hearing procedure, the Government of Japan should undertake a review in a forward-looking manner by referring to foreign cases and by maintaining consistency with criminal and other administrative procedures in Japan, with respect to the right to appoint a representative, right to have legal counsel present, and right to request a transcript of the recorded statements."

In the future, it is expected that there will be a request to "visualize" the investigation procedures (*i.e.*, make the investigation procedures more transparent) so as to guarantee procedural fairness and transparency. However, this approach is criticized because witnesses may be refrained from telling the truth. Moreover, particularly in cases such as abuse of superior bargaining position, small and medium sized enterprises that were harmed may be unwilling to cooperate because they are afraid of revenge from the infringers. Similarly, there are no regulations regarding the presence of legal counsel during witness interrogation and, in practice, it is not accepted either.

As to the reason for not permitting the presence of legal counsel, it is pointed out that if such right was permitted, it would be easier to destroy evidence by conspiracy, resulting in reluctant witness problems and thus constituting an obstacle to the discovery of truth. The "reluctant witness problem" happens not only when legal counsel is appointed by the entrepreneur, but also when such counsel is appointed by the witness itself. There are no differences in the fundamental problem – a witness may be reluctant to testify due to his/her awareness of a third party existing in the procedure. When a witness refuses to appoint a legal counsel recommended by the entrepreneur, and decides to appoint one by itself, this may be regarded as an indicator that this particular witness will testify against the entrepreneur. A secondary reason for not permitting the presence of legal counsel is that, under current similar criminal and other administrative investigation procedures in Japan, it is still not allowed for legal counsel to be present during interrogation proceedings. By contrast, some argue that if the person under investigation submits a request, a transcript of the recorded statements should be disclosed

[50] *Supra* note 29.

to the requester[51]. Some corresponding measures should also be taken such as allowing the presence of legal counsel during the interrogation conducted by the investigator and the video recording of the procedure.

Concerning the arguments for introducing the right to legal counsel and the attorney-client privilege, it is worrisome that if such a system was to be introduced into the current administrative investigation procedures for violations of the AMA, it might become more difficult for the JFTC to discover the truth. The enforcement of the AMA would thus be significantly affected. On the other hand, it is indisputable that procedural protection of parties should be properly ensured. In conclusion, we should thoroughly and carefully examine the arguments for introducing the right to legal counsel and the attorney-client privilege, rather than denying these arguments in the very beginning.

V. Concluding Remarks

In conclusion, the following point should be noted. In order to facilitate sanctions serving as enforcement of competition law, the following four aspects are crucial and should be emphasized. The first issue relates to effectiveness. No matter how severely the sanctions regime is strengthened, it would remain an unrealistic hope to uphold the Japanese Antimonopoly Act without effective enforcement methods. The second aspect is related to legal systematization. Among various sanctions prescribed by the Antimonopoly Act, some are, such as the surcharge and fine, in the same manner pecuniary burdens. The legal nature of these sanctions should be further examined in a systematic manner so as to sufficiently suppress anticompetitive violations. The third issue regards fairness. It is essential even for addressees subject to sanctions that the sanctions regime is fair and acceptable, which also correlates with the enhancement of deterrence. The last aspect relates to efficiency. The JFTC, though performing a central role in enforcing the Antimonopoly Act, has only limited resources. This realization inevitably leads to the fact that the costs of implementing laws and regulations need to be kept relatively low in comparison with the benefits derived from the very same laws and regulations.

What is of particular significance from among these aspects, from the perspective of this paper, is that due process of law must be guaranteed in the

[51] *See*, *e.g.*, the Japan Federation of Bar Associations, *Opinion on the Summary of Issues for Administrative Investigation Procedures under the Antimonopoly Act* (2014), pp. 6–8: available at http://www.nichibenren.or.jp/library/ja/opinion/report/data/2014/opinion_140717_2.pdf (2.09.2014).

process of rendering administrative decisions. Administrative decisions issued by the JFTC, including cease and desist as well as surcharge payment orders, have formed the core of the enforcement of the Antimonopoly Act. It is thus necessary to establish fair and transparent procedures for the issuance of such decisions. In the meantime, securing effective law enforcement should not be neglected when taking into account the due process of law. For this reason, by focusing on the Amendment to the Antimonopoly Act, this paper aims to depict how the Japanese lawmakers endeavoured to strike a balance between procedural fairness and the effectiveness of competition law.

Plausibility, Facts and Economics in Antitrust Law

by

Mariateresa Maggiolino*

Just the facts ma'am:
competition cases are all about facts[1]

CONTENTS

Abstract

According to EU competition law, the existence of an anticompetitive agreement can be inferred from a number of coincidences and indicia only *in the absence of another plausible explanation* of the facts at stake. According to U.S. federal law

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[1] I. Forrester, "A Bush in Need of Pruning: the Luxuriant Growth of 'Light Judicial Review'" [in:] C-D. Ehlermann, M. Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and Its Judicial Review in Competition Cases*, Hart Publishing 2011, p. 410.

(antitrust law included), only *a complaint that states a plausible claim for relief* can survive a motion to dismiss at the pleading stage. What is plausible, however? After explaining the relationship between facts and evidence law, this chapter analyses the general meaning of the notion of plausibility, discusses the degree of discretion that it introduces, how it affects the justifications that judges and fact-finders make for their choices, and remarks on how this concept relates to substantial accuracy. On the other hand, the chapter acknowledges that antitrust law, by relating our understanding of what is plausible to economic models, debunks these concerns and raises another striking issue. Since economics is rooted in various axioms and value-choices, the link that antitrust law establishes among plausibility, standards of proof and economics grants to these axioms and value-choices the possibility of affecting the antitrust decisions about facts, although these decisions (as all factual decisions) should amount to pure descriptions of the concrete facts disputed at trial or during the administrative procedure.

Résumé

Conformément à la loi européenne sur la concurrence, l'existence d'un accord anticoncurrentiel peut être inférée d'un certain nombre de coïncidences et d'indices seulement en *l'absence d'autre explication plausible* des faits en cause. Selon la loi fédérale américaine (loi antitrust inclus), *seule une plainte qui indique une réclamation plausible pour le soulagement* peut survivre à une requête en irrecevabilité à l'étape de la plaidoirie. Qu'est-ce que est plausible, alors? Après avoir expliqué la relation entre les faits et le droit de la preuve, le présent chapitre analyse le sens général de la notion de plausibilité, explique le degré de discrétion qu'il présente, comment ce notion affecte les justifications que les juges et d'enquêteurs font de leurs choix, et se penche sur la manière dont ce concept se rapporte à la précision importante. D'autre part, il reconnaît que le droit antitrust, en liant notre compréhension de ce qui est plausible aux modèles économiques, il démystifie ces préoccupations et soulève une autre question. En effet, depuis l'économie est enracinée dans des axiomes et des choix de valeur différents, le lien antitrust entre la plausibilité, les normes de preuve et l'économie fourni ces axiomes et ces choix de valeur en possibilité d'affecter même les décisions antitrust sur les faits, même si ces décisions ne devraient se limiter qu'aux descriptions pures des faits concrets.

Classifications and key words: plausibility, antitrust evidence, standards of proof and economic models

1. Introduction

As well known, antitrust cases are highly fact-intensive. Even more, their outcomes are very fact-specific. Hence, in light of the great attention that the interface between evidence law, which presides over issues of facts, and competition law should deserve, this chapter focuses on one of the many facets of this interface. It explores the notion of plausibility, which moulds some evidence standards that European and U.S. antitrust laws currently employ during court and administrative procedures. Since, within the field of antitrust law, economic theory is what strongly influences the concept of plausibility, the chapter intends to remark that, by using such a notion, U.S. and European fact-finders allow economic theory to affect their decisions about *facts*. Yet, economics is a rather normative (social) science – it does not supply pure *descriptions* of how business facts really come about[2]; it relies also on axioms and value-assumptions. Hence, there is a sort of mismatch between the theoretical choice whereby factual decisions depend on plausibility, on the one hand, and the economic and, thus, normative flavour that plausibility acquires within the scope of antitrust law, on the other hand.

In detail, the concept of plausibility has made its appearance in antitrust evidence law for some years now. In the European Union (EU), the concept of plausibility lies beneath the standard of proof applying to cartels inferred from circumstantial evidence – decision-takers deem them proved only *in the absence of another plausible explanation* of the facts at stake (paragraph 3). In the United States, what is plausible underpins the standard of pleading holding in all federal cases –only claims showing *plausible grounds to infer an* unlawful conduct, such as an *anticompetitive agreement*, deserve to proceed (paragraph 4).

However, in its epistemic meaning, the notion of plausibility addresses what is compatible with our conception of how the world *normally* works and is *expected* to work (paragraph 5). Accordingly, since this form of extra-legal knowledge is somehow undetermined and uncertain, the concept of plausibility can undermine the main duty of fact-finders. It can jeopardize their capacity to find which factual hypothesis, from among that of the plaintiff and that of

[2] Here, when the word "description" is used, it implicitly refers to the cognitive-rationalist approach according to which human beings are able, if not to distinguish between facts and values, to differentiate, at least, between assertive speeches and statements of fact on the one hand, and prescriptive discourses and value judgments on the other hand. In the wake of this, the word "descriptions" is thus used, as well as the intensified expression "pure descriptions", to address those statements that regard just facts and that, accordingly, have nothing to do with normative choices. For the cognitive-rationalist approach see, e.g., W. Twining, *Theories of Evidence: Bentham and Wigmore*, Stanford University Press 1986, p. 12.

the defendant, corresponds to the facts as they actually occurred. In other words, the chapter acknowledges that, when plausibility acquires the status of a legal criterion for evidence standards, decisions about facts become, to some extent, risky and slippery (paragraph 6).

Nevertheless, within the boundaries of antitrust law, it is up to economic models to shape what is plausible, i.e. how the business world *normally* works and is *expected* to work. Hence, on the one hand, antitrust fact-finders do not enjoy a lot of discretion and, accordingly, their capacity to ascertain the actual facts is not badly undermined. On the other hand, the fact cannot be overlooked that our economic conception of the business world also results from axioms and value-choices that, by definition, have little to do with facts (paragraph 7). Therefore, by accommodating these axioms and value-choices, the notion of plausibility allows antitrust decisions about facts to be distanced from *pure descriptions* of the disputed facts. In other words, due to the evidence standards that pivot around plausibility, economic theory does not only contribute to fixing the goals of antitrust law, interpreting its words and establishing which facts are material for the occurrence of violations. It plays a role even in determining which factual hypothesis, from among that of the plaintiff and that of the defendant, can be accepted as true, even though we all know that economics is strongly normative (paragraph 8).

This chapter develops the above reasoning after briefly discussing the functions that standards of proof and standards of pleading play within evidence law (paragraph 2).

2. Evidence Law in a Nutshell: the Functions of Standards of Proof and Standards of Pleading

Any process of legal proof can be conceived of as a *cognitive* process whereby fact-finders expand their knowledge about the facts alleged by the parties via the collection of the best available evidence. In other words, if court and administrative proceedings aim at uncovering the truth about the opposing factual hypotheses of the plaintiff and the defendant[3], fact-finders must establish whether the disputed facts actually occurred and[4], to this

[3] *See*, *e.g.*, W. Twining, *Rethinking Evidence. Explanatory Essays*, Cambridge University Press 2006, p. 73 and S. Haack, "On Truth in Science and Law" (2007–2008) 73 *Brooklyn Law Review* 986.

[4] In other words, fact-finders must show whether the hypothesis addressing the facts included in the claim – the so-called factual hypothesis – is proved, i.e. whether decision-takers can accept it as true. *See* J. Ferrer, I. Beltran, *'It is Proven that p': The Notion of Proven Fact in*

end, they cannot but look for the tracks and signs that those facts should have left[5].

Proof rules govern this practice. For example, they control how fact-finders select and adduce evidence[6], and how decision-takers assess the probative value of each of these pieces of evidence[7]. Moreover, proof rules establish how and when decision-takers can achieve a conclusion about the disputed facts.

Standards of proof consist of just these latter decision-making rules. First, they accomplish an epistemic function. They (should) fix the *epistemic* conditions (say, also, the "verification criteria") under which decision-takers can utter, on the basis of the whole collected evidence, that the plaintiff has proved the factual hypothesis included in her claim. For example, a standard of proof for criminal cases could require decision-takers to accept the factual hypothesis if it: (i) explains, in a consistent way, the whole available evidence, (ii) is not *ad hoc*, and (iii) defeats all the other plausible defensive hypotheses which explain the same data that the plaintiff's claim explains[8]. In short, standards of proof (should) reel off the steps of cognitive effort that decision-takers must endure to accept the facts alleged in the claim as verified[9].

Nevertheless, current standards of proof often come in other forms. In common law countries they consist of two fixed, though ambiguous, formulas – i.e. the "preponderance of the evidence" applying to civil cases and the

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the Law, Duncker & Humblot, 2004, p. 29 and M.S. Pardo, "Pleadings, Proof, and Judgment: A unified Theory of Civil Litigation" (2010) 51 *Boston College Law Review* 1451, 1470.

[5] When possible, fact-finders collect *direct evidence* of the alleged facts, that is to say, tracks capable of grasping the very same facts included in the claim, such as testimonies, records, tapes or written documents. More frequently, fact-finders gather *indirect/circumstantial evidence* of the claimed facts, i.e. pieces of evidence portraying facts that, although different from the ones named in the claim, allow inferences as to the occurrence of the alleged facts.

[6] *See*, e.g., D.A. Nance, "The Best Evidence Principle" (1987–1988) 73 *Iowa L. Rev*. 227.

[7] Note that the well-known French criterion of the *intime conviction* and the similar Italian, German and Spanish criteria of the *libero convincimento*, *freie Beweiswürdigung*, and *reglas de la sana critic,* have a twofold function. First, they affirm the principle of the free evaluation of proof, which leaves decision-takers free to liberally assign a specific probative value to each piece of the evidence collected. Second, as we will see in the text, these principles leave decision takers free to determine liberally, i.e. without following any *ex ante* standard of proof, if the plaintiff has proved the factual hypothesis included in her claim. *See* M. Taruffo, "Rethinking the Standards of Proof" (2003) 51 *American Journal of Comparative Law* 659 and F. Castillo de la Torre, "Evidence, Proof and Judicial Review in Cartel Cases", (2009) 32 *World Competition* 505.

[8] *See* J.F.I. Beltrán, "La prueba es libertad, pero no tanto: una teoría de la prueba cuasi-benthamiana", 20, available at http://www.derechoyjusticia.net/fr/actividades/ver/id/33.html (13.05.2014).

[9] For this view, *see supra*, nt. 3. Furthermore, *see* K. Brennan-Marquez, "The Epistemology of Twombly and Iqbal" (2013) 26 *Regent University Law Review* 167, 172 (discussing "the specific *cognitive* operation that plausibility analysis requires") emphasis added.

"beyond a reasonable doubt" applying to criminal cases[10]. In civil law countries, authorities and courts do not even have any *ex ante* standardized decision-making rule to follow[11]. Rather, as EU courts do in connection to some antitrust offences[12], they formulate the criteria under which they accept a claim as proved case by case.

Second, standards of proof accomplish a moral function. They change according to the interests at stake in a specific context, i.e. according to the *political* and *moral* sustainability of the mistakes that a judicial decision can entail.[13] In simpler terms, there is no certainty as to disputed facts: any judicial decision may be wrong since even the best evidence available is not "perfect evidence", and since decision-takers may err because of both incorrect and unsound inferences. However, and just by way of example, all of society considers incorrect criminal law decisions to be much worse than incorrect civil law decisions because sending an innocent to prison is much more serious than making someone pay for damage that she did not cause. Therefore, with regard to error allocation, while the "beyond a reasonable doubt" standard reflects a strong preference for protecting criminal defendants, the "preponderance of the evidence" standard treats plaintiffs and defendants roughly equally[14]. In other words, the "beyond a reasonable doubt" standard requires decision-takers to make an almost maximum cognitive effort in order to accept the accusatory factual claim as proved. To put this differently, the "preponderance of the evidence" standard requires decision-takers to make the same cognitive effort either way, i.e. to either accept or reject the claim as proved.

In sum, standards of proof are decision-making rules which (i) require and entail a cognitive effort that, at the moment, no jurisdiction establishes in detail, and (ii) whose height changes according to the political and moral values that each jurisdiction endorses.

Standards of pleading, though, consist of procedural proof-rules. They apply to court cases and govern the way in which a lawsuit develops by controlling

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[10] In the US, another standard of proof applies to special civil law cases – the "clear and convincing evidence" standard.

[11] *See*, M. Taruffo, "Rethinking the Standards…", op. cit., p. 666.

[12] *See* paragraph 3 for some examples of decision-making rules that EU courts associate to specific cartel cases.

[13] What said in the text briefly describes the political and moral soul of standards of proof. See, in this regard, E. van den Haag, "On the common saying that it is better that ten guilty persons escape than that one innocent suffer: pro and con" (1990) 7 *Social philosophy and policy* 226; A. Stein, *Foundations of Evidence Law*, OUP, 2005, p. 144.

[14] *See*, e.g., D.H. Kaye, "Clarifying the Burden of Persuasion: What Bayesian Decision Rules Do and Do Not Do" (1999) 3 *Int'L J. Evidence & Proof* 1, and R.J. Allen, "The Error of Expected Loss Minimization", (2003) 2 *Law Prob. & Risk* 2.

the number of cases allowed to go through the diverse phases of the litigation – roughly, pleading, discovery and trial. Namely, standards of pleading serve to select claims that deserve to move at least toward the pre-trial stage. As a consequence, these standards result from the tension between opposite needs and wants: on the one hand, concerns for access to courts, participation values and meritorious lawsuits; on the other hand, worries about saving judicial resources, in terrorem settlements and meritless lawsuits[15].

Clearly then, if we want lawsuits to work as inherently consistent mechanisms aimed at uncovering the truth about the opposing factual hypotheses of the plaintiff and the defendant, we should consider standards of pleading not totally detached from standards of proof[16]. In other words, standards of pleading should dialogue with the specific standards of proof applying to the cases at stake, so as to reject claims that, even when further scrutinized, would have no chance of surviving the applicable standard of proof. For example, in civil cases, where the "preponderance of the evidence" standard applies, the chosen standard of pleading should be capable of rejecting claims that, after being tested, would turn out to be as probable (in epistemic terms) as the opposing defences. In short, standards of pleading should work as alignment mechanisms. Intuitively enough, however, the problem lies in discovering a verification criterion, *other than from epistemic probability*[17], that should be included in the standard of pleading formula so as to facilitate the achievement of this result.

To be sure, we should not push this argument too far. Broadly speaking, a plaintiff wins when she proves that her specific case coincides with the abstract case which the law qualifies as unlawful. Hence, from the outset, a claimant has two options which are independent from the verification criteria included in the applied standard of pleading. The plaintiff either manages to subsume her particular case in the abstract one, or runs the risk of having her claim rejected because it is incomplete.

3. Plausibility and the EU Standards of Proof for Cartels

Looking at EU competition law, the US formulas of "beyond a reasonable doubt" and the "preponderance of the evidence" cannot be found. EU

[15] *See* L.B. Solum, "Procedural Justice" (2004) 78 *S. Cal. L. Rev.* 181, 237–73, and A.I. Gavil, "Civil Rights and Civil Procedure: The Legacy of Conley v. Gibson" (2008) 52 *How. L. J.* 1, 4.

[16] *See*, *e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

[17] Indeed, we can associate a degree of epistemic probability with a factual hypothesis only after testing it.

expressions such as the "requisite legal standard"[18] result only from the effort to reconcile the diverse legal traditions that converge in the EU experience. They amount to *ex post* constructs that should sit well with common law commentators.[19]

Indeed, many antitrust scholars complain about the lack of these US-like standards of proof in EU competition law. Although the ambiguous US formulas end up indicating the sole degree of persuasion that decision-takers must achieve before reaching final decisions[20], these scholars would like the European Commission (hereafter: EC) to adopt some *ex ante* decision-making rules so as to govern its discretion and guarantee more certainty and predictability[21]. On the other hand, other scholars maintain that the EC does not need to use US-like standards of proof because it already complies with the continental approach, which pivots around other *ex ante* formulas such as those regarding the features that "good evidence" should have[22], and the "firm conviction" that decision-takers should achieve[23].

Actually, the mere fact that the EC follows the tradition of civil law countries does not mean that it does not adopt decision-making rules, or that these rules are gratuitous. For example, many scholars have shown how these rules change according to some (even opposing) criteria, such as the severity of the imposed

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[18] *See*, *e.g.*, Case C-70/12 P, *Quin Barlo and others v Commission*, not yet published, § 29; Case C202/07, *France Telecom v Commission*, [2009] ECR I-02369, § 5; Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, § 58, and Case C49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, § 86.

[19] *See*, *e.g.*, E. Gippini-Fournier, "The Elusive Standard of Proof in EU Competition Cases" (2010) 33 *World Competition* 187 and F. Castillo de la Torre, "Evidence, Proof and…", op. cit..

[20] *See*, *e.g.*, M.S. Pardo, "Second Order Proof Rules" (2009) 61 *Florida Law Review* 1083, 1091.

[21] *See*, *e.g.*, P. Craig, *EU Administrative Law*, Oxford University Press, 2006, p. 470–471; B. Lassere, "The European Competition Law Enforcement System" [in:] C-D. Ehlermann, M. Marquis (eds), *European Competition Law…*, op. cit., p. 71; J.S. Venit, "Human All Too Human: The Gathering and Assessment of evidence and the Appropriate Standard of Proof and Judicial Review in Commission Enforcement Proceedings Applying Articles 81 and 82" [in:] Claus-Dieter Ehlermann, Mel Marquis (eds), *European Competition Law…*, op. cit., p. 193; and D. Bailey, "Standard of Proof in EC Merger Proceedings: A Common Law Perspective" (2003) 40 *Common Market Law Review* 848.

[22] Consider, e.g., the expressions requiring evidence and proof to be "sufficiently precise and coherent", "sufficiently precise and consistent", "sufficiently cogent and consistent", and "factually accurate, reliable and consistent". *See, e.g.*, Case C-29 e 30/83, *CRAM e Rheinzink v Commission*, [1984] ECR 01679 § 20; Case, C-68/94 e C-30/95, *France et al. v Commission (Kali und Salz)*, [1998] ECR I-01375, § 228; and Case C-12/03 P, *Commission v Tetra Laval*, [2010] ECR I-00067 § 39.

[23] *See*, *e.g.*, Case T-67/00, T-68/00, T-71/00 and T-78/00, *JFE Engineering and others v Commission*, [2004] ECR II-02501 § 179, and Case T-28/99, *Sigma Tecnologie v Commission*, [2002] ECR II-01845, § 51.

fines and the need not to neutralize the deterrent effect of antitrust offences that, in some circumstances, become difficult to prove[24]. What is more, we know that in cartel cases the EC applies two diverse standards depending on the collected evidence.

When documents which directly establish the existence of concertation exist, there is no need to further examine the question of the existence of the alleged anticompetitive agreement[25]. Where the EC succeeds in gathering documentary evidence in support of the alleged infringement, and where that evidence appears to be sufficient to demonstrate the existence of an agreement of an anti-competitive nature, there is no need to examine the question of whether the firms concerned had another justification for taking part in the agreement.

By contrast, when the only available evidence is circumstantial, the decision rule that the EC adopts to establish whether a cartel occurred is that of the absence of another *plausible* explanation[26]. In other words, if the facts at stake cannot be explained other than by the existence of an anticompetitive behaviour, the EC can hold the firms liable. However, when firms can put forward arguments which cast those facts in a different light, and thus provide another plausible explanation, the EC has not met the standard of proof. This means that, in order to establish the fact that a cartel took place, this factual hypothesis must defeat any other factual plausible hypothesis asserting that no cartel occurred.

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[24] *See*, *e.g.*, A.L. Sibony, *Le juge et le raisonnement économique en droit de la concurrence*, L.G.D.J. 749 (2008); D. Bailey, "Standard of Proof…", op. cit., p. 866; H. Schweitzer, "The European Competition Law Enforcement System and the Evolution of Judicial Review" [in:] C-D. Ehlermann, M. Marquis (eds), *European Competition Law…*, op. cit.; K. Lenaerts, "Some Thoughts on Evidence and Procedure in European Community Competition law", (2007) 30 *Fordham International Law Journal* 1463, 1494; T. Reeves, N. Dodoo, "Standards of proof and standards of judicial review in EC Merger Law" [in:] B. Hawk (ed.), *International Antitrust Law and Policy*, New York, 2006, p. 127; I. Forrester, "A Bush in Need of…", op. cit., p. 417; and J.S. Venit, "Human All Too Human: The Gathering and Assessment of evidence and the Appropriate Standard of Proof and Judicial Review in Commission Enforcement Proceedings Applying Articles 81 and 82" [in:] Claus-Dieter Ehlermann, Mel Marquis (eds), *European Competition Law…*, op. cit., p. 245.

[25] *See*, *e.g.*, Joined Cases C-403/04 P and C-405/04 P, Sumitomo Metal Industries Ltd, Nippon Steel Corp., [2007] ECR I-00729, §§ 46 and 70.

[26] *See*, *e.g.*, Case C-53/03, *BPB plc*, [2005] ECR I-04609 §63; Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P., *Aalborg Portland and Others* v *Commission*, [2004] ECR I-00123, § 165; Case C105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I8725, § 94; and Joined Cases C89/95, C104/85, C114/85, C116/85, C117/85 and C125/85 to C129/85 *Ahlström and Others* v *Commission* [1993] ECR I1307, §§ 126 and 127.

What is a plausible explanation of the disputed facts, though? Does a plausible explanation of those facts differ from a possible or a probable explanation of them? Interestingly enough, some recent decisions by the US Supreme Court induce similar questions about the notion of plausibility.

4. Plausibility and the US Standards of Pleading

Rule 8 of the Federal Rules of Civil Procedure establishes that a plaintiff's complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief"[27].

In 1957, in *Conley v. Gibson*,[28] the US Supreme Court clarified that a complaint served to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests"[29]. Therefore, a complaint was to be dismissed only when it appeared "beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief"[30]. On the other hand, a plaintiff introducing a correct theory of harm about the illegality of a practice that *might* have occurred deserved the opportunity to prove her claim during the lawsuit. In short, *Conley* established the so-called "no set of facts" standard, which judges applied from then on.

However, in the recent *Twombly* and *Iqbal* cases,[31] the Supreme Court changed its view, requiring enough factual specificity to make the plaintiff's claim plausible. In *Twombly* an antitrust decision about an alleged anticompetitive agreement – the Court did not define what plausibility means but it elaborated several expressions to describe this concept. It wrote that: (i) in order to proceed, a complaint must "raise a right to relief above the speculative level"[32], (ii) the new standard of pleading must "not impose a probability requirement at the pleading stage" because "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the facts alleged] is improbable"[33], and (iii) allegations must cross the lines between "possibility and plausibility"[34], and between what is "factually neutral" and what

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[27] Fed. R. Civ. P. 8(a)(2).

[28] *Conley v. Gibson*, 355 U.S. 41 (1957)

[29] *Id.*, at 47.

[30] *Id.*, at 45-46 (emphasis added).

[31] Respectively, *Bell Atlantic v Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

[32] 550 U.S., at 555.

[33] *Id.*, at 556.

[34] *Id.*, at 557.

is "factually suggestive"[35]. Furthermore, in *Iqbal* – which was not an antitrust case – the Court repeated that the pleading must include enough factual details to enable the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged"[36], and it cannot plead facts that are "merely consistent with a defendant's liability" because in so doing "it stops short of the line between possibility and plausibility of 'entitlement to relief'"[37].

In sum, in the above cases the Supreme Court (similarly to the present Court of Justice of the European Union) did not define the notion of plausibility directly but confronted it with the concepts of speculations, possibility and probability. Moreover, the Court tried to establish a link between the notion of plausibility and the number and quality of factual details that a pleading must contain.

Therefore, moving on from both the EU and U.S. experiences, there is room to look for a more direct and clear definition of what plausibility means.

5. A General Definition of What Plausibility Is

Among epistemologists, the concept of plausibility has not triggered much interest yet. Nevertheless, due to the above legal functions that European and U.S. courts now give it, defining its general meaning deserves a try – even a preliminary one – in order to then appreciate its legal nuances. In particular, since the notion of plausibility is often confronted with the concepts of possibility and probability, it is useful to consider the latter two concepts first.

It is by tradition that, primarily, we define what is possible as what is "not-impossible"[38] and, next, we distinguish between logical and empirical impossibilities[39]. *Logical impossibility* addresses what amounts to a "contradiction in terms" – that is, to what is necessarily false to a person who knows no facts but who is capable of reasoning and well acquainted with the senses of the words combined together to assert p[40]. On the other hand,

[35] *Id.* at 557 n.5.

[36] 556 U.S., at 663.

[37] 556 U.S., at 678.

[38] *See*, *e.g.*, Aristotle, *De Interpr.*, 13 22b 28, William of Ockham, *Summa Log.*, II, 25 and Rudolf Carnap, *Meaning and Necessity*, § 39-3.

[39] *See*, also, P. Butchvarov, "The concept of possibility" (1960) 20 *Philosophy and Phenomenological research* 318.

[40] *See*, *e.g.*, Pierce Collected Papers, § 4.67, working in the wake of the traditional definition of logical impossibility that can be traced back to Aristotle, *Metaphysics*, ed. W.D. Ross, Oxford Clarendon Press 1924, V12, 1019 b 30.

empirical impossibility addresses what is contrary to the scientific and technical rules that govern a given scenario, so that the sentence "it is empirically impossible that *p*" means that a person cannot say that *p* is true on the basis of the data and laws relating to that scenario[41]. Therefore, whatever is neither self-contradictory nor contrary to the rules of nature and technique applying to a given scenario constitutes a logical and empirical possibility. In short, what is possible is not a matter of degree – *p* is either possible or impossible according to a well-identified and grounded benchmark, that is, the laws of logic together with those of nature and technique.

On the other hand the concept of probability is not a categorical concept. The sentence "it is probable that *p*" is a matter of degree – it depends on the quantitative question of how likely it is that *p* holds true. Granted that *p* is either possible or impossible, when *p* is impossible, the probability of *p* is zero. When *p* is possible, *p* may be more or less probable. Then, it is again by tradition that we know that the concept of probability may assume diverse meanings[42]. It can specify the observer's personal belief in *p*, that is, her *subjective probability*. It can measure the *frequency* or *propensity* of *p* when it indicates how many times *p* either has happened in a time interval in the past or is going to happen in a time interval in the future. Finally, "it is probable that *p*" may clarify the degree/level of corroboration that supports *p*. In this latter case, we talk about *epistemic probability* – *p* can be more or less probable in epistemic terms because *p* can be more or less well-supported according to the evidence available in the case at stake[43]. Therefore, if it can be said that *p* is probable in epistemic terms, it means that there is evidence supporting it *and* it is known that, if enough evidence is collected to meet the chosen decision-making rule (which, within the process of legal proof, is the chosen standard of proof), *p* will be accepted as true.

Now, in relation to the notion of plausibility, there is room to argue that, unlike probability and like possibility, it is not a matter of degree. It amounts to a categorical concept, so that *p* is either plausible or implausible, and what is plausible may be more or less probable[44].

In addition, we know that, while looking for a description of a phenomenon, the sentence "it is plausible that *p*" conveys the idea that *p* deserves further analysis because, prima facie, it can be taken more seriously than its alternatives

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[41] See, *e.g.*, Pierce Collected Papers, § 4.67, and H. Reichenbach, "Verifiability theory of meaning", in Proceedings of the American Association of Arts and Sciences (1951), p. 53.

[42] *See*, *e.g.*, M.C. Gavalotti, *Philosophical Introduction to Probability*, CSLI Publications, 2005.

[43] As a consequence, when turning to epistemic probability, the use of numbers and percentages is just a rhetorical solution to signal how well-supported a factual statement is.

[44] *See* K. Brennan-Marquez, "The Epistemology…", op. cit., p. 180.

– that is, the other possible descriptions of the events that led to the regarded phenomenon[45]. Hence, in this context, the concept of plausibility works as a selection criterion – like a threshold to screen out some possibilities that, in common parlance, are indeed addressed as "mere possibilities" or "pure speculations".

However, this latter definition of plausibility has a mere *pragmatic meaning* that, though correct and totally worth sharing, does not say what makes *p* plausible (what justifies the idea that *p* is plausible). In other words, knowing that what is plausible is taken more seriously than what is possible does not explain *the reasons why* such a choice was made and, as a consequence, does not allow someone else to judge whether you were right in considering *p* more seriously than the other possibilities. For example, did you consider *p* plausible because *you* expected *p* to be true? Or because *p* is expected to be true irrespective of your point of view?[46] Also, on the basis of what elements and cognitive process did you achieve your conclusion? On the basis of your intuition, or on data? By making a comparison among the alternatives[47], or in absolute terms? In sum, an epistemic definition of the concept of plausibility is missing that, as such, could be used even outside the context of hypothesis selection.

In this regard, although no definitive word can be spoken, there is room to argue that "it is plausible that *p*" means that *p* does not conflict with our own conceptualization of how the world *normally* is – that is to say, with what we consider to be a *usual* (say, also, an *ordinary* or *natural*) description

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[45] Collected Papers of Charles Sanders Pierce, ed. Charles Hartshorne and Paul Weiss, Harvard University Press, 1932, II, § 662.

[46] *See*, in this regard, K. Brennan-Marquez, "The Epistemology…", op. cit., p. 177 talking about a case where a husband decides to test the hypothesis of his wife's betrayal, not because he believes that it is true but because he considers that hypothesis compatible with a normal explanation of some factual elements that he has discovered.

[47] Actually, if you define what is plausible by comparing it to the formulated alternatives, you elaborate an endogenous definition of plausibility – what is plausible will vary according to the alternatives against which it is compared and just one single hypothesis is plausible among the alternatives. *See*, in this regard, G. Harman, "The Inference to the Best Explanation" (1965) 74 *Philosophical Review* 88; P.R. Thagard, "The best explanation" in (1978) 75 *The Journal of Philosophy* 76; P. Lipton, "Inference to the Best Explanation" [in:] W.H. Newton-Smith (ed.), *A companion to the Philosophy of Science,* Blackwell 2000; J.R. Josephson, "On the proof dynamics of inference to the best explanation" (2000–2001) 22 *Cardozo Law Review* 1621; M. S. Pardo, "The field of evidence and the field of knowledge" (2005) 24 *Law & Phil*. 321; and R.J. Allen, "Factual Ambiguity and a Theory of Evidence" (1993–1994) 88 *Nw. Ul. L. Rev.* 604. Differently, in this paper, it is assumed that the touchstone for establishing whether *p* is plausible is an exogenous element. Therefore, as said before, plausibility is a categorical concept and, at the same time, more than one hypothesis can be plausible.

of the scenario under scrutiny[48]. In other words, the notion of plausibility hinges on individuals' conception of how the world is, granted that there is no single idea of the world that individuals share by definition, and that each individual's conception of the world results, by and large, from an unknown and uncontrolled mixture of many and diverse elements, running from facts, scientific laws and correct generalizations to experiences, beliefs, prejudices and even commonplaces.

As a consequence, plausibility has a quite subjective flavour that the notions of possibility and epistemic probability do not have[49]. In addition, the mere fact that *p* is plausible does not say anything about whether *p* is actually true or false. Hence, in this sense, there is no difference between the notions of possibility and plausibility. If you say that *p* is plausible, you mean that *p* can be either true or false *and* you know that only a test will reveal whether *p* can be accepted as true or rejected as false. The difference between possibility and plausibility rests, instead, on the term of comparison that you choose to make your assessment: what is possible does not contradict what we have above called "a well-identified and grounded benchmark", that is, the laws of logic, nature and technique that together govern the scenario under scrutiny. What is plausible, in contrast, does not contradict what *you* consider to be *normal* and *ordinary* in that same scenario. To be sure, if your idea of what is common in a specific scenario depends on facts, scientific laws and correct generalizations, the notions of possibility and plausibility arguably converge. Moreover, in this specific hypothesis there is even room to argue that the concept of plausibility consists of a sort of esteeming of the epistemic probability that we will associate with *p* after having tested it[50]. Nonetheless, if your conceptualization of how the world normally operates is also impinged on by experiences, beliefs and commonplaces, plausibility addresses something different from possibility and does not consist of reliable esteeming of the epistemic probability of the factual hypothesis at stake.

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[48] *See*, *e.g.*, R. Bone, "Twombly, Pleading Rules, and the Regulation of Court Access" (2009) 94 *Iowa L. Rev*. 873, 885-87; E.Hartnett, "Taming Twombly, Even After Iqbal" (2010) 158 *U. Pa. L. Rev*. 473, 500; and P.R. Thagard, "The best…", op. cit., p. 79.

[49] To be sure, to argue that *p* is better supported than *q* requires a subjective judgment. Nevertheless, the very same idea of epistemic probability requires that such a judgment is rooted in evidence – better, in a form of evidence that is more verifiable than that unique mixture of diverse elements that forms individuals' conceptualization of the world.

[50] *See*, *e.g.*, R.T. Harris, "Plausibility in Fiction" (1952) 49(1) *The Journal of Philosophy* 5, 6-7, who argues that "the plausibility of a hypothesis is perhaps nothing more than *a* general feeling associated *with an* estimating *by* intellect *of the* hypothesis' antecedent probability". His reasoning works in connection to "scientific predictions and practical foresight" in a context where "the plausibility of a hypothesis … depends on data … easily traceable and … directly relevant to presentations of sense".

This latter difference is not a minor one, especially when plausibility becomes a legal criterion employed within evidence standards that directly and indirectly select the factual hypothesis that fact-finders accept as true.

6. Plausibility as a Legal Criterion

When the concept of plausibility becomes a legal criterion for defining standards of proof and pleading, judges and fact-finders are induced to move outside the boundaries of the complaint that lies in front of them[51]. In other words, since the notion of plausibility commands them to establish whether *p* is compatible with their own conceptualization of how the world normally works, judges and fact-finders are required to mirror a mixture of elements that is "extra-legal" for at least two reasons. First, because it does not necessarily regard statutes, legal rules and other species of legal content; second, because this mixture of cognitive elements comes from outside the lawsuit or proceeding that they are presiding over[52].

Now, some consequences follow from this. First, it is hard to establish the facts that a plaintiff should allege so as to make her claim not only possible but also plausible. In short, once used as a legal criterion, the notion of plausibility introduces a certain degree of discretion and indeterminacy[53] because plaintiffs cannot guess what their specific judges and fact-finders may deem to be plausible.

Second, under the veil of plausibility, it is hard to detect the exact reasons why judges and fact-finders consider *p* plausible and, as a consequence, it is hard to judge whether their decisions are correct and sound.

Third, in the absence of any further specification, nothing excludes judges and fact-finders considering *p* plausible because of their own experiences and beliefs or even because of some commonplaces. This latter possibility is risky, especially when we want lawsuits and proceedings to establish which of the factual hypotheses from among that of the plaintiff and that of the defendant corresponds to the actual facts. Indeed, in general, experiences, beliefs and

[51] *See* K. Brennan-Marquez, "The Epistemology of…", op. cit., p. 203.

[52] [Going back to our example – have you used this alligator example before somewhere?], suppose that the owner of the shop whose window was crashed by an alligator acted for damages against a Voodoo priestess, alleging that she is the owner of the beast. Is this claim plausible? Everything depends on whether judges believe that alligators that roam around New Orleans belong to people somehow involved in Voodoo rituals.

[53] *See*, *e.g.*, D.L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 138–41 (2010); R. Bone, "Twombly, Pleading Rules…", op. cit., p. 887; M. Pardo, "Pleadings, Proof, and Judgment: A unified theory of civil litigation", (2010) 51 *Boston College Law Review* 1451, 1461.

commonplaces are bad tools not only for selecting the claim that, after due testing, would result in a factual hypothesis that can be accepted as true, but also (and *a fortiori*) for assessing whether the accusatorial version of the facts must be accepted as proved. Sure, a standard of proof that says that "in order to be accepted as true, the factual accusatorial hypothesis must defeat any plausible defensive hypothesis" requires a very high cognitive effort: even a commonplace would prevent us accepting as true the accusatorial hypothesis. In other words, subordinating the acceptance of a charge to refusing all plausible explanations that favour defendants would require almost maximum cognitive effort and, as a consequence, would be consistent even with the presumption of innocence principle that, for example, holds in criminal cases. Indeed, many scholars use the notion of plausibility in this way just to interpret the "beyond a reasonable doubt" standard[54]. Yet, if the regarded standard of proof establishes that "accusatorial hypotheses must be accepted as true when they are plausible", we run the serious risk of considering proved something that is devoid of grounding and corroboration, especially when the reasons why *p* is plausible do not have anything to do with a shared vision of the world which is rooted in scientific laws.

In summary, the general notion of plausibility used as a legal criterion within evidence standards poses some concern over the real capability of court and administrative proceedings to achieve a true description of the concrete facts in dispute. Hence, the time is ripe to discuss whether these risks remain the same when it comes to antitrust evidence standards.

7. Plausibility as a Legal Criterion within Antitrust Law

Within the boundaries of competition laws, economic theory is called on to *describe* the world in which antitrust law has to intervene. In other words, antitrust scholars and enforcers assume that economics is "the" (social) science that illustrates how markets work and are expected to work[55]. As a consequence, there is room to argue that antitrust scholars do not have to worry about the above concerns that the notion of plausibility introduces[56]: they can feel comfortable in considering that what "makes no economic sense"

[54] *See*, *e.g.*, J.R. Josephson, "On the proof dynamics…", op. cit., p. 1642 and R.J. Allen, "Rationality, Algorithms and Juridical Proof: A Preliminary Inquiry" (1997) 1 *Int'l J. Evid. & Proof* 254.

[55] *See*, *e.g.*, H. Hovenkamp, "The Rationalization of Antitrust" (2003) 116 *Harv. L. Rev.* 917.

[56] K. Brennan-Marquez, "The Epistemology of…", op. cit.

is implausible[57]. Better, there is also the temptation among antitrust lawyers to assume that what is not conceivable for economic theory should be treated – and, specifically rejected – as a matter of law, i.e. beyond any inquiry about facts.[58]

Hence, plaintiffs do not have to guess judges' and authorities' normal conception of how the world works – they know that this conception derives from economic theories and models.

In addition, judges have no problems in finding materials to justify their economic vision of how the world normally is because economics provides them with many theoretical and empirical studies that make their legal decisions reliable. Just to mention some examples, in the above-mentioned *Twombly* case, Justice Souter elaborated on his conclusion by relying on eight economic theoretical and empirical studies about how firms behave in oligopolistic markets[59]. Also, in one of the first EU cases about parallel conduct, the *Ahlström* case, the European Court of Justice relied on the opinion of economic experts to reject the Commission's explanation of parallel conduct[60].

Finally, in connection to the risk of substantial inaccuracy that "general plausibility" introduces, we should debunk this in relation to antitrust law because economics amounts to a (social) science that has among its main tasks that of describing business behaviours and market functioning. As a consequence, the probability that a standard of pleading pivoting around antitrust plausibility would reject would-be grounded claims is very low. Likewise, the risk that a standard of proof impinging on plausibility leads to false descriptions of business facts is minimal. This is so in cases of standards of proof that consider what is plausible to be proved as well as, *a fortiori*, in cases of standards of proof that consider as proved what defeats plausible alternative hypotheses.

Accordingly, we should not have doubts as to the substantial accuracy of the EU standard of proof that the EC applies to cartels inferred from circumstantial evidence. This specific decision-making rule, indeed, requires us to accept as proved the hypothesis of the existence of a cartel only when there is no economically meaningful explanation of the facts at stake that excludes the

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[57] *See*, *e.g.*, Matsushita *v. Zenith Ratio Corp*., 475 U.S. 574 (1986).

[58] *See*, *e.g.*, *Eastman Kodak Co. v. Image Technical Services*, *Inc.*, *et al*, 504 U.S. 451 (1992), where the Defendant tried to characterize as a "matter of law" the union between the market for equipment and the market for spare parts. Actually, the Supreme Court refused to endorse this approach, by claiming that the union or separation between these markets was an issue of facts to be properly alleged and proved.

[59] 550 U.S. 555-570.

[60] Case C-89/85, Ahlström Osakeyhtiö v. Comm'n, [1993] ECR I-01307, §§ 121–125.

possibility that firms had the same ideas in their business practices. Therefore, in the case of parallel practices happening in concentrated markets, it is clear that the EC will not meet the standard of proof when perfect interdependence is plausible – when perfect interdependence can explain parallelism.

Likewise, the *Twombly* pleading standard does not jeopardize judges' capacity to find out the facts as they actually occurred – it does not deprive of relief US antitrust plaintiffs that have actually suffered damage. By asking these plaintiffs to write plausible pleadings, the *Twombly* standard only avoids wasting time and material resources on pleadings that, during the subsequent phases of the lawsuit, would not survive a motion for summary judgment[61] or meet the "preponderance of the evidence" standard. In general terms, indeed, no reasonable jury could find facts in support of an accusatorial factual hypothesis that is economically senseless. Also, in a trial, the same accusatorial factual hypothesis could not find any corroboration if not compatible with economics, i.e. could not have an epistemic probability higher than the epistemic probability of the contrasting defensive factual hypothesis, especially if this latter were plausible.

In short, if economics indicates how the business world works and is expected to work, antitrust judges and authorities do enjoy a *shared vision* of the world that, in addition, does not amount to an unknown and uncontrolled mixture of experiences and commonplaces but results from the rigorous elaboration of tested models and theories. Hence, we can argue that, differently from "general plausibility", *antitrust plausibility* does not entail a significant degree of discretion and indeterminacy, a lack of justification on the part of decision-takers, or a serious risk of mistakes.

Yet, we should not push the above arguments too far. Economics is not a perfect science –we cannot *fully* rely on it because economic theories and models can also be incorrect and unsound. In particular, if the considered economic model is unsound, a factual hypothesis that does not make economic sense could actually describe facts that have indeed occurred. Indeed – truth be told – the *Twombly* court was aware of this possibility when it referred to *Matsushita* and to the idea that a plaintiff can always support a prima facie implausible claim by adducing more persuasive factual allegations that may turn an implausible claim into a plausible one[62][63].

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[61] The standard for granting summary judgment works after an adequate period of discovery and screens the specific claims and defences that, since they are factually unsupported, must be terminated before the trial stage.

[62] *See*, 475 U.S. 574.

[63] Again, also this sort of "inverse relation" between plausibility and amount of factual allegations finds support in the U.S. case law about the definition of the relevant market. Implausible claims – say, also, unusual claim – can however proceed if the plaintiff brings

Furthermore, even setting aside any questions about the *reliability* of economic models and theories, economics is not a hard science that provides *pure* descriptions of the world. Generally, economic theses about the functioning of the business world are rooted in normative choices[64] such as: (i) axioms about human beings' rationality, (ii) unproven assumptions regarding the self-correcting nature of markets, (iii) value judgments about the importance of efficiency gains, and (iv) policy choices relating to the social costs of some government forms of action outside antitrust law.

Therefore, we can have – and we do have – many economic visions of the world that, in addition, give significant leeway to untested and non-verifiable hypotheses and value judgments[65]. Accordingly, as long as plausibility shapes antitrust standards of pleading and proof, the factual hypotheses selected to be tested and accepted as true also depend on these unverifiable and value-based choices. In other words, when plausibility is called on to shape the above standards, economic theories and models – also the theories and models of behavioural economics – are called on to play a role in the process of proof and, as a consequence, the axioms and value assumptions underpinning these theories and models affect even the factual analysis that antitrust judges and authorities carry out. This introduces a sort of *ex ante* risk of substantial inaccuracy that rests with axioms and value assumptions that, by definition, have nothing to do with pure descriptions of the real world. This, in other words, creates a theoretical hiatus – a sort of inconsistency – between the factual decisions that must result from the application of evidence standards and the kind of knowledge, which is not only empirical, from which we draw because of the verification criteria, like plausibility, that inform those standards.

Sure, it is always true that the final decisions about legal cases, antitrust law cases included, may rely on elements other than facts, such as policy

a detailed complaint about her own definition of the relevant market. *See*, *e.g. Arnold Chevrolet LLC v. Tribune Co.*, 418 F. Supp. 2d 172 (E.D.N.Y. 2006), where the Court granted a leave to amend the complaint that failed to describe and explain why the market for sale advertising relating to new automobiles was separated from the market for sale advertising, or from the market for sale advertising for automobiles,

[64] *See*, *e.g.*, W.H. Page, "Ideological Conflict and the Origins of Antitrust Policy" (1991) 66 *Tulane Law Review* 1; M.S. Jacobs, "Essay on the Normative Foundations of Antitrust Economics" (1995) 74 *North Carolina Law Review* 219; D.B. Audretsch, "Divergent Views in Antitrust Economics", 3 *The Antitrust Bulletin* 33; and S. Weber Waller, "Market Talk: Competition Policy in America" (1997) 22 *Law & Social Inquiry* 435; J.E. Lopatka and W.H. Page, "Economic Authority and the Limits of Expertise in Antitrust Cases" (2004–2005) 90 *Cornell L. Rev.* 637.

[65] Think, for example, of the many schools that form antitrust law. Each of them has, beyond a technical, a political soul. *See*, in this regard, M. Maggiolino, *Intellectual Property and Antitrust. A comparative economic analysis of US and EU Law*, ch. 1, Edward Elgar 2011.

evaluations. Yet, one thing is to admit that policy choices find, more or less overtly, room in legal *argumentation*; another thing is to make a standard of proof, which by definition should pertain only *facts*, inherently dependent upon value-choices.

8. A further role for economics within antitrust law

We usually think that economics may play a twofold role within the realm of antitrust law.

First, economics may answer some *policy* questions by fixing the goals that antitrust provisions should pursue. Many antitrust scholars, indeed, still maintain that competition law should protect the good functioning of the market and, hence, total welfare (or, at least, consumer welfare) in lieu of other interests – the so-called non-economic interests – such as fairness and justice[66].

Second, economics may contribute to *interpreting* antitrust provisions. In particular, sometimes some economic concepts, such as "market power"[67] or "interdependence"[68], directly imbue with meaning some ambiguous legal expressions, such as "dominant position" or "concerted practice". At other times – better, in the great majority of times – economics designs the exact boundaries of antitrust prohibitions by indicating the circumstances in which a "restriction of competition" happens. Indeed, once antitrust law protects total or consumer welfare, it is up to economic models – and, in particular, to the hypotheses of industrial organization models – to indicate the conditions under which a specific practice has a net negative impact on total/consumer welfare. It is not by chance that among antitrust scholars "theory of harm" is a quite frequent expression, just because it embraces those economic conditions deriving from an economic model that must be met in order to show that antitrust restriction is in place.[69]

However, economics may play a further role within antitrust law – a role that has nothing to do with policy or interpretation but regards facts. Namely,

[66] The literature on this topic is huge. *See*, *ex multis*, S. Martin, *The Goals of Antitrust and Competition Policy*, 2007, available at http://www.krannert.purdue.edu/faculty/smartin/vita/Goals0707Cmu.pdf. (29.07.2014).

[67] The antitrust literature is also widespread on this topic. *See, ex multis*, I. Lianos, "'Lost in Translation': Towards a Theory of Economic Transplants", available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485378 (28.10.2014).

[68] *See*, *e.g.*, F. Ghezzi, M. Maggiolino, "Bridging EU Concerted Practices with U.S. concerted actions", (2014) *Journal of Competition Law & Economics* 647.

[69] *See*, *e.g.*, H. Hovenkamp, "Fact, Value and Theory" (1987) *Duke Law Journal* 901.

we firstly know that the antitrust version of the notion of plausibility addresses the way in which economics describes – or is said to describe – the facts of the business world. Secondly, we know that: *(i)* standards of proof should reel off the verification criteria that decision takers must meet to accept the facts alleged in a plaintiff's claim as proved, and *(ii)* standards of pleading should contain the verification criteria necessary to reject claims that, even when further scrutinized, would have no chance of surviving the applicable standard of proof. As a consequence, once the notion of plausibility becomes a verification criterion, we must conclude that the way in which economics describes the facts of the business world becomes "the" benchmark for saying whether: *(i)* the disputed facts occurred, and *(ii)* the allegations would never be considered as proven, even after the process of legal proof was carried out.

Now, given that economics is not physics, from a theoretical standpoint what is problematic is the possibility that a mixture of axioms, value-choices and descriptive elements influences a kind of decision-making that, for the sake of rigour, should be only a matter of facts, that is, should be deprived of any normative flavour.

9. Conclusions

The notion of plausibility addresses what is compatible with the normal conceptualization of the world. Hence, in this general meaning, it is highly context-specific[70] and, as a consequence, makes room for discretion, lack of justification and substantial inaccuracy. In antitrust law, plausibility acquires a specific meaning that minimizes these shortcomings: it addresses what is compatible with economics. However, this specific notion of plausibility highlights another problematic issue, that is, that antitrust law allows economics to mould decisions about facts, despite the fact that economics results also from normative choices.

[70] Iqbal v. Hasty, 490 F. 3d 143, 157-158 (2nd Circ. 2007).

Fishing Expeditions and Subsequent Electronic Searches in the Light of the Principle of Proportionality of Inspections in Competition Law Cases in Europe

by

Marta Michałek*

It tends to be a frightening experience when – more often than not, early in the morning – European Commission inspectors turn up unannounced at the doors of an undertaking with the intention of searching its premises as part of a dawn raid aimed at determining whether that undertaking is involved in anti-competitive practices.[1]

CONTENTS

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[1] Opinion of Advocate General (hereafter: AG) Kokott of 3 April 2014 in Case C-37/13 P *Nexans SA and Nexans France SAS vs European Commission*, para 1.

Abstract

Inspections carried out in competition law cases are undoubtedly an effective instrument of competition law enforcement since they constitute an efficient means to obtain relevant evidence. Nevertheless, this institution often leads to a serious interference with the sphere of an undertaking's rights, in particular the right to defence.

Several problems can be observed when it comes to the conduct of inspections in the framework of competition law in Europe. These relate, inter alia, to the right to defence, including the privilege against self-incrimination and legal professional privilege, right to privacy, right to an effective remedy and the principle of proportionality. Most of these questions are common to various European states since they emerge at the level of the European Union, in old and new EU Member States (such as Poland) as well as in countries outside the EU (Switzerland).

This paper focuses on the questions of fishing expeditions and subsequent electronic searches. They are analysed mostly in the light of the principle of proportionality. The paper presents selected controversies and developments in relation to the powers of inspection granted to competition authorities as well as procedural safeguards available to undertakings.

Résumé

Les inspections menées dans les affaires du droit de la concurrence sont sans aucun doute un instrument efficace de l'application du droit de la concurrence, car ils constituent un moyen fructueux d'obtenir des preuves pertinents. Néanmoins, cette institution mène souvent à une grave ingérence dans la sphère des droits des entreprises, en particulier le droit de la défense.

Plusieurs problèmes peuvent être observés par rapport à la conduite des inspections dans le cadre du droit de la concurrence en Europe. Ceux-ci concernent, inter alia, le droit de la défense, y compris la protection contre l'auto-incrimination et le secret professionnel, le droit à la vie privée, le droit à un recours effectif et le principe de proportionnalité. La plupart de ces questions sont communes à plusieurs pays européens, car ils émergent au niveau de l'Union européenne, dans les anciens et les nouveaux États membres de l'UE (comme la Pologne) ainsi que dans les pays extérieurs à l'UE (Suisse).

Cet article se concentre sur les questions des «expéditions de pêche» et des recherches électroniques ultérieures qui sont analysées à la lumière du principe de proportionnalité. Ce texte présente certains controverses et développements concernant les pouvoirs d'inspection conférés aux autorités de la concurrence ainsi que des garanties procédurales offertes aux entreprises.

Classifications and key words: Fishing expeditions, subsequent electronic searches, principle of proportionality, procedural safeguards of undertakings, competition law's inspections, powers of inspections, judicial review

I. Introduction

"Dawn raids" are unannounced inspections conducted by competition authorities. They are undoubtedly an effective instrument that leads to the detection of competition law infringements[2] committed by inspected undertakings. Inspections are said to be much more effective if carried out without a forewarning[3] seeing as this usually makes it possible to gather key evidence of the given investigation. For that reason, dawn raids often constitute a significant investigative step leading to the subsequent finding of a competition law infringement and imposition of substantial fines[4].

Nevertheless, the implementation of those far reaching investigative powers granted to competition authorities constitutes a major intervention into the private sphere of the undertakings concerned regarding their private activities and premises. It has to be stressed that inspections are liable to interfere with several rights granted to undertakings namely: the right to defence[5], including the privilege against self-incrimination and legal professional privilege, right to privacy[6], right to effective judicial protection[7] as well as with the principle of proportionality.

The principle of proportionality requires that any interference with an undertaking's business activities has to take the least onerous form possible. This principle has been introduced in all of the legal orders under review – the EU, the Polish and the Swiss. Still, one might sometimes question whether the powers of inspection granted to competition authorities, on the one hand, and the safeguards granted to undertakings, on the other hand, entirely guarantee the observance of the principle of proportionality in competition law proceedings. Such controversies relate mostly to the issue of fishing expeditions and the coping of entire hard drives for subsequent electronic searches.

It is indispensable in this context that those subject to an inspection are "given the opportunity to seek a comprehensive and effective judicial review of

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[2] For instance cartels.

[3] M. Bernatt, "Powers of Inspection of the Polish Competition Authority. Question of Proportionality" (2011) 4(5) *YARS* 58.

[4] The level of imposed fines has been constantly increasing, mostly in the EU, due to the Commission's prevailing aim to strengthen deterrence of EU competition law violations. On the increase of fines, see, e.g. I.S. Forrester, "Due Process in EC competition cases: A distinguished institution with flawed procedures", (2009) 34 *ELRev* 824-826.

[5] Art. 6(1) of the European Convention of Human Rights (hereafter: ECHR); since inspections are part of proceedings of a criminal or quasi-criminal nature.

[6] Art. 8(1) ECHR.

[7] Art. 6 and 13 ECHR (right to an effective remedy).

the legality of both the decision ordering that investigation and the individual steps taken during the investigation"[8]. In the light of the above, the following assessment covers remedies available to undertakings as well as the scope of judicial review.

Since most of the relevant questions are common to various European states, that is, they emerge at the level of the European Union, in old and in new EU Member States as well as in countries outside the EU, all above issues are analysed in the light of the EU, Polish and Swiss competition law regimes[9]. In conclusion, some improvements to the current system are proposed.

II. Principle of proportionality

According to the essential legal principle of proportionality, any "interference by public authorities with the rights and freedoms of private entities is permissible only if it is in accordance with the law and is necessary in a democratic society for the protection of key interests such as public order or the rights and freedoms of others"[10]. Actions of public authorities should be deemed disproportional if the aim they pursue can also be achieved by less intrusive means.

The *Société Colas Est and Others v France*[11] judgment related to competition law procedure. The European Court of Human Rights (hereafter: ECtHR) confirmed therein the direct application of Article 8 of the European Convention of Human Rights (hereafter: ECHR) for the purposes of the protection of undertakings against arbitrary inspections carried out by competition authorities[12]. Pursuant to this provision "everyone has the right to respect for his private and family life, his home and his correspondence"

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[8] Opinion of AG Kokott of 29 April 2010 in Case C-550/07, *Akzo Nobel Chemicals and Akcros Chemicals Ltd vs Commission*, para 43.

[9] The perception of this problem is nevertheless different depending on whether it is discussed in the EU, in Poland or in Switzerland since its focus is placed on diverse aspects and perspectives. The author decided to slightly differentiate the analyses of these three legal orders (scope and emphasized content) so as to reflect the particularities of the relevant legal debates present in each competition law regime.

[10] M. Bernatt, "Powers of Inspection…", op. cit., p. 48.

[11] Judgment of the European Court of Human Rights (hereafter: ECtHR) of 16 April 2002 in case *Société Colas Est and other vs France*, application no. 37971/97, para 51.

[12] ECtHR judgment in *Société Colas Est*, paras 48-49 and 51; even though in its literal wording Art. 8 ECHR seems to be applicable only to natural persons and private dwellings, its scope has been extended by the ECtHR to legal persons and business premises. See ECtHR judgment of 16 December 1992 in case *Niemietz vs Germany,* application no. 13710/88.

apart from public interference which is (1) "in accordance with the law", (2) "necessary in a democratic society" and (3) "in the interests of the economic well-being of the country [or] for the prevention of disorder or crime". The ECtHR further emphasised that even though the aim to "prevent the disappearance or concealment of evidence of anti-competitive practices" justifies the impugned interference with undertakings' right to respect for their premises, the relevant legislation and practice must however afford "adequate and effective safeguards against abuse"[13]. Although the ECtHR held in *Niemietz* that entitlement to "interfere" to the extent permitted by paragraph 2 of Article 8 ECHR may be "more far-reaching" where professional or business activities or premises are involved[14], inspections must nevertheless be "strictly proportionate to the legitimate aims pursued"[15].

The principle of proportionality is part of the legal order of the EU, Poland and Switzerland. Pursuant to Article 5(4) TEU, the content and forms of EU actions shall not exceed what is necessary to achieve the objectives of the Treaties. Moreover, the jurisprudence of the Court of Justice of the EU (hereafter: CJ) confirms that "the principle of proportionality (…) requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued"[16].

The European judiciary clarified also that any intervention made by the public authorities in the sphere of private activities of any - natural or legal - person, "must have a legal basis and be justified on the grounds laid down by law" and, further, protection against arbitrary or disproportionate intervention must be guaranteed under the law in all the legal systems of the Member States.[17]

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[13] ECtHR judgment in *Société Colas Es, p*ara 48;

[14] See ECtHR judgment in *Niemietz*, para 31.

[15] M. Bernatt, "Powers of Inspection…", op. cit., p. 50.

[16] ECJ judgment in case C-133/93 *Crispoltoni v Fattoria Autonoma Tabacchi*, [1994] ECR I-4863, para 41; See also judgment in *C-331/88 The Queen vs The Minister for Agriculture, Fisheries and Food and the Secretary of State for Health, ex parte: Fedesa and Others*, [1990] ECR 1-4023, para 13.

[17] ECJ judgment of 21 September 1989 in Joined Cases 46/87 and 227/88 *Hoechst AG v Commission,* para 19; an unannounced inspection should be regarded as proportionate only if it is justified in the given circumstances. See to this effect ECJ judgment in case 136/79, *National Panasonic vs Commission*, para 30.

With regard to the Polish legal order, the principle of proportionality is enshrined in Article 31(3) of the Polish Constitution. Article 31(3)[18] stipulates that "(a)ny limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights". Pursuant to Article 22(1) "limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons".

In the Swiss legal order, the principle of proportionality is derived from Article 5 of the Federal Constitution (the rule of law), stating that State activities must be conducted in the public interest and be proportionate to the goals pursued. According to Article 36 thereof, any restrictions on fundamental rights, aside from having a legal basis and being justified by a public interest or by the need to protect the fundamental rights of others, must also be proportionate[19]. Furthermore, the right to privacy is protected by Article 13 of the Federal Constitution[20]; the relevant procedural guarantees granted to undertakings are set out in Articles 29 (right to a fair trial and right to be heard), Article 29a (guarantee of access to the courts), Article 30 (right to be heard by a independent and impartial court) and Article 32 (presumption of innocence) thereof.

An inspection undoubtedly constitutes a significant intervention in the business activities of the undertaking concerned. An undertaking's activities are usually paralysed during a dawn raid; their subsequent resumption may be impeded as well.[21] Inspections run by competition authorities, which are liable to interfere with the rights of undertakings, are thus only allowed if they meet the above-mentioned requirements. The principle of proportionality should be fully respected, regardless of the gravity of the suspected infringement of competition law[22].

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[18] Art. 31(3) is part of Chapter III entitled "*Freedoms, Rights And Obligations Of Persons And Citizens*".

[19] Moreover, Art. 9 of the Federal Constitution grants protection against arbitrary conduct of state authorities.

[20] "Every person has the right to privacy in their private and family life and in their home, and in relation to their mail and their telecommunications."

[21] A. Waser, "Verfahrensrechte der Parteien – neueste Entwicklungen" [in:] I. Hochreutener, W. Stoffel, M. Amstutz (eds), *Droit de la concurrence: Développements, droit de la procédure, décloisonnement du marché suisse / Wettbewerbsrecht: Entwicklung, Verfahrensrecht, Öffnung des schweizerischen Marktes*, Schulthess, Growth Publisher Law 2014, p. 80.

[22] Since dawn raids occur in principle only in cases regarding hard-core infringements of competition law, all suspected anticompetitive behaviours of the undertakings inspected are

III. Fishing expeditions

The overall aim of inspections is to ensure that the competition authority disposes of an effective measure to detect competition law infringements. Nevertheless, due to the scale of the interference with the rights and activities of undertakings, inspections cannot be ordered freely. An unconditional competence to carry out inspections might lead to an arbitrary or disproportionate intervention by public authorities into the private sphere of undertakings. It might, for instance, result in so called *fishing expeditions*. This term refers to inspections conducted without factual or legal basis – they are driven merely by an unsubstantiated suspicion of a potential infringement. Fishing expeditions are prohibited since they constitute an abuse of public powers by a competition authority, a realisation which was, *inter alia*, recently confirmed by the CJ[23].

Certain procedural guarantees have been put in place in order to avoid such an abuse and, more generally, to balance the far-reaching powers of competition authorities. Inspections have to be subject to specific requirements regarding, *inter alia*, the existence of a sufficient suspicion of an infringement as well as a precise delineation of their scope in the prior authorisation of a given investigation (obligation to specify the purpose and the subject matter). These prerequisites should be regarded as a fundamental guarantee against an arbitrary or disproportionate intervention by public authorities. The scope of the inspection, specified in its authorisation, determines the areas of the activities of the investigated undertaking which the inspection relates to. It thus sets the limits of the allowed interference of the officials[24]. The Polish Supreme Court confirmed in this context that during an inspection of business premises, the obligation to cooperate with the inspectors includes providing access to documents, or providing a copy of them, that are related to the subject of the inspection[25].

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actually regarded as serious and very detrimental. The standard of the undertakings' protection does not vary depending on the gravity of alleged infringement but applies equally to all undertakings inspected.

[23] See judgment of the General Court (hereafter: GC) of 14 November 2012 in Case T-135/09 *Nexans v Commission*.

[24] No measure can go beyond it; see e.g. Art. 79a (8) of the Polish Act on the Freedom of Economic Activity.

[25] Polish Supreme Court judgment of 7 May 2004, III SK 35/04, OSNP 2005, No. 7, item 103.

This requirement may be identified in all relevant legal orders, albeit the form of such authorisation[26], as well as precise requirements and emphases as to its content, vary depending on the legal system concerned.

In the EU, it is emphasised first of all that an inspection decision must be *properly reasoned*. The obligation to state the reasons for an act of the European Union derives from Article 296 TFEU. It is also introduced, as part of the right to good administration, in Article 41(2)(c) of the Charter of Fundamental Rights of the European Union[27] (hereafter: Charter). In accordance with settled jurisprudence, every EU institution which adopts a measure has to explain it. It must disclose its reasoning (in a statement of reasons) in a clear and unequivocal manner in order to provide the entity concerned with the justification of the undertaken measures, as well as to enable EU courts to exercise their power of review[28]. More specifically, Article 20(4) Regulation 1/2003[29] further clarifies the required content and scope of the obligation to state the reasons for the issuance of an inspection decision. Pursuant to its second sentence, such decisions must specify, *inter alia*, the subject-matter and purpose of the inspection in question. This provision is meant to ensure that no inspection constitutes a "fishing expedition", in other words, that is it not carried out by the Commission on a speculative basis and without any concrete suspicions[30]. EU courts have repeatedly held that this special duty to state reasons is a fundamental requirement in this context – it is "designed not merely to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence"[31].

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[26] Namely, an authorization of the UOKiK President, an order of the Presidium of the Swiss Competition Commission (hereafter: Comco), a decision of the European Commission or an order of the Polish Court of Competition and Consumers Protection (hereafter: SOKiK).

[27] See Opinion of AG Kokott in *Nexans*, para 41.

[28] ECJ judgment in Case C-367/95 P *Commission vs Sytraval and Brink's* France, para 63; ECJ judgment in case C-413/06 P Bertelsmann and Sony Corporation of America vs Impala, para 166; and CJ judgment in case C-439/11 P Ziegler vs Commission, para 115; See also Opinion of AG Kokott in *Nexans*, para 42

[29] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, pp. 1–25

[30] See in this regard Opinion of AG Mischo in cases 46/87 and 227/88 *Hoechst* vs *Commission*, para 206 and the Opinion of the AG in case C-109/10 P *Solvay* v *Commission*, para 138.

[31] *Hoechst* judgment, para 29; ECJ judgment in Case 85/87 *Dow Benelux* vs *Commission*, para 8 and 40; ECJ judgment in Joint Cases 97/87 to 99/87 *Dow Chemical Ibérica and Others* vs *Commission*, paras 26 and 45; and ECJ judgment in Case C-94/00 *Roquette Frères*, para 47. Similarly, ECJ judgment in Joint Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* vs

With reference to the content of inspection decisions, the General Court held that they must at least state "essential characteristics of the suspected infringement" and "identify the sectors covered by the alleged infringement"[32], albeit they are not required to specify the relevant geographical market[33]. The Commission is further obliged to indicate as precisely as possible the presumed facts which it intends to investigate[34] including the evidence sought and the matters to which the investigation must relate[35].

Polish legislation focuses mostly on the (1) indication, in the inspection authorisation, of the subject and scope of the inspection, including the period covered[36], as well as (2) prior possession of relevant evidence supporting the need to carry out an inspection[37]. Therefore, an authorisation or a court order should firstly indicate the markets and the products or services covered by the investigation as well as the suspicious conduct being subject to the inspection (such as is pricing policy). Secondly, it should specify the alleged competition law infringement concerned[38]. With reference to the indication of the aim of the inspection, the President of the Polish Office of Competition and Consumer Protection – *Prezes Urzedu Ochrony Konkurencji i Konsumentow* (hereafter UOKiK President) – is required to determine, on the basis of knowledge already in his/her possession, the facts, which he/she intends

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Commission, para 299. This jurisprudence relates to the predecessor provision of Regulation 17, however it is readily transposable to Art. 20(4) Regulation 1/2003. See also Opinion of AG Kokott in *Nexans*, para 44.

[32] GC judgment in *Nexans.*

[33] CJ judgment of 25 June 2014 in case C-37/13 P *Nexan vs Commission*, where the CJ accepted the description of the relevant geographical market as "probably global"; See Opinion of AG Kokott in *Nexans*, paras 22 and 45.

[34] *Hoechst* judgment, para 41; *Dow Benelux* judgment, para 10; *Dow Chemical Ibérica* judgment, para 45; Opinion of AG in *Solvay*, para 138.

[35] *Roquette Frères* judgment, para 83.

[36] Other necessary elements of an inspection authorization issued by the UOKiK President, in case of a control, or with a court order, in case of a search include: (1) identification of the inspecting authority; 2) indication of the legal basis; (3) date and place of its issue; (4) inspectors' identification data; (5) indication of the inspected party; (6) determination of beginning and anticipated completion date of the inspection; (7) signature of the authorizing person, (8) instruction of the rights and obligations of the undertakings concerned.

[37] M. Bernatt, "Powers of Inspection…", op. cit., p. 52.

[38] M. Bernatt, G. Materna, "Article 105a" [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds) *Ustawa o ochronie konkurencji i konsumentów, Komentarz*, C.H.Beck Warsaw 2014, Chapter V, No. V. 8; direct relation should occur between the control and the allegations regarding the undertaking controlled. See also M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji,* Warsaw 2011, p. 197 and CFI judgment in Case T-39/90, *SEP vs Commission*, para 29.

to establish through the control indicating the suspected infringement of competition rules[39].

In Switzerland, the focus rests mostly on the existence of (1) sufficient suspicion of the commitment of a competition law infringement[40] and (2) probability that relevant evidence will be found in the given undertaking's premises[41]. The inspection order has a limiting and controlling function[42]. For that reason, it must, in particular, indicate the characteristics of the infringement suspected as well as reasons (relevant facts) of this suspicion[43].

Nevertheless, some problems may arise when it comes to the judicial interpretation of the above requirements. The approach adopted by the judiciary while assessing the legal requirements applicable to the statement of reasons for an inspection decision seems too lenient. Since unannounced inspections normally take place at a very early stage (as part of preliminary investigations[44]), competition authorities understandably lack, at that time, the information necessary to make a specific legal assessment[45]. Taking into account the above argument, doctrine postulates, however, that the scope of the inspection should not be indicated too vaguely in order to avoid potential abuses of inspectors' powers[46].

Unfortunately, the European judiciary held that it is not indispensable for an inspection decision to contain exact legal assessments, despite the legitimate interest of undertakings in safeguarding their rights of defence.

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[39] M. Bernatt, G. Materna, "Article 105a…", op. cit., Chapter V, No. I. D.

[40] The requirement of sufficient suspicion is comprised of two prerequisites: 1) from the facts of the case, described in details, a suspicion may result that one or more competition law infringements were committed; 2) the suspicion in order to be sufficient must be supported by adequate evidence or indications provided in order to confirm the indicated facts. Such indications should refer to incriminated conduct and make it possible to sufficiently establish adequate suspicion. See judgment of the Federal Court of 25 April 2013, 1B 98/2013.

[41] Art. 48 para 1 of Swiss Administrative Criminal Law.

[42] I.e. it should allow the undertaking concerned to verify whether the measure undertaken in its application is in line with its content and if not, to raise relevant objections.

[43] D.R. Gfeller, "Kommentar zu Art. 241 stop" [in:] M. Niggli, M. Heer, H. Wiprächtiger (eds), *Basler Kommentar Schweizerische Strafprozessordnung / Jugendstrafprozessordnung*, Basle 2010, N 7 f.

[44] Before the preparation of the Statement of Objections ; See *Commission notice on the Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU,* OJ (2011) C 308, p. 6, para 50; see also R. Whish, D. Bailey, *Competition Law*, 7th ed., Oxford OUP, p. 285.

[45] See to this effect *National Panasonic*, para 21 as well as Opinion of AG Mischo in *Hoechst*, para 174; Opinion of AG Kokott in *Solvay*, para 143. Regarding the determination of whether an infringement of Art. 101 or 102 TFEU occurred, see Opinion of AG Mischo in *Hoechst*, para 176; Opinion of AG Kokott in *Solvay*, para 144 and Opinion of AG Kokott in *Nexans*, para 48.

[46] C. Kosikowski, *Ustawa o swobodzie działalności gospodarczej. Komentarz*, 7th Edition, LexisNexis Warsaw 2013, p. 519.

An inspection decision does not need to precisely define the relevant market, set out the exact legal nature of the presumed infringement[47] or indicate the period during which the infringement at stake are said to have been committed[48]. According to the CJ, the focus should be shifted to the definition of the suspected infringements of competition law rather than on a precise description of the markets concerned[49]. The Commission must only show "that it is in possession of information and evidence providing reasonable grounds for suspecting the infringement", it "is not required to state the evidence and indicia on which the decision is based"[50].

In a recent ruling, the Polish Court of Competition and Consumer Protection (*Sad Ochrony Konkurencji i Konsumentów*, hereafter SOKiK)[51] did not agree with the allegations raised by an undertaking in relation to the inspection carried out at its premises. The undertaking complained that the authorisation did not specify whether the inspection related to a suspected infringement in the form of an anticompetitive agreement or an abuse of a dominant position[52]. Such lack of specifics is, however, liable to allow UOKiK officials to conduct fishing expeditions.

According to the jurisprudence of the Swiss Federal Criminal Court[53], the evidence or indications held by the authorities at early stages of the investigation neither have to present a high degree of probability of subsequent conviction[54] nor to precisely predict possible future sanctions[55]. In competition law proceedings, the Swiss Federal Criminal Court accepted, for instance, a search which was conducted solely on the basis of the vague presumption of a price agreement[56]. In the so called *Bathrooms* case, the opening of the proceedings and the conduct of dawn raids (including making copies of hard drives) was based on consumer emails only that complained about excessive

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[47] It is sufficient to indicate the "essential features" of the suspected infringements. See CFI judgment of 8 March 2007 in Case T-339/04, *France Telecom SA v Commission*, paras 58 and 59.

[48] *Hoechst* judgment, para 41; *Dow Benelux* judgment, para 10; *Dow Chemical Ibérica* judgment, para 45; *Roquette Frères* judgment, para 82; Opinion of AG Kokott in *Nexans*, para 49. It is worth remembering that this period must be specified in Poland in the inspection authorization.

[49] CJ judgment in case *Nexans 2014*, Opinion of AG Kokott in *Nexans*, para 59.

[50] *FranceTélécom* judgment, paras 60 and 123.

[51] 1st instance court for competition matters in Poland.

[52] Only a general notion of "practices restricting competition" was used to indicate the object of the control. See SOKiK ruling of 14 February 2012, XVII Amz 6/12, XVII Amz 7/12, unpublished.

[53] The highest instance court for criminal matters in Switzerland.

[54] Decision of the Swiss Federal Criminal Court of 4 October 2012, E. 3.1.

[55] Decision of the Swiss Federal Criminal Court of 20 February 2007, BE. 2006.7, E. 3.1.

[56] Decision of the Swiss Federal Criminal Court of 11 July 2012, BE. 2012.4, E. 3.3.

prices[57]. The Swiss Federal Criminal Court upheld this stance and recalled that criminal proceedings can be initiated on the basis of a substantiated complaint that justifies a probable cause[58].

The Swiss Federal Criminal Court's interpretation of sufficient suspicion has been strongly criticised for hindering the protection of fundamental rights. Swiss scholars emphasise that one cannot come to the conclusion that a *sufficient suspicion* exists only basing on an ungrounded perception, resulting from the authority's initial research, consumer complaints of allegedly excessive or fixed prices in the market[59] or remarks from competitors that an illegal restriction of competition might have occurred[60]. To the contrary, sufficient suspicion requires the existence of concrete indications, going beyond general suppositions, rumours or pure guesses that suggest the presence of an illegal restriction of competition[61].

The approach towards documents falling outside the scope of the inspection decision constitutes another important issue connected with the problem of fishing expeditions.

As confirmed by the courts, such as the Polish SOKiK, it is the very essence of an inspection that inspectors may uncover information and documents that are not covered by the scope of the given inspection[62]. Nevertheless, it is obvious that the authority's powers are limited to the subject-matter of the investigation. While carrying out an unannounced inspection, inspectors are thus entitled to search for, and examine, only those business records that can be relevant to the proceedings at stake[63]. Items not related to the subject matter

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[57] E.g., a consumer email of 22 October 2011: "prices were very similar" ("*les prix étaient très proches*"), consumer email of 1 November 2011: "I've become aware of excessive prices in the construction industry, for example, of bathtubs" ("*ich bin auf massiv überhöhte Preise im Baugewerbe aufmerksam geworden, z.B. Badewannnen*").

[58] Decision of the Swiss Federal Criminal Court of 11 July 2012, BE. 2012.4, E. 3.2; See also decision of the Federal Criminal Court of 22 April 2005, BE.2004.10, E. 3.3(2)

[59] Compare Decision of the Swiss Federal Criminal Court of 11 July 2012, in the *Bathrooms* case, BE. 2012.4.

[60] A. Waser, *Verfahrensrechte der Parteien…*, op. cit., p. 75; S. Bangerter, *Kommentar zu Art. 42 KG…*, op. cit. No. 50.

[61] J. Weber, "Kommentar zu Art. 197 StPO" [in:] M. Niggli, M. Heer , H. Wiprächtiger (eds), *Basler Kommentar Schweizerische Strafprozessordnung / Jugendstrafprozessordnung*, Basle 2010 No. 7 f.; Hence, e.g., specific information provided from leniency applicants giving concrete indications in relation to an infringement in a determined market will meet the above requirement. See A. Waser, *Verfahrensrechte der Parteien…*, op. cit., p. 75.

[62] SOKiK judgment of 8 November 2003, XVII Ama 123/02.

[63] See in this regard *National Panasonic* judgment, para 20; *Hoechst* judgment, para 25; *Dow Benelux* judgment, para 36; *Dow Chemical Ibérica* judgment, para 22; *Roquette Frères* judgment, para 48. This limitation is however not required to be expressly specified in the statement of reasons. See Opinion of AG Kokott in *Nexans.*

of the given proceedings can therefore be neither subsequently taken into consideration nor seized[64]. Furthermore, every case of a dispute regarding the nature of the document at hand should be noted in the inspection protocol[65].

However, if documents falling outside the scope of the inspection happen to be seized by the competition authority, it is paramount that such illegally obtained documents are returned to the undertaking. They cannot remain in the authority's possession. Unfortunately, undertakings may not always have sufficient legal instruments to successfully execute the return of such documents.

At the EU level, the General Court (hereafter: GC) expressly held that it is not entitled to issue precise instructions in order to determine the consequences of the decision's annulment. Namely, it cannot order the Commission to return all documents collected by the Commission in relation to annulled parts of inspection decision[66]. Indeed, EU law does not provide the courts with such power[67]. Nevertheless, since documents which had been obtained illegally are to be excluded from the case file and returned to the undertaking concerned, it may be justified to recommend the introduction of such a power.

The need for granting the GC with such additional power is strengthened by the fact that, pursuant to the Commission Notice on the rules for access to the Commission file[68], documents found to fall outside the scope of the subject matter of the case "*may*[69] be returned to the undertaking from which they have been obtained" and "will no longer constitute part of the file". In EU competition law proceedings the irrelevant documents are in practice subsequently returned to the undertaking concerned. Nevertheless, a legal approach that lacks a clear obligation to return the documents that "the Commission had no power in the first place to take"[70], is definitely untenable.

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[64] Judgment of the Polish Supreme Court of 7 May 2004, III SK 35/04; See also M. Swora, *Article 105 b*…, No. 12.

[65] M. Bernatt, G. Materna, "Article 105a…", op. cit., Chapter V, No. II. D.

[66] In GC judgment in *Nexans.*

[67] Under Art. 266 TFEU, it is for the Commission to draw the consequences of the decision's annulment. If undertaking is willing to receive the contested documents from the Commission, and the Commission does not do so spontaneously or following the undertaking's request, the undertaking concerned has to bring, for this purpose, an action for failure to act under Article 264 TFEU.

[68] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22.12.2005, para 9.

[69] Instead of "must".

[70] D. Théophile, I. Simic, *Legal Challenges*…, op. cit., p. 518.

The recent *Deutsche Bahn*[71] ruling of the GC may raise some further doubts in this context. Deutsche Bahn challenged the legality of all inspection decisions regarding this undertaking and claimed that its fundamental rights had been violated. It contested the fact that the 2nd and 3rd inspections were based on information obtained illegally during the 1st inspection. In its judgement, the GC confirmed its position[72] that it is not illegal for the Commission to use as intelligence (as opposed to as evidence) information which it has obtained accidentally. Pursuant to the GC, the Commission was allowed to "kill two birds with one stone" – it should not turn a blind eye to documents potentially pointing to another infringement even if they are discovered by accident during an investigation regarding another potential violation. Nevertheless, such approach might be subject to criticism and regarded as giving a green light for conducting fishing expeditions or making an illegal use of "chance discoveries".

Although due to the limits of this paper it is not possible to consider fishing expeditions any further, it is important to briefly identify other most questionable points. It is worth noting that inspections are commonly carried out already during explanatory proceedings[73]. Even though this solution seems to be common practice, it has both supporters as well as opponents in the doctrine. In the Polish context, since explanatory proceedings may be conducted with various aims, an inspection may only be justified if the given explanatory proceedings aim at "initially determining whether an infringement took place of the provisions of the [Competition Act] which would justify the institution of antimonopoly proceedings". Inspections should be excluded in other circumstances. It is argued in Switzerland in this context that, contrary to the practice of the Competition Commission (hereafter: Comco), inspections should not be undertaken within preliminary investigation but only at the stage of a full investigation. The latter can be initiated only if there are indications of an unlawful restraint of competition, and after consultation with a member of the presiding body[74].

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[71] In March 2011, the Commission carried out dawn raids at various premises of Deutsche Bahn suspecting abuse in relation to the supply of electric traction by giving preferential rebates to its own subsidiaries. During the inspection, Commission officials uncovered documents indicated other possible abuses (discriminatory conditions in the railway transport sector or refuse to access to its terminals). In order to *legally* obtain evidence of the new infringement, the Commission adopted immediately a 2nd inspection decision followed by a 3rd in July 2011, entitling the officials to return to DB's premises to search for further evidence in relation to a possible abuse in all railway transport markets.

[72] Established since the *Dow Benelux* judgment.

[73] See A. Waser, *Verfahrensrechte der Parteien*…, op. cit., p. 80

[74] Art. 26 and 27 of the Cartels Act.

Problems surround also the distinction between a control and a search in Polish competition law. A control, specified in Article 105(a), takes place when UOKiK inspectors are entitled to study only the material provided to them by the staff of the inspected undertaking. According to the SOKiK, a *control* "is based on the voluntary and conscious cooperation of the inspected undertaking. During the simple inspection the undertaking is obliged to provide any necessary information or access to books, documents, data storage, premises and means of transport"[75]. By contrast, a *search*[76] has been defined as an inspection where UOKiK inspectors look for evidence of an alleged infringement independently, that is, without any cooperation or help from the representatives of the undertaking concerned.

The division between a control and a search results in a problematic differentiation of the safeguards granted to undertakings depending on the type of inspection carried out since safeguards are more limited with respect to controls than with respect to searches. First, unlike with a search, no judicial consent is needed for a control. Second, the control authorization issued by the UOKiK President is not regarded as an order under Art.123 of the Code of Administrative Procedure. Therefore, contrary to the solution adopted in EU competition law, the undertaking concerned is deprived of the right to challenge the legality and proportionality of the control authorization before a court. The undertaking is, however, obliged to cooperate with the inspectors during the control and has no possibility to deny access to its premises without being fined[77]. It has to be stressed also that the presence of the undertaking's representatives in the inspected premises is not obligatory during a control. There is also no procedural safeguard to prevent such a control from practically becoming a search. This stance may easily lead to abuse (fishing expeditions) and a violation of the undertaking rights. Unfortunately, the subsequent seeking of relief before the SOKiK may not be successful[78].

[75] SOKiK judgment of 11 August 2003, XVII Ama 123/02, Journal of Laws of UOKiK of 2004, No. 1, item 281.

[76] See, e.g. judgment of the Supreme Court of 7 May 2004, III SK 34/04, UOKiK OJ 2004 No. 4, item 330; the judgment of the SOKiK of 11 August 2003, XVII Ama 123/02, Journal of Laws of UOKiK of 2004, No. 1, item 281.

[77] See Art. 105e and 106(2)(3) of the Competition Act; the UOKiK President's decision of 4 November 2010, DOK-9/2010 and of 24 February 2011, DOK-1/2011. See also M. Kozak, *Simple procedural infraction or a serious obstruction of antitrust proceedings, are fines in the region of 30-million EURO justified? Case comment to the decisions of the President of the Office for Competition and Consumer Protection of 4 November 2010 Polska Telefonia Cyfrowa Sp. z o.o. (DOK-9/2010) and of 24 February 2011 Polkomtel SA (DOK-1/2011)*, YARS 2011 4(5).

[78] In the *Centertel* case, which focused on this issue, the SOKiK rejected the allegations that the UOKiK inspectors were *de facto* carrying a search, rather than a control, and upheld the UOKiK President's decision to impose a fine on the undertaking inspected for its refusal to cooperate. See judgment of the Supreme Court of 7 May 2004, III SK 34/04 *Polskiej Telefonii*

So far, pursuant to the old version of Article 105c(1), a search could be conducted within a control and ordered during a control. According to the new provisions, searches become a totally distinct type of an inspection, regulated separately in the Competition Act. The newly added Article 105n clarifies that during explanatory or antimonopoly proceedings of cases regarding practices restricting competition, the UOKiK President is entitled to conduct a search in the undertaking's premises. The purpose of a search is to find and obtain information from various types of items (including digital information) that could possibly constitute evidence in the case. A search can be conducted if justified reasons exist to support the view that relevant information or objects are kept in those premises.

Another problematic issue concerning dawn raids that must be mentioned here is the lack of an effective right to oppose an inspection which is analysed in the following section.

IV. Subsequent electronic searches of copied hard drives

Taking away forensic copies of computer hard drives for later review at an authority's premises constitutes an extremely controversial, albeit common, practice related to inspections carried out by competition authorities. Looking at the ECtHR's approach confirmed in *Robathin*[79], some doubt may however arise whether this practice is fully in line with Strasbourg jurisprudence.

According to the ECtHR, any seizure amounts to an interference with the right to privacy which has three consequences. First, 1) a sufficient basis for such an action must be established in the relevant legal provisions. Second, 2) the use of this measure must be necessary to achieve the legitimate aim in the circumstances at stake (question of proportionality). Third, 3) the inspected entity must be granted safeguards against arbitrary actions by the authorities.

In the *Robathin* case, the ECtHR found a violation of Article 8 ECHR since the seizure and examination of electronic data had gone beyond what was necessary to achieve the legitimate aim. The ECtHR noted first that the scope and purpose of the inspection warrant had been very broad and thus procedural guaranties and remedies were required in order to counterbalance

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Komórkowej "Centertel Spółki z o.o vs the UOKiK President. See also the previous judgment in this case of the SOKiK of 11 August 2003, XVII Ama 123/02.

[79] During the search, officials copied all files from the applicant's computer. Since Mr. Robatin objected to the data being examined, the copied discs were sealed and provided to the court which approved the screening of all data.

its scope. The applicant was provided with a remedy – a court scrutinized whether the examination of the seized electronic data was permissible. However, according to the ECtHR, the review body exercised its supervisory function incorrectly since it only gave very brief and rather general reasons for authorising the search. It also did not consider the issue of proportionality – it neither addressed the question whether it would be sufficient to search only that data which was limited to the scope of the investigation, nor gave any specific reasons for its finding that a search of all of the applicant's data was necessary for the investigation[80]. Nevertheless, a seizure of electronic data raises questions of proportionality. Even if the seizure took place in pursuit of a legitimate goal (public protection of competition[81]), it is indispensable to ascertain whether the measure subject to the complaint was "necessary in a democratic society". In other words, the court should have assessed whether the relationship between the aim sought to be achieved by way of the inspection and the means employed can be considered proportionate[82].

Before considering whether the solutions adopted in the EU, Poland and Switzerland are in fact compatible with the three Robathin requirements, it is worth noting the unfortunate avoidance of the European judiciary to rule on the merits of this issue. As an example, one may point to the judgement in *Nexans*. The GC was called to rule on the question of the legality of a measure consisting of the removal from company premises of forensic copies of computer hard drives for later review at the authority's premises. However, instead of pronouncing on the issue, the GC simply declared the challenges inadmissible[83].

According to the ECtHR, the first issue to consider with respect to the seizure of copies of entire computer hard drives is whether there is a sufficient legal basis for such far-reaching public intervention. In the EU, one can indicate here Article 20(2)b and c Regulation 1/2003[84] as well as, as a complementary document, *Commission's Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003*[85].

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[80] *Robathin* judgment, paras 47-52.

[81] Judgment of the Polish Supreme Court of 28 October 2003, I CK 179/02, not yet reported.

[82] *Robathin* judgment, paras 42-43.

[83] It was noted, however, that an undertaking is entitled to file an action in tort against the Commission if its unlawful act inflicted damage on the undertaking inspected. Unfortunately, the GC did not specify what the term *damage* means in this context.

[84] Commission officials authorized to conduct an inspection are empowered to examine the books and other records related to the business, irrespective of their storage medium, and to take or obtain in any form copies of or extracts from such books or records.

[85] Paras 9, 10 and 14 entitle the Commission to take a full image of a server or storage media for safekeeping purposes, block individual email accounts and examine storage media.

In Poland, UOKiK officials were entitled to search and copy "all kinds of documents and data carriers" already under the previous version of the Competition Act. The newly amended Competition Act[86] provides for an even stronger basis thereof[87]. According to the new Article 105b(1)2 and 4, UOKiK inspectors are empowered *expresis verbis* to search and take copies of computer storage media or other IT equipment containing electronic data or IT systems[88].

The Swiss Federal Act on Cartels and other Restraints of Competition (hereafter: LCart)[89] lacks a sufficiently clear and explicit basis for the discussed practice. Article 42(2) LCart, constituting the sole legal basis for investigative powers, has an extremely general nature – it only states that "the competition authorities may order searches and seize any evidence". Moreover, the relevant provisions of the Swiss Criminal Administrative Law[90], to which the LCart makes reference, use the term *papers*[91]. IT storage media or electronic data cannot, therefore, be seen as covered by the scope of the inspectors' competences.

When it comes to the criteria of necessity (proportionality), it has to be stressed that the matter and geographic limitation of the inspection is simply not respected by the inspectors in every case of subsequent electronic searches of hard drives that had been copied in their entirety. Taking away the forensic copies of entire hard drives equals the seizure of documents falling outside the investigation, being covered by the scope of neither the investigation nor the inspection decision. For instance, they might relate to other activities of the inspected undertaking. Furthermore, hard drives may contain documents that can never be searched or sized by competition authorities, including documents protected by the right to privacy, confidentiality of correspondence as well as legal professional privilege.

And yet this measure might also be considered a means to shorten the time frame in which the undertaking's activities are being interrupted by an inspection. Since the functioning of the undertaking is paralysed during an inspection, some undertakings may prefer letting the inspectors continue the search at the authority's premises rather than having their own premises

[86] The amended Act on competition and consumer protection was adopted by the Polish Parliament on 10 June 2014 and subsequently signed by the President on 30 June 2014. It will come into force on 18 January 2015. See Journal of Laws 2014, 945.

[87] See the amended Art. 105b(1)2 of the Polish Competition Act.

[88] Including providing access to IT systems owned by another entity but contained data related to the subject of the inspection, insofar as the undertaking inspected has access to them.

[89] Federal Act of 6 October 1995 on Cartels and other Restraints of Competition.

[90] Federal Act of 22 March 1974 on criminal administrative law.

[91] Fr. *Perquisition visant des papiers* / Ger. *Durchsuchung von Papieren* / It. *Perquisizione di carte.*

occupied for a longer period of time. Nevertheless, it is crucial for this solution not to be imposed arbitrarily by the officials but for the inspected undertakings to have an actual choice in this matter.

As to the third requirement of the safeguards – the right to oppose an inspection – it is worth noting that an attempt by the scrutinised undertaking to exercise its right to stop such measure usually leads to the imposition of a procedural fine[92]. Even though undertakings are said to be granted the right to oppose[93], none of the courts has specified the conditions under which they may successfully (that is, without being fined) do so[94]. Due to the lack of any practical judicial guidance, undertakings inspected are left in a very difficult situation.

An undoubtedly important, albeit not sufficient, safeguard lies in the inspected undertaking's right to assist (be present) during the subsequent searches of its copied data. Nevertheless, unlike the solutions adopted in the EU or Switzerland, in Poland inspected undertakings do not have the right to be present during the subsequent searches of their data undertaken by the inspectors in the UOKiK office. This stance should be regarded as truly unacceptable – undertakings cannot know whether inspectors examine only documents falling into the scope of the investigation or whether they abuse their powers and review documents covered by privileges, private information or data not related to the investigation at stake, but containing information that may lead to the opening of new proceedings[95]. The risk of making an illegal use of data discovered by chance has increased especially in the aftermath of the recent *Deutsche Bahn* judgment. Inspectors may now try to raise the argument that they have used the discovered information only as *intelligence* rather than as evidence.

Finally, none of the relevant legal orders provides for separate judicial control over seizure of electronic data. According to the courts, contested actions of a competition authority do not constitute actionable decisions but are merely measures implementing the inspection decision. Such implementing measures can thus only be challenged in the appeal of the final decision on

[92] Either immediately or in the framework of the final decision; see EU case *Energeticky a prumyslovy*, T-272/12 and the Polish case *Polkomtel S.A.*

[93] See e.g. GC judgment of 6 September 2013 in *Deutsche Bahn* T-289/11.

[94] Even if according to the GC, fines provided for in Art. 23 & 24 Regulation 1/2003 may only be imposed if an undertaking either obviously obstructs or abuses its right to oppose. Unfortunately, the GC has not clarified what should be understood under the term *an obvious obstruction* or *an abusive opposition*.

[95] In the light of *Deutsche Bahn,* a competition authority is allowed to make use (initiate separate proceedings) of unrelated documents that the officials came across incidentally while exercising their inspections powers.

the infringement, or the decision imposing fines for a failure to cooperate[96]. Such stance brings about legal uncertainty for undertakings since it leads to unreasonable delays between the carrying out of inspections and the moment its implementation stands to be reviewed[97]. Moreover, it is conditional upon the adoption of a decision finding an infringement or imposing a fine, which may not necessarily happen[98].

It is noteworthy that, at the EU level, undertakings have nevertheless the possibility to lodge an action for damages under Article 268 TFEU – a solution that may be regarded as an immediate remedy. Such action can further be accompanied by requests for interim measures[99] that may include injunctive relief[100] as well as provisional damages, if it is necessary and appropriate to avoid irreparable harm.

However, due to its particular character and especially its serious consequences for the undertaking, seizure of entire discs of electronic data should be considered as an example of acts adopted during inspections "which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position" and therefore should be able to be the subject of an action for annulment. Like in the case of legal professional privilege, a decision by the competition authority to reject the right to oppose granted to an undertaking, and to consequently take a copy of the entire hard drive for subsequent search at the authority premises, brings about a significant change to that undertaking's legal position and irreversibly affects its fundamental rights (right to privacy and right to defence). Documents enter into the possession of the competition authority which the latter does not have the right to seize (such as documents covered by legal professional privilege or privilege against self-incrimination). The above denies the undertaking sufficient protection of its right to defence[101].

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[96] See for instance GC judgment in *Nexans.*

[97] Often couple of years after the inspection had been carried out.

[98] See GC judgment of 17 September 2007 in Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd vs Commission*, para 47; D. Théophile, I. Simic, "Legal Challenges to Dawn Raid Inspections under the Principles of EU, French and ECHR Law", (2012) 3(6) *Journal of European Competition Law & Practice*, 519.

[99] Available under Art. 279 TFEU.

[100] In order to prevent further damage occurring. Furthermore, in interim measure cases, unlike cases regarding an annulment of final decisions, the EU judicature can give precise instructions to the Commission.

[101] See *Akzo Nobel* judgment, paras 46 and 47.

V. Remedies and judicial review

Given the far-reaching inspection powers granted to competition authorities[102], and the weak position of the inspected undertakings, it is essential that both inspection decisions as well as all measures undertaken during inspections are subject to full judicial review exercised by independent courts. The principle of effective judicial protection is enshrined by the ECHR[103] as well as the legal orders concerned[104].

The ECtHR has set standards to be followed by judicial review in a number of its cases[105]. For instance, in the *Ravon*[106] judgment, the ECtHR emphasised that both inspection decisions and measures taken in their application should be subject to effective judicial control *de facto* and *de iure*[107]. In the view of the ECtHR, full jurisdiction occurs if a court is entitled to examine all relevant facts of the case and actually does so[108] as well as to quash the appealed decision in relation to all its factual and legal aspects[109]. Furthermore, the court has to be entitled to set aside the impugned decision either entirely

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[102] With controversies arising around some of them.

[103] Art. 6(1) and 13 ECHR.

[104] See Article 47 (1) of the Charter of Fundamental Rights of the EU, Article 45 of the Polish Constitution and Article 30 of the Swiss Federal Constitution.

[105] ECtHR judgment of 7 June 2007 in Case *Smirnov v. Russia*, no. 71362/01, para 45 as well as ECtHR judgment of 15 February 2011 in Case *Harju vs Finland*, no. 56716/09, paras 40 and 44, and ECtHR judgment of 15 February 2011 in Case *Heino vs Finland*, no. 56720/09, para 45; ECtHR judgment of 10 February 1983 in Case *Albert and Le Compte v Belgium,* application no. 7299/75, 7496/76, para 29; ECtHR judgment of 20 May 1998 in Case *Gautrin and others v France*, application no. 21257/93, para 57; ECtHR judgment of 16 December 2008 in Case *Frankowicz v Poland*, application no. 53025/99, para 60. In relation to judicial control over administrative bodies see: ECtHR judgment of 24 February 2004 in Case *Bendenoun v. France*, application no. 12547/86, para 46; ECtHR judgment of 23 October 1995 in Case *Umlauft v Austria*, application no. 15527/89, para 37–39; ECtHR judgment of 23 October 1995 in Case *Schmautzer v Austria,* application no. 15523/89, para 34; ECtHR judgment of 21 May 2003 in Case *Janosevic v Sweden*, application no. 34619/97, para 81. See also Opinion of AG Kokott in *Nexans*, para 85.

[106] ECtHR judgment of 21 February 2008 *Ravon e.a. vs France,* application No. 18497/03, in relation to the French tax authorities' inspection regime.

[107] Para 28. According to the established ECtHR jurisprudence, any decision taken by administrative bodies, which is not a *tribunal* under Art. 6(1) ECHR, must "be subject to subsequent control by a judicial body that has full jurisdiction" over both fact and law. See L. Drabek, "A Fair Hearing Before EC Institutions", (2001) 4 European Review of Private Law 561; K. Lenaerts, J. Vanhamme, "Procedural Rights of Private Parties in the Community Administrative Process" (1997) 34 CMLR 561-562.

[108] *Schmautzer* judgment, para 35.

[109] Ibidem; See *Janosevic* judgment, para 81.

or partially, if "procedural requirements of fairness were not met in the proceedings which had led to its adoption"[110].

Moreover, while ruling on the *Primagaz*[111] case, regarding competition law, the ECtHR clearly stated that it is necessary to allow the inspected undertakings to rely on "the certainty (…) to obtain effective judicial review of the contentious measure and within a reasonable time period".

It is appropriate to consider next remedies available to undertakings as well as the scope of judicial review in the relevant legal orders.

In principle, there is no prior judicial control within the EU[112]. This stance is, however, unproblematic since a prior court authorisation is not mandatory for an inspection to be considered legal as long as the inspection can be subject to comprehensive judicial review. The undertakings have the possibility to challenge an inspection decision but their appeal cannot include the contestation of an inspection measure since "a provisional measure intended to pave the way for the final decision is not (…) a challengeable act"[113]. In the search for an immediate remedy, undertakings inspected may lodge an action for damages under Articles 268 TFEU. Nevertheless, as already mentioned, no special and separate remedy is provided for measures undertaken during the inspection, besides the exception provided for legal professional privilege[114].

The *ex post* judicial review exercised by the EU Courts is regarded as complete[115] since the GC has the power to review all legal and factual questions; nevertheless, it cannot act *ex officio*, but only at the request of the applicant

[110] *Potocka* judgment, para 55. In consequence, the court should also consider whether the principle of proportionality was observed by the competition authority. M. Bernatt, "Powers of Inspection…", op. cit., p. 63

[111] ECtHR judgment of 21 December 2010 in Case *Primagaz* application No. 29613/08.

[112] An exception is provided in Art. 20(7) Regulation 1/2003. If an inspection is carried out with the assistance of national officials, due to its very coercive nature, this type of inspection may be subject to prior judicial control by national courts, if national relevant law provides so. Nevertheless, this control is said to be illusory since its scope is limited only to whether the "coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection", (do not appear "manifestly disproportionate and intolerable in the light of the objectives pursued by the investigation"). This test was established in ECJ judgment of 2 October 2002 in Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des frauds* (paras 74, 80) and subsequently introduced in Art. 20(8) Regulation 1/2003.

[113] See *Akzo Nobel* judgment, para 45.

[114] More precisely, acts adopted during the inspection "which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment under Article 230 EC (current Article 263 TFEU)".

[115] W.J.P. Wils, "The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker" (2014) 37(1) *World Competition* 5-26.

when it comes to reviewing evidence[116]. Despite some critical comments[117], the present judicial review regime applying to Commission inspections seems to be in line with the standards set by the ECtHR, although it could be improved.

Considering remedies and judicial control provided in Poland in response to the powers of inspection of the UOKiK President, the following should be listed: (1) prior judicial control with respect to searches, (2) the right to lodge an objection in relation to the conduct of an inspection, (3) right to complain on control measures granted to other entities whose rights were violated during a control and (4) judicial review of final decisions of the UOKiK President in case of procedural objections in relation to the conduct of administrative proceedings.

Prior judicial control is limited to searches only[118] and its current legal basis should be criticised for three further reasons. First, the Competition Act fails to set out its scope[119] – this is a solution inconsistent with Article 2 of the Polish Constitution which states that legal provisions resulting in a limitation of rights and freedoms are to be non-ambiguous and precise[120]. It is nevertheless crucial that the question of proportionality is taken under consideration by the SOKiK while deciding whether a justifiable suspicion exists that the Competition Act had actually been violated. Second, prior judicial control of the UOKiK President's inspection powers is minimal (not to say illusory) since, in practice, the SOKiK seems to authorise all searches requested by the UOKiK President[121]. This is not in line with the jurisprudence of the ECtHR which states that the particular importance of a court's supervisory function requires considering whether a measure requested is "necessary in a democratic society". In other words, the court should check if the relationship between

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[116] See e.g. GC judgment of 14 March 2014 in Case T-296/11 *Cementos Portland Valderrivas,* paras 24-26 and 41.

[117] D. Théophile, I. Simic, *Legal Challenges…*, op. cit., p. 518.

[118] Controls are based on a UOKiK President's authorization and may only be subject to objections raised under the Act on the Freedom of Economic Activity, to court review of the UOKiK President decision of the imposition of a fine for non-cooperation or of a final infringement decision. Moreover, this limitation is criticized due to the above-mentioned problems in distinguishing between a search and a control.

[119] The new Art. 105n(4) (ex 105c (3)) of the Competition Act provides only that the SOKiK should decide within 48 hours on authorizing a search upon the request of the UOKiK President.

[120] See judgments of the Polish Constitutional Court: of 22 May 2002, K 6/02, (2002) 3/A *OTK ZU* sec. 33 and of 11 January 2000, K 7/99, (2000) 1 *OTK ZU* sec. 2. See also the ECtHR judgment of 16 February 2000 in Case *Amann vs Switzerland*, application No. 27798/95, para 56.

[121] This was at least the case between 2008 and 2011, when the SOKiK authorized 3 searches in 2008, 5 in 2009, another 5 in 2010 and 6 in the first six months of 2011. M. Bernatt, "Powers of Inspection…", p. 62.

the aim sought and the means employed can be considered proportionate or if this aim may be achieved in a less onerous way[122].

Third, decisions of the SOKiK authorising a search cannot be appealed[123], which is an exception from the Polish constitutional principle of a two-instance judicial process[124]. This provision meets with vivid criticism due to the significant interference of searches with the rights and freedoms of undertakings, on the one hand, and the lack of sufficient procedural safeguards, on the other hand (in particular the right to privacy). Therefore, there is an urgent need for an adequate amendment to the Competition Act introducing, similarly to the solution adopted in Polish criminal procedure[125], the right of undertakings to appeal the court order which authorises a search[126].

With reference to the second point, undertakings are entitled to lodge an objection against the manner in which public administrative authorities exercise their rights of inspection under the Act on the Freedom of Economic Activity[127]. The objection leads to the suspension of the control until the decision of the UOKiK President[128] is rendered, which may be subsequently appealed to the SOKiK[129]. However, this right is unfortunately limited in relation to competition proceedings[130]. Undertakings are only entitled to contest irregularities regarding the control authorisation, such as a *de facto* broader extent of the control than the one specified in the authorisation[131]. With regard to the question of fishing expeditions, it has to be noted that the SOKiK is not entitled to verify whether the scope of the control specified

[122] See *Amann* judgment, paras. 42-43.

[123] Art. 105n(4) (ex 105c(3)) of the Polish Competition Act.

[124] Art. 78 and 176(1) of the Polish Constitution.

[125] Art. 236 of the Code of Criminal Procedure.

[126] M. Bernatt, "Powers of Inspection…", op. cit., p. 62.

[127] Art. 84c(1) of the Act on the Freedom of Economic Activity.

[128] Which is to be taken within 3 days. See Art. 84c(5) and (9).

[129] See Art. 479 (1) of the Polish Code of Civil Procedure, SOKiK decision of 22 December 2009, XVII Amz 54/09/A, not published, UOKiK President decision of 24 February 2011, DOK-1/2011, pp. 13–14; See also K. Róziewicz-Ładoń, *Postępowanie przed Prezesem Urzędu…*, pp. 261–262.

[130] Undertakings are entitled to lodge objections in relation to violations of Art. 79a(1) and 79a(3)-(9) of the Act on the Freedom of Economic Activity only, while under the general rule, objections may concern violations of Art. 79(1) and 79(3)-(7), Art. 80(1), Art. 82(1) and Art. 83(1) also. Nevertheless, due to the existence of an *expressis verbis* statutory exemption, the latter provisions do not apply in competition law proceedings. See M. Bernatt, "Powers of Inspection…", op. cit., p. 60 and B. Turno, *Komentarz…*, op. cit., p. 1156.

[131] Objections under the Act on the Freedom of Economic Activity are raised before the UOKiK President whose orders may be subsequently subject to review by the SOKiK, which is not an Administrative Court. See judgment of the Regional Administrative Court in Warsaw of 5 March 2010, III SA/Wa 1496/09. See also K. Róziewicz-Ładoń, *Postępowanie przed Prezesem Urzędu…*, op. cit., pp. 261–262.

in the authorisation, and the actions undertaken in its framework, related to the subject matter of the investigation. In practice, objections of this kind raised by undertakings have so far never been successful[132]. Therefore, the current legal basis and the application of the legal institution of an objection in competition law proceedings does not seem to fully protect the rights of undertakings[133].

It has to be stressed next that the new Article 105m of the Polish Competition Act will introduce a brand new remedy regarding controls – a complaint that can be lodged to the SOKiK by entities other than the undertaking concerned whose rights were violated during the control proceedings[134]. This complaint may relate to any control measure, or other control activities, undertaken beyond the scope of the control or in violation of legal provisions[135]. It is thus important to emphasise that its scope is much broader than the scope of an objection by the inspected undertaking. Furthermore, in case of a successful complaint, evidence obtained as a result of the contested control activities cannot be used in any proceedings. This means not just the proceedings concerned but also other proceedings conducted by the UOKiK President or in any other proceedings conducted pursuant to separate legal provisions. This new development is definitely of immense importance also for the prevention of fishing expeditions and may be regarded as slowly paving the way for the admission of direct actions against measures undertaken during inspections.

Finally, decisions of the UOKiK President are subject to judicial review of the SOKiK which cannot limit itself to a mere review of the challenged decision but should assess the case on the merits to the same extent as if it would be the competition authority[136]. The Polish Supreme Court confirmed

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[132] In *Polkomtel*, the undertaking unsuccessfully complained on the impartiality of the UOKiK inspectors, on the disproportional nature of the measures undertaken in the framework of the control, the *de facto* broader extent of the control than the one set out in the authorization and, finally, on the defects in the inspection authorization. All objections were dismissed by the UOKiK President and subsequently upheld by the SOKiK. See the order of the SOKiK of 22 December 2009, XVII Amz 54/09/A, the decision of the UOKiK President of 24 February 2011, DOK-1/2011, p. 12.

[133] G. Materna, "Sądowy nadzór nad wykonywaniem kontroli (przeszukania) u przedsiębiorcy w toku postępowania przed Prezesem UOKiK" (2012) 7 *PUG* 23; M. Bernatt, G. Materna, "Article 105a…", op. cit., Chapter V, No. I. 7.

[134] M. Bernatt, G. Materna, "Article 105a…", op. cit., Chapter V, No. I. 7.

[135] A SOKiK decision maybe be subject to a further appeal.

[136] The SOKiK is obliged to investigate the case from the beginning instead of merely relying on facts established by the UOKiK President. See judgment of the Court of Appeal of 21 June 2006, VI ACa 142/06, Journal of UOKiK of 2007, No. 1, item. 13, judgment of the Court of Appeal of 19 January 2011, VI ACa 1031/10, nyr VI ACa 1031/10, judgment of the Court of Appeals of 31 May 2012, VI ACa 1299/10, no yet reported, and judgment of the Court of Appeal of 21 September 2006, VI ACa 142/06, Journal of Laws of UOKiK of 2007, No. 1,

that the SOKiK is entitled to set aside the impugned decision[137] if "procedural requirements of fairness were not met in the proceedings which had led to its adoption"[138]. Nevertheless, Polish courts have followed a different approach also[139] whereby procedural irregularities concerning evidence, including the violation of the privilege against self incrimination or a disproportional character of inspections in relation to the right to privacy, should not result in the revocation of the contested decision provided the latter is in line with the provisions of substantive law. Pursuant to the latter approach, the SOKiK was said not to be obliged to focus on possible infringements of procedural rules[140], thus if the undertaking fails to prove that the alleged procedural irregularities influenced the UOKiK decision on its merits, they should not be taken into account by judicial control at all[141].

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item 13, where it was held that the SOKiK is obliged to independently assess all evidence and draw its own conclusions. See also M. Błachucki, *Polish competition law – Commentary, case law and texts*, UOKiK, Warsaw, 2013, p. 75.

[137] Either entirely or partially; also, after setting aside the challenged decision, the SOKiK enjoys full discretion on how to further proceed. Judgment of the Antimonopoly Court of 18 October 2000, XVII Ama 6/00, Wokanda 2001, No. 12, item 51.

[138] See the *Potocka* judgment, para 55. The Polish Supreme Court held that a violation of requirements necessary for the validity of proceedings may constitute sufficient grounds for the revocation of a UOKiK President decision. See judgment of the Polish Supreme Court of 29 April 2009, III SK 8/09. Therefore, in case of a violation of procedural fairness, constituting a violation of a requirement indispensable for the validity of the proceedings (e.g. the right to be heard) during administrative proceedings, the SOKiK should annul a UOKiK President decision in its entirety. See M. Bernatt, "The control…", op. cit., p. 304; See also: C. Banasiński, E. Piontek (eds), *Ustawa…*, op. cit., pp. 919–920.

[139] *Marquard Media Polska* judgment of the Court of Appeal in Warsaw of 17 June 2008, VI Aca 1162/07, not yet reported.

[140] SOKiK judgments of 24 July 2007, XVII Ama 84/06, not reported and of 22 June 2005, XVII Ama 55/04, UOKiK OJ 2005 No. 3, item 42. See also SOKiK judgment of 27 October 2009, XVII Ama 126/08, Journal of Laws of UOKiK of 2010, No. 1, item 5, were it was held *expressis verbis* that, since it hear the case independently and from the beginning, any procedural irregularities that took place during proceedings before the UOKiK President are irrelevant for the result of the court proceedings. Therefore, the appeal against the UOKiK President decision cannot be based on alleged procedural shortcomings which occurred within the antimonopoly proceedings.

[141] See judgment of the Court of Appeal in Warsaw of 24 July 2008, VI ACa 12/08. See also the Supreme Court decision of 29 April 2009, III SK 8/09, not reported and SOKiK judgment of 20 February 2007, XVII Ama 95/05, not reported. In this context it has to be noted that proceedings before the SOKiK are of a civil nature which means that the burden of proof lies on the claimant. The SOKiK does not conduct evidence proceedings, thus all evidence is produced only upon the motion of the parties. See judgment of the SOKiK of 19 December 2006, XVII Ama 15/06, Journal of Laws of UOKiK of 2007, No. 2, item 21. See also M. Błachucki, *Polish competition law…*, op. cit., p. 74.

Fortunately, the Supreme Court took the opportunity to fully clarify its opinions and adopt a coherent approach in relation to this issue in its recent judgment in the *PKP Cargo*[142] case. It was clearly stated therein that the first approach, constituting a well established practice of the SOKiK and of the Court of Appeal in Warsaw, should prevail. In other words, judiciary review is to also cover procedural aspects regarding administrative proceedings, albeit not every justified procedural allegation may lead to the acknowledgment of an appeal. Therefore, in the light of this recent interpretation provided by the Polish Supreme Court, the current state of judicial control over final decisions of the UOKiK President seems to be in line with the ECHR standards regarding the requirements of full jurisdiction[143].

The Swiss regime provides neither prior judicial control of the inspection order[144] nor a right to challenge it. Furthermore, apart from the "envelope procedure"[145], there is no possibility to challenge separately measures undertaken by inspectors during the inspection, which might seem to be incoherent with ECtHR jurisprudence requiring that measures taken during an investigation must be subject to judicial control[146]. Nevertheless, the judicial review system of the decisions taken by the Comco was recognised as being coherent with ECtHR requirements. In its landmark *Publigroupe*[147] judgement, the Swiss Federal Supreme Court acknowledged the compliance of the Swiss competition procedure with ECHR standards. The Court stressed that since the provisions on penalties set out in the LCart[148] are of a criminal

[142] See judgment of the Polish Supreme Court of 10 October 2013, III SK 67/12 *PKP Cargo.*

[143] M. Bernatt, "The control…", op. cit., pp. 303–305.

[144] Some Swiss authors argue that, to be fully in line with the ECHR requirements, judicial control should take place before the conduct of an inspection, i.e. the Comco should obtain prior authorization from a cantonal judge. See P. Kobel, "Sanctions du droit des cartels…", op. cit., p. 1157.

[145] Under Art.50 of Swiss Administrative Criminal Law, the undertaking inspected is granted the right to indicate the content of a document before it examination and thus, kind of, has a right to oppose its examination. In such cases, the document in question should be sealed, deposited in a safe place and deliver to the Federal Criminal Court that is to decide on the admissibility of its search (according to Art. 25(1) thereof). See judgment of the Federal Tribunal of 27 September 2005, 1S.28/2005, E. 2.4.2 and judgment of the Federal Criminal Court of 20 June 2005, BV.2005.20, E. 2.1.1. The sole existence of such opportunity does not mean that this remedy give effective protection as shown by the *Bathrooms* case. See e.g. Decision of the Swiss Federal Criminal Court of 11 July 2012, BE. 2012.4, E. 3.2.

[146] *Société Colas Est* judgment, paras 107, 125.

[147] See judgment of the Swiss Federal Supreme Court of 29 June 2012 in Case *Poubligroupe S.A. vs Competition Commission*, which related to the question of abuse in relation to the commissioning of professional intermediaries for newspapers. The investigation was initiated in 2002, the Comco delivered its decision imposing a fine on 5 March 2007. The *Poubligroupe* appeal was rejected by the Federal Administrative Court in 2010.

[148] Art. 49a of the Cartels Act.

nature, the relevant procedural guarantees of the ECHR[149], and of the Swiss Federal Constitution[150], are applicable to competition proceedings. According to the Federal Supreme Court, the requirements following from those safeguards are sufficiently fulfilled since the Federal Administrative Court has in principle full jurisdiction and reviews Comco's decisions in relation to questions of fact and law. The Federal Supreme Court held, however, that the Federal Administrative Court is allowed to limit its review of technical factual questions.

This ruling brought about a vivid debate on the institutional framework of competition law. It is worth noting that this judgement has influenced the current LCart reform. In its aftermath, the Council of State rejected the proposal presented by the Swiss Federal Council to introduce an institutional change (to set up an institutional separation between the investigatory body and the Competition Court) presented within the framework of prepared amendments[151].

VI. Conclusions

The presented analysis covered selected problems and developments concerning the powers of inspections granted to competition authorities. They were assessed, in particular, in the light of the principle of proportionality as well as in the context of problems surrounding the issue of fishing expeditions and subsequent electronic searches.

Despite some improvements[152] in all of the presented legal orders (the EU, Poland and Switzerland), the legal position of undertakings subject to an inspection remains weak and thus needs to be strengthened. It is necessary that both law and practice afford further effective safeguards against the abuse and arbitrary behaviours of competition authorities exercising their extensive inspection powers.

First, it is indispensable for courts to apply a strict interpretation of the requirement of *sufficient suspicion* including checking its components (such as prior possession of sufficient evidence)[153]. There should be an obligation for

[149] I.e. Art. 6 and 7 ECHR.

[150] I.e. Art. 30 and 32 of the Swiss Federal Constitution.

[151] The National Council refused to discuss and to decide on the proposed reform.

[152] E.g. relevant amendments to the Competition Act, prohibition of fishing expeditions expressly stated by the GC.

[153] In order to avoid the occurrence of unjustified cases such as the Swiss *Bathrooms* case.

an inspection decision to specify in detail its extent (subject matter[154], period involved and geographic scope) and goal (facts which the authority wishes to establish through the inspection) in order to successfully avoid any possible abuses by inspectors (fishing expeditions).

Second, the current practice, common for all competition authorities, regarding coping of entire digital storage mediums (such as hard drives) for subsequent review in the competition authority's offices, should be prohibited since it is too intrusive, not in line with the principle of proportionality and does not ensure a sufficient protection of the fundamental rights of undertakings[155]. If an amendment of that type if impossible, additional legal provisions have to be established specifying the details[156] of how to use this coercive measure – providing limits to the power of the authorities and for procedural safeguards for the undertakings concerned. Such provisions are necessary in order to prevent subsequent searches of digital evidence from being tantamount to fishing expeditions. In Poland, it is furthermore indispensable to allow undertakings concerned to be present during subsequent searches of the copied data that takes place in the offices of the UOKiK. Moreover, the judiciary is expected to eventually take clear position on the lawfulness of this practice.

Finally, it is strongly recommended to introduce a separate immediate remedy in relation to the measures undertaken by competition authorities during inspections[157]. Both in Poland and in Switzerland, it is necessary to establish a possibility for undertakings to lodge an appeal against an inspection authorisation. Moreover, where prior judicial control exists, it should not be illusory. Such a supervisory function is of particular importance[158]. Therefore, reviewing courts are to consider all relevant requirements, including those resulting from the principle of proportionality[159]. They cannot take arguments raised by competition authorities for granted and automatically authorise any inspection requested.

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[154] It is important, in particular, to define the suspected infringements of competition law. The use of too vague indication, for instance "practices restricting competition", should not be acceptable. See, *a contrario*, the SOKiK ruling of 14 February 2012, XVII Amz 6/12, XVII Amz 7/12, unpublished.

[155] *Inter alia* right to defense, right to privacy and privilege against self-incrimination.

[156] In conformity with the *Robathin* requirements, i.e. search of all electronic data should be justified by particular prevailing reasons and be proportionate to the circumstances at stake. See the *Robathin* judgment, paras 50-52.

[157] Especially, since a long period of time might pass since the final decision is reviewed by the judiciary.

[158] *Robathin* judgment, para 51.

[159] I.e. whether an inspection does not go beyond what is necessary to achieve its legitimate aim. See *Robathin* judgment, para 43.

Access to Leniency Documents: Should Cartel Leniency Applicants Pay the Price for Damages?

by

Kasturi Moodaliyar*

CONTENTS

Abstract

The paper gives an overview of the South African Corporate Leniency Policy which is a whistleblowing tool used by Competition agencies to detect and punish cartel behaviour. The leniency applicant provides vital information to the competition authorities to fulfil the needs of this Policy. This information

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would be of great assistance to a claimant harmed by the cartel and who wishes to submit a claim for follow-on damages. Revealing this information results in serious implications for both leniency applicants and civil damages plaintiffs and poses a dilemma to Competition authorities. This paper questions whether the interest of the leniency applicant should be protected or should the information be handed over to the claimant to pursue a case for damages. After considering the status quo of the South African legal context, a survey of the EU and USA position on this is provided. The paper concludes on how a balance should be struck.

Résumé

L'article donne un aperçu de la politique sud-africaine en matière de la clémence des entreprises qui est un outil d'alerte utilisé par les agences de compétition pour détecter et sanctionner le comportement de cartel. Le demandeur de clémence fournit les autorités de la concurrence en informations essentielles pour satisfaire les besoins de la présente politique. Ces informations seraient d'une grande aide à un prestataire lésé par le cartel et qui souhaite présenter une demande pour obtenir les dommages par la suite. La révélation de ces informations résulte en conséquences graves pour les deux demandeurs de clémence et les plaignants des dommages civils, et pose un dilemme aux autorités de la concurrence. Cet article pose la question si l'intérêt du demandeur de clémence doit être protégé ou peut-être l'information devrait être remise au demandeur afin de poursuivre une affaire de dommages-intérêts. Après avoir examiné le status quo du cadre juridique d'Afrique du Sud, une enquête de la position de l'UE et les Etats-Unis sur cette question est prévue. L'article se termine sur la façon dont un équilibre doit être trouvé.

Classification and key words: cartels, private enforcement; damages; leniency documents; South Africa competition rules, EU competition rules, USA competition rules, EU Proposed Directive

I. Introduction

The Corporate Leniency Policy (hereafter: CLP) is a successful tool for destabilizing cartels. It entices cartel members to rush to be first to the door to confess their role in a cartel and provide evidence to the South African Competition Commission (hereafter: CC) against other members of the cartel in exchange for leniency. Whereas their fellow cartelists face penalties running into millions of Euros, leniency applicants are rewarded for their confessions by receiving immunity from fines. However, the CLP does not

provide immunity to applicants named as respondents in private claims for damages[1].

It is often difficult to ascertain evidence to prove a damages case and, in particular, to demonstrate causation and quantum, even if liability was assumed on the basis of earlier administrative proceedings. In some cases, claimants might not even be able to formulate a *prima facie* case on the basis of publicly available information seeing as the very nature of cartel conduct is itself secretive. The damages claimant has to face the challenge of asymmetric information, while the leniency application contains evidence to prove the cartel. This information could be used to establish the causal link between the cartel conduct and the damages incurred by the claimants. This is why damages claimants wish to exercise their rights to claim damages and request access to documents obtained through the leniency application in order to make, and strengthen, their case. Competition authorities are weary of disclosing such information, as they do not want to undermine their leniency policy. Cartelists might hesitate to cooperate with the authorities if it is likely that their company information will be disclosed to third parties and used against them in damages claims, especially considering that damages might exceed administrative penalties that they are able to avoid through leniency.

The main questions addressed in this paper are:

(i) Whether a special dispensation should be given to leniency applicants so as to protect the integrity of the policy that competition authorities largely rely on to uncover cartels or;

(ii) Whether there is an overriding public interest to consider where private damages claimants have an automatic right to the evidence submitted by the leniency applicant?

This paper draws upon a comparison of jurisdictions (with a significant focus on European Union cases where these debates took place), and provides a brief analysis of the approach of American authorities in creating incentives to resolve this issue. The paper addresses the dichotomous role of competition authorities which, on the one hand, have to protect the leniency policy while, on the other hand, have to give due regard to the interest of victims of cartel cases. Recommendations on where the boundaries should lie in exercising these roles will then be provided.

[1] In South Africa cartelists are penalized up to 10% of their annual turnover. There are no criminal penalties enforced in terms of competition legislation. The CLP does not protect a cartelist from criminal sanctions based on any other legislation or criminal code.

II. The need for a Corporate Leniency Policy in cartel cases

There is no question that cartels operate in secret and are usually very difficult to detect. Based on the principles of "game theory" or the "prisoner's dilemma", leniency creates an incentive for a firm to break ranks with their fellow cartel members and race to the doors of competition authorities to provide information about the cartel in exchange for leniency. In South Africa, where the penalty for cartel conduct is 10% of the firm's annual turnover, leniency would provide a substantial saving for a successful applicant. Many competition jurisdictions around the world, including South Africa, have implemented their versions of the CLP.

1. Requirements and use of the CLP

South Africa's first CLP was published in 2004 and provided immunity to the first firm that confessed to the conduct, provided that it was not the instigator of the cartel[2]. Although the policy was based on international best practice, the first draft had a few drawbacks. The 2004 policy was underutilized due to its lack of clarity and certainty to potential leniency applicants[3]. Firms thus took the risk of remaining undetected rather than coming forth to blow the whistle. As a result, only 15 leniency applications[4] were submitted between April 2004 and March 2008. To be fair, it is often common for many jurisdictions to have an ineffective first draft of their leniency policy, which becomes more effective with later improvements[5].

The more successful 2008 version of South Africa's CLP provided a clearer outline of the immunity process[6]. Immunity is only given in cartel cases. Conditional immunity is given to the first firm making it "to the door" of

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[2] Corporate Leniency Policy, Government Gazette notice 194 of 2004. The policy came into effect on 1 February 2004.

[3] K. Moodaliyar, "Are Cartels Skating on thin Ice? An insight into the South African Corporate Leniency Policy" (2008) 125(1) *South African Law Journal* 175.

[4] Competition Commission (hereafter: CC) Annual Report 2011/2012, p. 21.

[5] For example, when the first American CLP was enacted in 1978, the Department of Justice had on average 1 application per year. It was also underutilized. Upon revision, the DoJ now receives about 50 applications per year. See S. Hammond, "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades", speech, 24th Annual National Institute On White Collar Crime Presented by the ABA Criminal Justice Section and the ABA Centre for Continuing Legal Education, Florida, 25 February 2010; available at http://www.justice.gov/atr/public/speeches/255515.htm.

[6] Corporate Leniency Policy, Notice 628 of 2008, Government Gazette No 31064, 23.05.2008.

the CC. The CC benefits in that it would now receive vital information about a cartel that: it may not have been aware of; a cartel it knew about, but did not have sufficient information about and thus was not investigating; or where there was a pending investigation and the CC had insufficient evidence to proceed with the case[7]. The applicant firm must act honestly and provide complete and full disclosure of information and evidence about the cartel so that it is possible for the CC to institute an investigation. The applicant must also cease the cartel conduct; must not alert other cartelists; nor destroy any information[8]. Immunity can be revoked if the CLP and the CC's instructions are not complied with[9].

If there are subsequent firms who wish to come clean about their cartel activities, the CC can consider this as a mitigating factor in those firms' request to negotiate a lesser fine, or ask the Tribunal for a favourable treatment of such firms, depending on their level of co-operation and the information they brings[10].

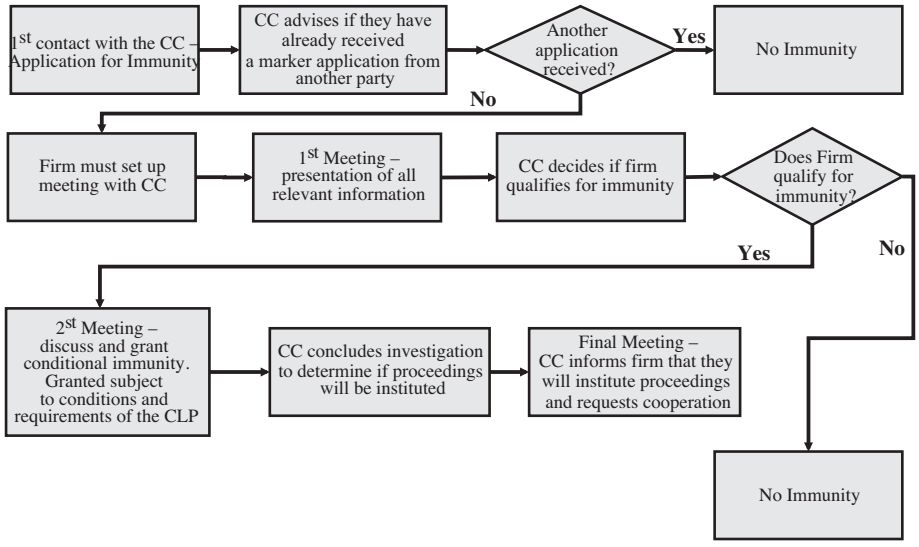
Total immunity is given once the case has been finalized before the Tribunal, or after an appeal if there is one and after all the conditions have been met. Total immunity is granted if the conditions of conditional immunity listed above are fulfilled[11]. Firm must apply for leniency with respect of each cartel transgression, seeing as the CLP does not provide for an overall blanket leniency of all cartel infringements, unless the contraventions cannot be separated[12]. The diagram in Figure 1 below shows the flow of the CLP application process. Immunity is dependent on all the requirements of the policy being met.

In comparison with the 2004 CLP, the 2008 policy removed the wide discretion of the CC (addressing a major criticism of the earlier CLP) and gave greater legal certainty to leniency applicants. Another change in the 2008 policy is that the instigator of the cartel is no longer excluded from bringing an application[13]. The reason for this is that there may be cases where the cartel has existed for decades – the turnover of staff and authority might thus make it difficult to identify which firm started the cartel in the first place. This amendment puts to rest any disputes that may have arisen in this regard. The 2008 policy now also provides for the applicant to make their submissions in

[7] CLP 2004, para 5.5.2, the same sentiment is expressed in CLP 2008, para 5.5.
[8] CLP 2008, para 10.1.
[9] CLP 2008, para 13.
[10] CLP 2008, para 5.6.
[11] CLP 2008, para 9.1.2.
[12] CLP 2008 para 5.4.
[13] The 2004 CLP excluded the instigator from applying for leniency in terms of para 5.8 ad 10.1(d) of the policy.

writing and orally[14]. Since some applicants are more comfortable giving oral statements, which can be later transcribed.

Figure 1.
Process of the Leniency application



The most important new development in the 2008 policy was the introduction of the marker system[15] which allows the firm to approach the Commission, requesting a marker for first place in the queue, whilst providing details of the firm, cartel conduct and participants. The CC has the discretion to accept the marker application and can provide the assurance that the firm is first in queue. The firm is then given time to gather evidence and to provide it to the CC. While the marker is in place, no other firm can take the first place. The marker system provides greater security to firms which may not have all the evidence available at the time of the application, but still wish to apply for immunity.

2. Legal challenge to the 2008 CLP mandate

The CC's power and authorization of the leniency policy was challenged in the *Agri Wire*[16] case. The case was based on an investigation initiated by the CC in the steel mill industry that involved several companies including

[14] CLP 2008 para 15.
[15] CLP 2008 para 12.
[16] *Agri Wire (Pty) Ltd et al v The CCet al*, North Gauteng High Court, Case No 7585/2010.

Scaw South Africa (Pty) Ltd (hereafter: Scaw). Scaw has management control of Consolidated Wire Industries (hereafter: CWI), which was one of the companies under investigation. Scaw conducted its own internal investigation and uncovered cartel conduct in both its companies. It applied for leniency, which the CC granted conditionally, in exchange for information and evidence of the cartel[17]. The CC subsequently referred the complaint to the Competition Tribunal. It cited 12 companies as members of the cartel, including Agri Wire, and asked that all of these companies, except CWI, pay the administrative penalty of 10% of their annual turnover[18].

Agri Wire took the case to the High Court challenging the immunity that the CC gave to CWI in terms of its immunity application. It argued that the Competition Act did not authorize the CLP and so any information provided by CWI in terms of the leniency policy was inadmissible. To the same extent, it argued that the complaint and the referral to the Tribunal were unlawful[19].

Judge Zondo explained in his dismissal of the complaint that conditional immunity contemplated in the CLP is not to be interpreted in the normal sense of "immunity", since the CC does not have the final say on the fate of the applicant[20]. It is a mere promise by the CC to ask the Tribunal not to impose a fine upon the leniency applicant, in exchange for the latter's cooperation and assistance in the referral. The Tribunal has the final authority to decide on whether or not a fine can be imposed. There is also nothing in the CLP obliging the Tribunal not to impose a fine on the leniency applicant[21].

Regarding Agri Wire's accusation that the CC was selectively prosecuting companies, Judge Zondo held that the CC had cited all the wrongdoers in its referral to the Tribunal, it acted well within its power to seek relief against the selected respondents and to seek leniency for CWI[22].

On Appeal, the Supreme Court of Appeal (hereafter: SCA) dismissed the *Agri Wire* case by taking an even more definitive stance. It said that the Competition Act vested power in the Commission to issue the CLP, thus allowing it to grant conditional and total immunity to the leniency applicant[23]. The SCA further stated that if the CC decides to refer a case to the Tribunal then "…the Act specifically provides that the Commissioner may refer all or some of the particulars of the complaint and may add particulars to the complaint

[17] *Agri Wire*, para 10.
[18] *Agri Wire*, para 11.
[19] *Agri Wire*, para 29-31
[20] *Agri Wire*, para 58.
[21] *Agri Wire*, para 62.
[22] *Agri Wire*, para 72.
[23] *Agri Wire (Pty) Ltd et al v The Competition Commission*, SCA, Case no: 660/2011 (hereafter: *Agri Wire SCA*), para 24.

submitted by the complainant"[24]. The SCA also found that the High Court erred in its judgment by stating that where the CC had granted immunity, the Tribunal could still impose an administrative fine. The SCA made it clear that the CC is allowed to grant conditional immunity notwithstanding the power vested upon the Tribunal to take the party's co-operation into consideration in determining the sanction. The SCA held that the leniency applicant will "only be referred to the Tribunal for the purpose of adverse determination and the imposition of an administrative penalty if the Commission revokes its conditional immunity"[25].

The SCA reiterated that the CLP is a useful tool to combat cartel behaviour. It also correctly pointed out that "hard-headed businessmen, contemplating baring their souls to the competition authorities, will generally want a more secure undertaking of a tangible benefit, before furnishing the co-operation that the Commission seeks from them"[26]. To do so otherwise would render the CLP "far less effective, if not entirely useless"[27].

3. Successful outcomes of the CLP

Unlike the 2004 CLP which saw very little use, the 2008 policy stimulated a race for immunity. Lavoie attributes the success of the policy to a number of factors including:

"(i) a growing awareness among the public and business community of the existence of the [Competition] Act and the CLP and the consequences of contravening the Act;

(ii) the Commission's investigation in certain sectors of the economy creating instability amongst cartel members and a race to apply first for immunity;

(iii) the dismantling of cartels in related sectors of the economy;

(iv) the changing business environment whereby internal compliance investigations are being conducted within corporate ranks and

(v) the forthcoming introduction of criminal sanctions for individuals involved in cartel conduct"[28].

These are valid factors which, together with the improvements in the 2008 policy, created the environment for companies to come forth and make use of the CLP. Criminal sanctions, which were outlined in the Competition

[24] *Agri Wire SCA*, para 24.

[25] *Agri Wire SCA*, para 7.

[26] SCA, Ibid. para 9.

[27] Ibid.

[28] C. Lavoie, "South Africa's Corporate Leniency Policy: A Five-Year Review", (2010) 33(1) *World Competition* 155.

Amendment Act of 2009, have not come into effect yet.[29] The Commissioner, Tembinkosi Bonakele, stated in a recent news report that the Amendment Act will come into effect in stages, and that institutional structures are not yet in place to manage criminalization. The current CLP does not provide immunity in criminal cases and the Commissioner is weary that the threat of criminalization may discourage potential CLP applicants from coming forward. This may put the CLP at risk[30].

The table below gives an indication of the fines received in particular industries from the year 2011–2013. Many happen to concern intermediary products with fines running into millions.

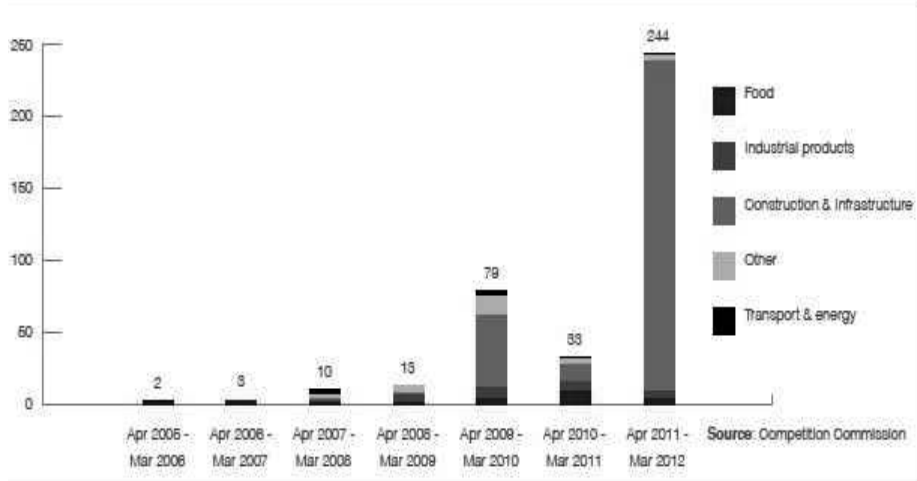
Table
Industries involved in cartel activity uncovered through the CLP process 2009–2011

Industry	Total Penalties in Euro
2011 Decisions	
Structural concrete reinforcement, construction, welded mesh fabric reinforcement and supply, cutting and bending of rebar (steel reinforcing bars),	11 144 616 222
Petroleum and energy, bitumen	489 459 565
Cement production	1 0 61 772 642
2012 Decisions	
Steel products	6 113 890 122
Milling (white maize and wheat)	4 249 4 66 127
Manufacture and supply of generic paving blocks	942 873 873
Property and rental property,	194 521 955
Airline	905 984
Petroleum, bitumen and bitumen products	486 394 167
2013 Decisions	
Construction and civil engineering	10 861 483 690
Wholesale of glass product, manufacture and distribution	3 590 574 414
Gas and Chemicals supply and distribution	525 926 294
Industrial and specialty gases	1 974 591 522
Manufacture and supply of generic paving blocks	480 655 922
TOTAL	**35 906 019 857**

[29] Competition Amendment Act No. 1 of 2009. The Amendment Act has been signed by the President but has not been given a date for it to become effective.

[30] A. Slabbert, "CompCom not ready to criminalise anticompetitive behavior", *Moneyweb*, 19.05.2014; available at http://www.moneyweb.co.za/mw/content/en/moneyweb-south-africa/compcom-not-ready-to-criminalise-anticompetitve-b.

The graph below, which tracks the number of CLP applications since the inception of the 2004 policy, shows a dramatic increase in applications after 2008 indicating the success of the amended policy.



Source: Competition Commission Annual Report 2011/2012

There was a sharp increase in the number of applications to 244 in the last financial year of the CC (2011/2012). This can be attributed to its fast track settlement process in the construction industry launched in February 2011. This was the first time the CC had invited firms in this industry to engage in a fast track settlement process of this nature. It became apparent that the construction industry was rife with cartel behaviour. The Commission settled with 15 construction companies who admitted to collusive tendering and paid fines totalling around 140 million Euro (Annexure A provides a detailed table of leniency applications from 2008–2013). Those companies who did not receive leniency paid a substantial amount in fines totalling over 3.5 billion Euro during that period.

III. Should leniency documents be disclosed to third party damages claimants?

1. Issuance of the certificate by the Competition Tribunal

Not long after the fines in the construction cases were imposed, there were numerous media reports that affected Government departments wish to claim

damages for losses suffered as a result of the price fixing[31]. Unlike in the United States, where damages claimants can approach a court directly to initiate a civil claim without waiting for a finding from the Department of Justice[32], damages cases in South Africa can be instituted in a civil court only after the damages claimant has obtained a certificate from the Competition Tribunal once the latter has made its finding[33]. In most cases, the CC does not cite the leniency applicant as a respondent on the referral papers. This became a contentious issue in the *Premier Foods* case heard in the North Gauteng High Court[34].

Premier Foods, a leniency applicant, sought to question whether the Chairperson of the Competition Tribunal, or the Tribunal itself, had the jurisdiction to issue the required certificate in terms of Section 65(6)(b) of the Competition Act against Premier seeing as the latter was not cited as a respondent in the case against the other cartelists which was heard by the Tribunal[35]. Without the certificate, a prospective damages claimant would not be able to pursue a civil claim against Premier.

Premier argued that having a certificate issued against it by the Chairperson of the Tribunal, even though it was not cited as a respondent by the CC, violated the *audi alterem partem* rule[36]. In his deliberation, Judge Kollapen held that: "in as much as the principle of *audi* is inextricably linked to considerations of fairness, even handedness, objectivity and inclusiveness in the decision-making process, it is also both a matter of form and of substance. It may be appropriate in circumstances where form may be said to be wanting to examine issues of substance in order to determine whether there has been observance of the principle notwithstanding any deficiency in form. Not to do so would run the risk of adopting an overly technical and formal approach to a principle that at the heart of it is about procedural fairness"[37].

In dismissing Premier's contention, Judge Kollapen maintained that the *audi* principle was applied to Premier in that it "was represented at the hearing, allowed its staff to participate and to contribute to the proceedings as witnesses

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[31] See, e.g. N. Gabara, "Salga wants construction firms to pay up", *SA News.Gov.ZA*, 5.07.2013; available at http://www.sanews.gov.za/south-africa/salga-wants-construction-firms-pay. R. Cokayne, "Charge colluding individuals" *Business Report*, 18.07.2013; available at http://www.iol.co.za/business/companies/charge-colluding-individuals-1.1548686#.Ugfh8hzdI3U. L. Gedye, "Construction cartel not off the hook yet", *City Press*, 30.06.2013; available at http://www.citypress.co.za/business/construction-cartel-not-off-the-hook-yet/.

[32] Section 4 of the Clayton Act 15 U.S.C. § 15.

[33] Section 65(6)(b) of the Competition Act.

[34] *Premier Foods (Pty) Ltd v Norman Maniom N.O and the Competition Tribunal et al, North Gauteng High Court*, Case no38235/2012, decision issued on 02.08.2013.

[35] *Premier Foods*, see para 9 and 10.

[36] *Premier Foods*, see para 12.

[37] *Premier Foods*, para 50.

and was heard in every sense of the term"[38]. In relation to whether a certificate could be issued against Premier, it was pointed out that a certificate is issued based on the fact that the Tribunal has made a finding in the given case[39]. In terms of Section 66 of the Competition Act, any person can apply for that finding to be amended, or set aside the order, if it was issued erroneously or granted in the absence of a party[40]. Premier did not make such an application.

The outcome of this case was that even though Premier (as the leniency applicant) was not cited as a respondent by the CC in the case against other cartelists, the Tribunal was still allowed to issue a certificate against it as their findings were not contested. There is thus no obligation on the CC to cite the CLP applicant as a respondent in its referral of a cartel case to the Tribunal. Having a certificate issued against the CLP applicant, even if not cited as a respondent, opens the door for claimants to pursue a follow on damages case against a CLP applicant.

2. A South African Courts' view of access to privileged CLP documents

The CLP does not prevent a plaintiff from instituting damages cases against the successful leniency applicant[41]. The question posed then is, without the extension of this immunity to civil cases, would the threat of a much higher civil compensation deter leniency applicants from coming forward? Should leniency documents receive special protection? The CLP has been a major tool in the detection and destabilization of cartels in South Africa. Zero penalty is a huge incentive for companies to use the policy. Would a case of damages against the leniency applicant take away that incentive? This begs the question whether the ultimate goal is to protect the leniency applicant, and maintain the attractiveness of the CLP, or to protect the public interest of cartel victims, and give them access to leniency documents, and thus providing greater access to justice.

Privileged documents provided by the leniency applicant were brought into question in the *Arcelor Mittal (AMSA)* case[42]. AMSA and Cape Gate, members of an alleged steel cartel, requested access to documents provided by the leniency applicant, Scaw, to address the allegations made against them. Cape Gate sought access to the leniency application and annexes of

[38] *Premier Foods*, para 51.
[39] *Premier Foods*, see para 42-43.
[40] *Premier Foods*, para 44.
[41] CLP 2008 para 5.9.
[42] *Competition Commission of SA v Arcerlormittal SA Ltd* et al (680/12) [2013] ZASCA 84 (hereafter: *AMSA*).

the supporting documents. It relied on Rule 35(12) of the Uniform Rules of Court, which confers the right to inspect and copy any document mentioned in the pleadings or affidavit by any party to the proceedings[43]. AMSA relied on the Competition Commission's rule 15(1) which gives the right to anyone (whether or not they are being investigated) to inspect or copy the CC's record. On this basis, AMSA sought access to all records of the CC generated after the investigation[44]. AMSA also requested access to the leniency application, marker, and discovery of all documents mentioned in the referral affidavit on the basis of Uniform Rule 32(12)[45]. The CC refused to disclose the documents saying that it formed privileged information prepared for litigation purposes. The Tribunal upheld the CC's argument and dismissed the submissions, save for an order of limited disclosure of three documents that were referred to in the CC's referral affidavit[46].

At the Competition Appeal Court (hereafter: CAC), AMSA only sought access to the CC's record while both AMSA and Cape Gate sought access to the leniency application. The CAC however made no such order saying that it found it unnecessary to decide on matters already determined by the Tribunal[47]. The CAC upheld Scaw's contention that the documents were protected from disclosure because Scaw claimed confidentiality under Section 44(1)(a) of the Competition Act. The CAC stated that access to information over which confidentiality had already been claimed was a matter to be determined by the Tribunal.

The case was ultimately brought before the SCA due to the CAC's failure to either confirm or set aside the Tribunals order. Before the SCA, the CC argued that it was entitled to withhold the information from AMSA and Cape Gate because firstly, it was protected by the litigation privilege and secondly, it was restricted information. It relied on Competition Commission rule 14(1), which gives it discretion to withhold information under 37(1)(b) of the Promotion of Access to Information Act (PAIA).[48] In relation to disclosure of its record, the CC argued that Competition Commission Rule 15 finds no application once litigation commences[49].

The SCA in its analysis indicated that the litigation privilege, which protects communication between a litigant, or its legal advisor, and a third party, exists when two requirements are met. First, "the document must have been

[43] *AMSA*, para 15.
[44] *AMSA*, para 16.
[45] Ibid.
[46] *AMSA*, para 17.
[47] *AMSA*, para 18.
[48] Act 2 of 2000.
[49] *AMSA*, para 19.

obtained or brought into existence for the purpose of the litigant's submission to the legal counsel for advice". Second, whether "litigation was pending and contemplated as likely at the time"[50].

The SCA stressed that whether or not the issue of litigation privilege is attached to the leniency application is dependent on the facts of the case[51]. The CC intended to use the information provided by Scaw to institute a prosecution and litigate against AMSA and Cape Gate. The SCA held that the documents held by the CC were privileged as a result[52]. However, the SCA stated also that the CC impliedly waived this privilege when it openly referred to the leniency application in its referral affidavit to the Tribunal[53]. The referral affidavit contains evidence that the CC intended to lead during the hearing and it was under no obligation to include or make reference to the leniency application[54]. The SCA also had to rule on Scaw's claim that some of their documents were confidential. This matter was referred back to the Tribunal.

The implication of this judgment is that any reference to a leniency application in the CC's referral affidavit can be regarded as a waiver of the litigation privilege. Cartel members who may be considering using the CLP may thus question the protection afforded by the policy. They may ask for assurance that their information is not unduly disclosed.

What does this judgment mean for the private plaintiff who wishes to claim damages? It gives them greater access to the documents provided during the CLP process. If applicants would like their documents to remain confidential, the Tribunal will have to decide whether such information relates to "trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available or known by others" as defined in the Competition Act[55]. The Tribunal will protect sensitive trade secrets, but any information outside this ambit would be subject to disclosure. Leniency applicants who have submitted their applications prior to this decision will now be concerned about the extent of information that the CC will be obliged to release. They would most likely be careful in how the information is disseminated to the CC, bearing in mind however, that non-cooperation will jeopardize their leniency application.[56]

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[50] *AMSA*, para 20-21.
[51] *AMSA*, para 28
[52] *AMSA*, para 31.
[53] *AMSA*, para 37.
[54] Ibid.
[55] Definitions. Competition Act 89 of 1998 (as amended).
[56] See A. Caruso, "Leniency Programs and Protection of Confidentiality: The Experience of the European Commission", (2010) *Journal of European Competition Law & Practice* 454 and

The question of third parties requesting access to documents submitted during the leniency process has also been dealt with in the European Union.

IV. Lessons from the EU

Courts in the EU have grappled with the question of leniency documents disclosure, which could undermine the leniency programme while at the same time recognizing third parties' rights to claim damages. The three cases below illustrate the development of EU jurisprudence in this regard. In all three cases, information was requested by a damages claimant, which was submitted as part of a leniency process, such as documents that were submitted by the cartel members and confidential information from the decision of the European Commission. European Courts faced a difficult task in dealing with this dichotomy taking into consideration both EU rules and national laws. Before *Pfleiderer*[57], there was not much interest in this issue[58]. *Pfleiderer* was the first case to set the ground rules.

1. *Pfleiderer*

1.1. Background

The German Federal Cartel Office, otherwise known as the Bundeskartellamt (hereafter: BKA), received a leniency application in 2008 from a company involved in a décor paper cartel. Three of Europe's largest décor companies were subsequently fined approximately 62 million Euros for their involvement in the cartel. One of their customers, Pfleiderer AG, claimed that it had purchased over 60 million Euros worth of special décor paper over approximately 3 years whilst the cartel was in operation. It had thus suffered losses as a result of the high cartel price and intended to claim damages against the three décor companies.

To strengthen its damages case, Pfleiderer approached the BKA for full access to these leniency applications, which implicated the cartel. The BKA

C. Hodges, "Competition enforcement, regulation and civil justice: what is the case?", (2006) 43(5) *Common Market Law Review* 1390.

[57] CJ judgment of 14 June 2011 in Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161 (hereafter: *Pfleiderer ECJ*).

[58] Y. Botteman, P. Hughes, "Access to File: Striking the Balance between Leniency and Private Enforcement Tools", (2013) *Global Competition Review: The European Antitrust review*; available at www.globalcompetitionreview.com.

provided three decisions where fines were imposed, but removed from them certain information including a list of recorded evidence obtained during the investigation[59]. The BKA refused to grant Pfleiderer access to the statements and documentary evidence rendered as part of the leniency process. The BKA reasoned that the cartelists making use of leniency assisted the BKA with cracking the cartel in the décor industry. For the BKA to now grant access to leniency files to third parties, who would use that information in a civil damages case, would discourage future cartelists and witnesses from disclosing cartels[60]. Pfleiderer then applied to the local German court, the Amtsgericht Bonn, making a formal request for the leniency documents and to overturn the BKA decision.

In a confounding judgment, the Amtsgericht Bonn found that Pfleiderer had a "legitimate interest" in requesting the documents, and granted Pfleiderer's request to access the leniency documents. Having acknowledged the BKA's concern in protecting the confidentially of the leniency files, it also stayed the implementation of its order[61]. Instead the German Court referred the case to the European Court of Justice (hereafter: ECJ) to seek further clarity on the issue of disclosure of information from leniency applications to third parties[62].

1.2. ECJ judgment

The ECJ first considered the matter from the point of view of the BKA finding the leniency policy to be an effective mechanism in uncovering anticompetitive practices such as cartels[63]. ECJ believed that the effectiveness of the programme could be undermined if documents relating to leniency applications were to be disclosed; this would subsequently deter companies from cooperating with the National Competition Authority (hereafter: NCA)[64]. The ECJ then focused on the equally important right of Pfleiderer to claim damages, a right that it said was already established in the *Courage and Crehan* case[65]. It reiterated also a point made in that judgment whereby civil damages also "contributed to the maintenance of effective competition in the European Union"[66]. Emphasizing the principles of equivalence and effectiveness, the

[59] *Pfleiderer ECJ*, para 11.

[60] 9(22) A. Geiger, "The End of the EU Cartel Leniency programme"; available at www.euractiv.com.

[61] *Pfleiderer ECJ*, para 14-16.

[62] The German leniency policy is based on the European Commission Council regulation 1/2003.

[63] *Pfleiderer ECJ*, para 25.

[64] *Pfleiderer ECJ*, para 26.

[65] *Courage and Crehan* [2001] ECR 1-6297

[66] *Pfleiderer ECJ*, para 29, and see *Courage and Crehan*, para 27.

ECJ held that there is nothing in the leniency regulation precluding a third party from gaining access to leniency documents[67]. To reach a solution, the court would have to weigh "the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency"[68]. In a disappointing turn, the ECJ decided not to do the weighing exercise itself, but rather left it to the discretion of national courts on a case-by-case basis[69]. When making such decisions, the ECJ urged national courts to consider the facts of the case in relation to national laws, the conditions and type of evidence submitted under the leniency programme, and the rights and interests of the third party who wishes to institute a civil claim for damages[70].

The weighing exercise raises an interesting debate, especially when considering damages claims against non-leniency and leniency applicants. The leniency process has been an overwhelmingly important tool for the competition authorities to detect cartels. It seems that globally almost all cartels would not have been discovered without leniency. Even total immunity from damages is still "pro-claimant". However, as noted above, even allowing some penalty against leniency applicants may be regarded as a fair practice and not render the CLP totally ineffective. This will favour a harsher line against leniency applicants.

The Attorney General, Advocate General Mazák, provided an accompanying opinion in the Pfleiderer case[71]. His solution was to provide the leniency documents to the third party and withhold any self-incriminating documents or statements provided by a leniency applicant. He saw the refusal to disclose leniency information to the third party claiming damages as a violation of their right to a fair trial, especially if those documents (provided they do not contain confidential business information) could help the claimant establish the causal link between the harm caused and the anticompetitive conduct[72]. This also gives leniency applicants, or even a non-leniency cartelist for that matter, an opportunity to raise the "defence" of confidential business information. Like in South Africa, it would be up to the courts to decide whether the evidence does actually contain information that would unduly prejudice the business. Although the ECJ did not follow the opinion expressed by Advocate General Mazák, the latter appears to provide for a clearer solution.

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67 *Pfleiderer ECJ*, para 30 and 32.
68 *Pfleiderer ECJ*, para 30.
69 *Pfleiderer ECJ*, para 31.
70 *Pfleiderer ECJ*, para 30-31.
71 AG Mazak, Opinion in Pfleiderer, Case 360/09, www.curia.en, No 48.
72 Ibid.

1.3. Back to the local German court

Following the ECJ judgment, the *Pfleiderer* case was referred back to Amtsgericht Bonn – the court that initially granted Pfleiderer's access request. Following its guidance and weighing the factors outlined by the ECJ, Amtsgericht Bonn reversed its initial decision and denied Pfleiderer access to the leniency documents held by the BKA[73].

Amtsgericht Bonn considered the value of the information given in the framework of a leniency programme where the leniency applicant provided self-incriminating evidence and had the expectation that the information would remain confidential and the applicant's constitutional right in terms of German law, to have a say regarding the information it submitted and how much of it could be disseminated to third parties. The leniency programme proved very successful in uncovering cartel activity in the EU. Going back on these principles would jeopardize the attractiveness of the leniency programme[74].

Amstgericht Bonn, in its deliberations, also considered that many of the civil damages claims were follow-on cases after the competition authorities had uncovered the cartel. Subverting a successful leniency tool, and thus hampering future cartel investigations, would also negatively impact future damages cases[75]. The NCA's decision in itself should be useful enough to show the causal link between the cartel conduct and the damages to the third party. The court thus asserted that information from a leniency application would not be useful in quantifying those damages, and that normal civil procedure rules could be used to assess the loss suffered by the third party[76].

1.4 Implications of *Pfleiderer*

The ECJ ruling in *Pfleiderer* has been plagued with criticisms from the bar[77]. Instead of providing clarity sought by the parties, it introduced new problems. The ECJ ruling could have set an EU-wide standard for dealing with information requests concerning leniency applications. Instead, it left this decision in the hands of each Member State to deal with. The decision of Amtsgericht Bonn, which was welcomed by the BKA and the EC, had a detrimental impact on third party damages claimants. Confidentiality is

[73] *Pfleiderer v Bundeskartellamt*, 51 Gs 53/09 AG Bonn, 18.01.2012.

[74] C. Cauffman, "The Interaction of Leniency Programmes and Actions for Damages" (2011) 7(2) *The Competition Law Review* 3-4.

[75] Ibid. at 4.

[76] Ibid.

[77] See S. Campbell, T. Feunteun, "Article on developments in English Cartel and enforcement" (2012) *Stewarts law;* available at. www.stewartslaw.com; 9(22) A. Geiger, "The End…", op. cit.; 9(24) Y. Botteman, P. Hughes, "Access to File…", op. cit.

a distinctive feature of leniency, and these decisions neither provide much security to future leniency applicants, nor to third parties needing the information for their damages claim.

2. *Donau Chemie*

2.1. Background

On 6 June 2013, the Court of Justice (hereafter: CJ)[78] published its judgment in the *Donau Chemie*[79] case. This matter originated in Austria in 2010 where the Austrian competition authority, the Bundeswettberbsbehörde (hereafter: BWB), through their leniency programme, uncovered a cartel in the wholesale distribution of printing chemicals and imposed a fine of 1.5 million Euros on Donau Chemie and other companies involved[80]. The trade associations Verband Druck and Medientechnik asked BWB for access to leniency documents in order to use them in their follow-on damages case against the cartel.

The local Austrian court, the Oberlandesgericht Wien (the Vienna Higher Regional Court) found upon its analysis that Austrian provisions, applicable only in cartel cases, protected information submitted in cartel cases in so far as such information could only be divulged to third parties if all the parties consent to this waiver[81]. Moreover, parties can refuse to provide access to that information without furnishing reasons. This blanket restriction does not leave much room for the NCA to consider the interest of the third party. The Austrian Court was in doubt as to the compatibility of the national rules with EU law, especially in light of the *Pfleiderer* ruling, and thus approached the CJ for guidance.

2.2. Court of Justice ruling

Drawing on the *Pfleiderer* dicta and its principle of effectiveness, the CJ reiterated that a balancing exercise must be performed to weigh, on the one hand, the interests of the third party who would like access to the documents

[78] The name of the ECJ court changed to the Court of Justice of the EU when the Treaty of Lisbon came into force in 2009.

[79] *Bundeswettberbsbehörde v Donau Chemie AG and others*, Case C 536/11; available at www.eurlex.europa/LexUriServ.do?uri=CELEX: 62011CJ0536:EN:HTML (hereafter: *Donau Chemie CJ*).

[80] *Donau Chemie* CJ, para 5.

[81] Austrian Federal Law of 2005 of Cartels and Other Restrictions of Competition, Paragraph 39(2) which states "Persons, who are not parties to the procedure, may gain access to the files of the Cartel Court only with the consent of the parties".

to help enforce its rights to claim damages, and, on the other hand, the right to protect the information contained in the leniency application (such as the rights to protect personal or business secrets[82]) and not compromise the leniency programme[83].

In its appraisal of the law the CJ found that:

- The blanket restriction denying access to leniency information imposed by Austrian law should not result in making it virtually impossible for a third party to exercise its rights to claim damages[84].
- National courts must weigh the interests of the parties who wish to have access to the documents and those who do not want to disclose the information, because "any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as matter of course, is liable to undermine the effective application" of the legislation, and "the rights that provision confers on individuals"[85].
- National courts can conduct this balancing exercise on a case-by-case basis[86].
- To say that the mere risk that access to documents from a leniency file would in itself undermine the leniency programme cannot be justified[87].
- The fact that such refusal by a leniency applicant may circumvent a damages action "to the detriment of the injured parties, requires that refusal to be based on overriding reasons relating to the protection of the interest relied on and applicable to each document to which access is refused"[88].
- The only exception is if there is a risk that the document may "undermine the public interest relating to the effectiveness of the national leniency programme that non-disclosure of that document may be justified"[89].

2.3. Implications of the judgment

The CJ's judgment in *Donau Chemie* can be seen as a victory for potential damages claimants especially where national laws provide a blanket restriction to access leniency documents. However, the Court did not stray any further

[82] *Donau Chemie CJ*, para 33.
[83] *Pfleiderer ECJ*, paras 30 and 31, and reiterated in *Donau Chemie CJ*, para 9.
[84] *Donau Chemie CJ*, para 27.
[85] *Donau Chemie CJ*, para 31.
[86] *Donau Chemie CJ*, para 47.
[87] *Donau Chemie CJ*, para 46.
[88] *Donau Chemie CJ*, para 47.
[89] *Donau Chemie CJ*, para 48.

from *Pfleiderer* and merely reiterated the weighing of interests test to be decided on a case-by-case basis and in some respects, on a document-by-document basis[90]. The *Donau Chemie* ruling has not properly defined the criterion in this weighing exercise. Measuring the public interest in relation to the principle of the effectiveness of leniency also requires a proper assessment standard, which was not addressed in this ruling. It also appears that the competition authorities bear the burden of proving the public interest test. There is also no guarantee to prospective leniency applicants regarding the certainty of the confidentially of their documents. The court provided in *Donau Chemie*, just like in *Pfleiderer*, a broad approach without the comfort of clarity to either the leniency applicant or the damages claimants. This case does show that it is becoming more accessible for damages claimants to obtain access to leniency documents, and that the competition authorities cannot provide a leniency applicant with an absolute assurance that their information will be protected.

3. *National Grid*[91]

3.1. Background

The *National Grid*[92] case was brought to the Chancery Division of the English High Court which had to evaluate whether confidential documents given to the European Commission (hereafter: EC) could be disclosed to a potential damages claimant. National Grid Electricity and Transmission (NGET) wished to bring damages against those[93] involved in the Gas Insulated Switchgear cartel. A 750million Euro fine was imposed upon the cartel members by the EC. NGET requested these documents arguing that disclosure was needed so that it could collect as much information as possible in preparation of its follow on damages claim. The documents in question comprised the confidential version of the EC's report. Some of the documents were disclosed to NGET, but the company argued that it required more information still[94].

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[90] *Donau Chemie CJ*, para 47.

[91] *National Grid Electricity Transmission Plc v ABB Ltd*, Chancery Division, [2012] EWHC 869 (Ch).

[92] *National Grid Electricity Transmission Plc v ABB Ltd*, Chancery Division, [2012] EWHC 869 (Ch).

[93] Some of the parent companies involved in the cartel were ABB, Siemens, Alstom and Areva. ABB was granted immunity from the fine in terms of the Commission's 2002 Leniency Notice.

[94] See para 7 citing the High Court judgment [2009] EWHC 1326 (Ch) rejecting the defendant cartels' application to stay the proceedings.

3.2. High Court ruling

Justice Roth of the English High Court invited the EC to make oral submissions on the following points:

(1) Whether *Pfleiderer* applies to the disclosure of leniency documents in the context of a decision of the EC?

(2) Whether national courts have the jurisdiction to hear matters related to the disclosure of leniency documents or whether this request could only be made to the EC in relation to Article 15(1) of Regulation 1/2003, OJ 2003 L1/1?[95]

(3) If national courts do have such jurisdiction, what factors should they take into account to weigh the interests of the parties as indicated in *Pfleiderer* paragraphs 30-31?[96]

After hearing the arguments, Justice Roth's response was that:

(1) *Pfleiderer* had a broad appeal, which was not limited to national leniency programmes only. He emphasized that it was not the EC who suggested that there was any policy reason to give *Pfleiderer* a more restricted interpretation. He found that the ECJ's judgment did not allow for any qualification. Consequently, *Pfleiderer* applies with equal force to both the EC's leniency programme and that of NCAs'[97].

(2) Justice Roth made it clear that national courts did have the jurisdiction to rule on the disclosure application. He said: "there is nothing in Regulation 1/2003 that even remotely suggests that the court is precluded from applying its national procedures for access to documents"[98]. He agreed with the EC that there is nothing precluding Member States from adopting their own rules relating to the disclosure of leniency materials. He added that to rule otherwise would create a huge burden on the EC if every disclosure application for leniency documents had to be referred to the EC, and if there were potential appeals, it could lead to substantial delays in finalizing these cases[99].

(3) He considered the weighing exercise proposed by *Pfleiderer* by taking note of the fact that this is not a simple exercise "because the considerations that apply on the two sides are of a very different character, although it has similarities to the task of the court where

[95] Article 15(3) gives the NCAs and the EC the right to submit written submissions to the local/national courts of the Member States for matters in relation to Article 81 and 82 (now Article 101 and 102) European Treaty.

[96] *National Grid*, para 18.

[97] *National Grid*, para 26.

[98] *National Grid*, para 28.

[99] *National Grid*, para 29.

a claim to public interest immunity is raised"[100]. In his application, Justice Roth took several factors into account:

(a) He said that consideration must be given to the actual documents sought. In this case, NGET requested access to certain extracts that were incorporated into the EC's decision as well as certain replies and requests for information and explanations. It did not ask for all documents related to the leniency application[101].

(b) Some of the defendants argued that leniency applicants have a legitimate expectation that their documents would be protected. He stressed that the programme did not offer any legitimate expectations to leniency applicants that their documents would be protected from disclosure to third parties[102].

(c) All parties to the cartel are equally liable for the wrongdoing. Therefore, disclosing the leniency documents would not increase the leniency applicant's legal liability to a greater extent than of those parties who were not granted leniency[103].

(d) He considered factors such as the amount of the fine that the leniency applicant avoided by applying for leniency, the duration for which the cartel had been in operation, the gain attained by the cartel members, the alleged loss suffered by NGET, and the difficulty for the damages claimant to access evidence required to substantiate its claim or to establish causation between the prohibited practice, the damage and the quantification of damages[104]. These factors were weighed against the "potential effect of a disclosure order" in this case, and the deterrent effect it may have on potential leniency applicants in other cartels which are yet to be uncovered. If this is a company's main concern for not racing to the door to apply for leniency, it is a huge risk to take. Another cartel member could come forth and apply for leniency, thus uncovering the cartel. The company who decided not to apply for leniency will thus be exposed to higher fines and potential civil damages claims[105]. He assessed the proportionality of these factors in the following terms: "(a) whether the information is available from other sources, and (b) the relevance of the leniency materials to the issues in this case."[106]

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[100] *National Grid*, para 30.
[101] *National Grid*, para 31.
[102] *National Grid*, para 34.
[103] *National Grid*, para 35.
[104] *National Grid*, para 37 and 40.
[105] *National Grid*, para 37.
[106] *National Grid*, para 39.

(e) Justice Roth qualified that even if the claimant could obtain the requested documents from other sources, there is no guarantee that it will be able to use those documents because cartel documents are usually known to be "opaque or literally, cryptic"[107]. It is thus better to rely on information given to the EC, which is probably more reliable[108]. However, this does not mean that all information requests should be granted without considering the "countervailing factor[s] to be weighed against disclosure"[109]. "It is necessary to ascertain whether the particular documents or parts of the documents are of such potential relevance that specific disclosure should be ordered"[110]. Not all documents requested are relevant for the claimant's purpose. Accordingly, it would be wrong to order disclosure of all leniency materials without a proper examination of them all[111].

After inspecting the documents, Justice Roth observed that the decision of the EC could be distinguished from other documents access to which was sought. Some of the information that was redacted in the decision's non-confidential version related to confidential commercial information obtained from company statements. This would not have any effect on the leniency applicant's defence to the damages claim as it was already covered by the "confidentiality ring"[112]. He concluded that only a partial disclosure of the documents should be allowed[113].

3.3. Implications of the judgment

This judgment shed more light on the factors to consider when conducting the weighing exercise. However, it is noted that the weighing exercise was based on the facts peculiar to this case and should not be used as a definitive template. The weighing exercise as said in *Pfleiderer*, should be done on a case-by-case basis.

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107 *National Grid*, para 50.
108 *National Grid*, para 43.
109 *National Grid*, para 52.
110 Ibid.
111 *National Grid*, para 52 and 55.
112 *National Grid*, para 57.
113 *National Grid*, para 58.

4. *CDC Hydrogen Peroxide*

4.1. Background

The applicant, CDC Hydrogen Peroxide Cartel Damages Claims[114], was formed in order to institute damages against a cartel in the hydrogen peroxide industry were the EC fined 9 companies 338million Euro for price fixing[115]. In its quest to recover damages, CDC asked the EC for "full access to the statement of contents of the case file in the hydrogen peroxide decision"[116]. CDC requested the non-confidential version of the index of content relying on Article 4(2) of the Transparency Regulation[117]. This information would have helped CDC in the discovery process of identifying documents that the cartelist held, which could be used to strengthen their civil case. The EC raised exceptions to the Transparency Regulation and denied CDC access to the requested documents on the grounds that it could not disclose the companies' confidential commercial information and to do so would undermine the leniency process and investigation. The CDC turned to the General Court (hereafter: GC) asking for disclosure.

4.2. The General Court outcome

The GC dismissed the exceptions raised by the EC. The Court considered whether the index to the file, which was requested by the damages claimant, constituted protected commercial interest information. It held that the index itself was not submitted by the leniency applicant, and does not contain any information that could prejudice its commercial interests[118]. The usefulness of that information to further the claimant's case is a question that would be raised during the discovery process in the civil case[119]. Protecting the commercial interest of documents should not allow for the leniency applicant to avoid facing civil damages claims[120].

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[114] GC judgment of 15 December 2011 in Case T- 437/08 *CDC Hydrogen Peroxide Cartel Damages Claims (CDC Hydrogen Peroxide) v European Commission* [2011] ECR II-08251 (hereafter: *CDC*). CDC is a company called Cartel Damages Claims that brings actions on behalf of cartel victims.

[115] Commission Decision of 3 May 2006 in Case COMP/F/C.38.620 (2006) OJ L 353/54 (hydrogen peroxide decision).

[116] *CDC Hydrogen Peroxide*, para 1.

[117] Regulation (EC) No. 1049/2001, which allows the public access to European Parliament, Council and European Commission documents ([2001] OJ L145/43) (Transparency Regulation).

[118] *CDC*, para 45 and 70.

[119] *CDC*, para 47.

[120] *CDC*, para 49.

The EC submitted that the case may be appealed and thus disclosure would not be appropriate at this stage. The GC found that the EC's investigation was complete and said that even if the case went on appeal, this does not mean that access to the index should be denied[121].

The EC raised concerns that disclosure would undermine the leniency programme as potential applicants would not cooperate. The GC dismissed this argument saying that the leniency policy did not deserve any higher level of protection than a damages claim as both private and public enforcement contributed to deterring cartel conduct.

4.3. Implication of *CDC Hydrogen Peroxide*

Although the Commission jealously guarded every piece of information relating to the leniency case, including the index to its case file, this case raises further issues of uncertainty. Perhaps this specific request to see the index may not have been the ideal point to make for the EC in protecting access to documents. The index could clearly not be seen as confidential commercial interest information that would be used at a later stage. This case, like the others, emphasized the fact that the damages claimants have just as big a role to play in enforcement of cartels as leniency. Their requests should not be easily disregarded and dismissed.

V. The USA approach

In the United States a successful damages claimant, who has been harmed by a cartel, is awarded treble damages. Being awarded three times what you have quantified in your claim is a great incentive to sue for damages. Leniency applicants could thus easily become target respondents for damages cases. American competition authorities were thus also concerned about protecting their leniency policy, especially since the policy has been immensely successful in uncovering cartels[122]. In order to incentivize the use of the programme, the US authorities enacted the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA), which de-trebles the damages award. This means that a claimant is only entitled to single damages from a successful leniency applicant (and the leniency applicant is not jointly and severally liable, e.g. in the case of bankruptcy of a co-conspirator, which is very important, given the prevalence of "crisis cartels"), and the claimant can sue the other

[121] *CDC*, para 65.

[122] S. Hammond, "The Evolution of…", op. cit.

members of the cartel, who remain jointly and severally liable for treble damages[123]. A company being sued cannot recover its compensation from fellow co-conspirators[124]. The ACPERA incentive works well in the United States because of the parallel treble damages incentive. It also provides the leniency applicant some relief from civil damages in exchange for satisfactory and timely co-operation with the damages claimant[125]. Considering that there is no triple damages incentive in South Africa, it would not be possible to incorporate this solution directly into its law. However, it is worth considering.

Empirical evidence shows that the enactment of ACPERA has caused a minimal change in the number of leniency applications[126]. 78 leniency applications were submitted in the six-year period before the enactment of ACPERA in 2004, 81 applications were submitted during the six-year period after its enactment[127]. For those who did apply, there was a 6% increase of successful applications, especially in cases where the Department of Justice did not yet know about the existence of the cartel[128]. Although there is a slight shift of applications, ACPERA may have brought only slight relief to leniency applicants. The threat of criminal penalties still remains a greater incentive for these applicants to come forward to blow the whistle on the cartel[129].

Most importantly, it was found in the US Government Accountability office report that the information the damages claimant obtained through the co-operation in the ACPERA process helped to "streamline their cases by reducing the burden of long and costly civil discovery because leniency applicants provided a roadmap to the conspiracy"[130].

Through ACPERA, US authorities appear to have found a way to maintain the integrity of their leniency policy and destabilize cartels. Damages claimants can strengthen their case through the co-operation of the leniency applicant in exchange for a de-trebled damages award.

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[123] J. Green and I. McCall, "Leniency and civil claims" (2009) *Competition Law Insight* 3-5; S.W. Waller, "Towards a Constructive Public-Private Partnership to Enforce Competition Law" (2006) *World Competition* 367-381.

[124] *Texas Indus., Inc v Radcliff Materials, Inc*. 451 U.S. 630 (1981).

[125] ACPERA § 201–215. See also 2010 amendment to ACPERA Pub. L. No. 111–190 § 3, which added the "timeouts" requirement.

[126] United States Government Accountability Office (GAO), "Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform are Mixed, but Support Whistleblower Protection", Report to Congressional Committees, July 2011, GAO-11-619 p. 15 (otherwise known as the "GAO report").

[127] GAO report p. 16. "These data include both corporate and individual applications though the vast majority of applications submitted both before and after ACPERA were corporate leniency applications". Fn 40 GMO report.

[128] GAO report, p. 16.

[129] GAO report, p. 20.

[130] GAO report, p. 29.

VI. Finding the balance

There are a number of factors which can guide the process of finding a balance in weighing up the rights of damages claimants to access documents with the imperative to protect evidence gained through public enforcement. It should be noted that unlike in the EU or the US, damages claimants in South Africa have to wait for the outcome of the administrative decision – they must be issued a certificate by the Competition Tribunal before proceeding with a damages action. This might affect the balance.

The EC has consulted the public on how to encourage damages cases and proposed a procedure in the 2005 Green Paper and later in the 2008 White Paper. In June 2013, it issued a draft directive[131]. With regard to the disclosure of evidence, the EC calls for full protection of leniency documents, which cannot be disclosed even once the case has been finalized. This would apply to corporate statements, replies to requests for information, and other settlement submissions[132]. These documents are completely off limits and cannot be disclosed to third party damages claimants. This was also confirmed recently in the *Gas Switchgear Cartel* case where the CJ held that there was no overriding public interest on the part of a damages claimant to have access and use of the leniency documents[133].

The Proposed Directive gives some reprieve to the damages claimants if they would like a precise disclosure of documents, which would be substantively relevant to their case. These documents can only be disclosed after the competition authorities have finalized their case. National Courts are now given the discretion to determine the scope and cost of the disclosure request, whilst still protecting confidential and privileged information.

The EC Directive also proposes that a damages claimant can claim from the co-conspirators who will be liable jointly and severally for their conduct. The incentive to the leniency applicant is that it won't be liable for the entire compensatory amount, but rather, only liable for its own responsibility or share of the harm. The leniency applicant can be jointly and severally liable

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[131] European Commission "Proposal for a Directive of the European Parliament and of the Council on Certain Rules governing Actions for damages under National Law for infringements of the competition law provisions of the Member States and of the European Union" C(2013)3539/3.

[132] Ibid. at 4.2.

[133] CJ judgment of 10 April 2014 in Joined Cases C-231/11P, C-232/11P and C-233/11P and in Joined cases C-247/11P and C-253/11P *Commission v Siemens Österreich and Others, Siemens Transmission & Distribution v Commission, Siemens Transmission and Distribution and Nouva Magrini Galileo v Commission, Areva v Commission and Alstom and Others v Commission* (also known as the "Gas Switchgear Cartel" Case).

only if the claimant cannot recover the damages from other cartel members, albeit it seems this would only be allowed under exceptional circumstances[134].

VII. Conclusion

The South African competition authorities place considerable value on the CLP and indeed it has proven very effective in detecting cartel conduct[135]. It is therefore in their interest to protect the integrity of the policy. This becomes difficult in light of paramount public interest for third parties claiming damages to gain access to information which may help in establishing causation and the quantum of harm, in order to exercise their right to recover their losses. Private and public enforcement should be complementary tools for the eradication of cartels. However, this often results in a battle over access to the leniency information.

One outcome would be to find a perfect balance between suing the leniency applicant for damages (ability for follow on claims), versus partial leniency (such as in the US under ACPERA, where leniency applicants are still liable for single, but not treble damages), versus full leniency (with no follow on claims). Empirical evidence on ACPERA, which allows for some penalty, is still quite an encouraging incentive.

The South African courts have not had the opportunity to deal comprehensively with this dilemma, albeit some of these issues did come to the fore in the *AMSA* case. In this case, the SCA did find an interest in protecting the litigation privilege but did not have much choice regarding the disclosure of leniency information considering that the leniency applicant was mentioned in the referral document. This opened the door to disclosure, with AMSA and Cape Gate requesting information so that they could properly answer the CC's allegations. However, the case did not deal with the challenges facing a damages claimant.

It is thus worth looking to the EU for guidance on this. *Pfleiderer's* introduction of the principle of the weighing of interests, and its consideration of the principle of equivalence and effectiveness, introduced a new dimension to this debate. It could be argued that the ECJ could have taken the matter further by identifying the factors that should be considered by national courts when conducting this exercise, rather than leaving it in the discretion of the national judiciary on a case-by-case basis. This case should be lauded for

[134] Ibid. at 4.3.

[135] Annexure A is a list of cases, which have been successfully prosecuted as a result of the CLP.

entertaining the possibility that damages claimants could show that their interest in obtaining access to the documents to strengthen their case is worth serious consideration. The CJ agreed in *Donau Chemie* with *Pfleiderer's* weighing exercise and guarded against local laws that imposed blanket restrictions on the access to documents. *National Grid* went ahead to outline certain factors to consider, but keeping in mind that it was fact-based.

These cases appear to be leaning in favour of disclosing certain leniency documents to damages claimants, and not shutting them out completely. They have emphasized that private enforcement has just as big a role to play as public enforcement in eradicating cartels. The potential effect of the application of the CLP came into question and all courts were quite adamant that the programme did not offer a legitimate expectation that all evidence submitted by the leniency applications would remain undisclosed to third parties.

It was emphasized in *National Grid* that there is a greater risk in not applying for leniency (i.e. a greater financial risk of being fined by the competition authorities as well as the possibility of losing a damages case) than using the programme to obtain immunity. *National Grid* was also an important case after *Pfleiderer* by providing more guidance at the national level.

The *CDC* case illustrated that the competition authorities could be very conservative when it comes to the protection of leniency information. The authorities in CDC even tried to extend this protection to an index of a referral file. It remains to be seen whether companies would risk having their information being exposed to third parties and whether national courts would permit full disclosure to third parties without revealing business secrets and confidential company information.

The US does not offer much help in finding a balance because the existing legal incentives differ greatly. De-trebling of damages would be very encouraging to a potential leniency applicant. The EU and the US appear to be on the same page regarding joint and several liability of co-conspirators. The EU does take a step further with its exception allowing for joining of liability of the leniency applicant. This addition unfortunately allows for uncertainty to creep in.

The EC Proposed Directives are worth considering in the South African context. The national court rules may not directly apply because of South Africa's different legal structure. However, the provisions could still be considered. It does seem as though thesedirectives were in direct response to the Pfleiderer judgment. The EC is attempting to take a decisive stance and it would be interesting to see if it holds up in court. The directives closely protect information given within the leniency process, which is a step back from the judgments in *Pfleiderer*, *Donau Chemie*, *National Grid* and *CDC*. Indeed, all of the jurisprudence employs a balancing test, and understands

the position of damages claimants having asymmetrical information and the need to access leniency documents to strengthen their case. This is disquieting especially since the motivation behind the EC Green and White paper, and now the proposed directive, was to encourage more damages actions. Access to information that is available to damages claimants is quite limited in terms of the Proposed Directive.

At this stage it is uncertain whether South African courts would support the denial of access to leniency documents to uphold the integrity of the CC's leniency policy. It would be worrisome to think that they would have such a one sided view, especially when damages cases in competition law are still lacking, and claimants need to be incentivized and encouraged in South Africa so that they can get some reprieve. Hopefully, any recommendation issued by the Courts will seek to provide a balance between strengthening public enforcement and allowing damages claimants access to justice in private enforcement cases.

The Parent-subsidiary Relationship in EU Antitrust Law and the *AEG Telefunken* Presumption: Between the Effectiveness of Competition Law and the Protection of Fundamental Rights

by

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CONTENTS

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Abstract

The increasingly frequent reference to the protection of fundamental rights in the application of EU antitrust law is a trend that has grown significantly alongside the reforms brought about by Regulation 1/2003. Greater attention being given to fundamental rights is evident in the development of the application of the AEG Telefunken presumption, whereby a parent company may be penalized for the antitrust infringements of its wholly-owned subsidiary on the ground that the parent and the subsidiary constitute a single economic entity, and hence a single "undertaking". Recently, the Court of Justice has confirmed the lawfulness of that presumption. However, increasing attention is now given to the adequacy of the Commission's reasoning, particularly when the Commission rejects arguments made by parent companies to rebut the presumption. These developments suggest that the growing importance of fundamental rights protection may under certain conditions be a limit the principle of the effectiveness of EU competition law as well as a new legal tool to rectify (as much as possible) the EC's "conflict of interests" with regard to its two "souls", the "prosecutor" and the "judge".

Résumé

La référence de plus en plus fréquente à la protection des droits fondamentaux dans l'application du droit antitrust de l'UE est une tendance qui a augmenté de façon significative avec des réformes apportées par le règlement N° 1/2003. L'attention plus grande accordée aux droits fondamentaux est évidente dans le développement de l'application de la présomption AEG Telefunken, par laquelle une société-mère peut être sanctionné pour les infractions antitrust de sa filiale en propriété exclusive au motif que la société-mère et la filiale constituent une seule entité économique, et donc une seule «entreprise». Récemment, la Cour de justice a confirmé la légalité de cette présomption. Cependant, une attention croissante est maintenant dirigée vers la pertinence du raisonnement de la Commission, en particulier lorsque la Commission rejette les arguments présentés par les sociétés-mères pour réfuter cette présomption. Ces développements suggèrent que l'importance croissante de la protection des droits fondamentaux peut, sous certaines conditions, tempérer le principe de l'effectivité du droit communautaire de la concurrence.

Classifications and key words: relationship between competition law and fundamental rights; concept of undertaking; parent-subsidiary relationship in corporate groups; imputability of sanctions in corporate groups; standard of reasoning of the Commission

1. Introduction

The reform of Regulation 1/2003[1] has enabled the European Commission (hereafter: EC) to focus its enforcement primarily on cartels. This trend has been accompanied by a number of changes in the application of antitrust rules including a new, and more harsh fining policy with higher sanctions imposed on companies[2]. At the cornerstone of what one could call an effective and until now successful "war on cartels" was, *inter alia*, the *AEG Telefunken* presumption. The presumption deals with the imputation of the sanctions for the breach of *antitrust* rules to a parent company that holds a 100% shareholding of the subsidiary whereby it is the latter that has actually violated European competition law. Because of its features, this case-law has raised much criticism and was challenged in some fifty judgments in the last few years[3].

The EC's new policy on the "war on cartels" has led to the interesting trend of increasingly frequent complaints, also *vis a vis* the *AEG Telefunken* case-law, from companies subject to European antitrust proceedings claiming an alleged violation of their fundamental rights. This phenomenon – unknown to this extent in the US experience – is related to the specific characteristics of the European Union (EU) antitrust enforcement system.

On this background, the aim of this article is, first, to assess briefly the evolution of the application of fundamental rights protection in European *antitrust* law. Second, it is to give an overview of the imputation of antitrust law in corporate groups. Third, the article also aims to take into account the development of the so-called *AEG Telefunken* presumption in European jurisprudence and, fourth, to assesses the effect of the application of fundamental rights protection to that presumption.

2. The protection of fundamental rights and European antitrust law: a brief overview

Although the discussion of the relationship between competition law and the protection of fundamental rights has developed only recently[4], the

[1] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.01.2003, p. 1.

[2] See W. Bosch, "The Role of Fines in the Public Enforcement of Competition Law" [in:] K. Heschelrath, H. Schweitzer (eds), *Public and Private Enforcement of Competition Law in Europe*, Springer Verlag 2014, p. 53.

[3] For full list of judgments see ANNEX.

[4] See generally M. Bronckers, A.Vallery, "No Longer Presumed Guilty: The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law" (2011) *World Competition* 535.

application of fundamental rights in this area started in much earlier times and can be organized into three phases.

The first phase begun with the recognition of fundamental rights protection within the EU legal order. The Court of Justice recognized already in the *Nold* case (1974) (one of the first rulings considering this issue) that even in the absence of a catalogue of rights in the Treaty, the protection of fundamental rights was part of European law[5]. That judgment was, in fact, a competition law case. It concerned a plea against an EC decision taken under Article 66(1) and (2) ECSC Treaty, that is, the rules on the control of concentrations covered in the ECSC Treaty[6] .

The second phase begun in the 1980s when claims were made concerning the illegality of the European system of competition law enforcement for its violation of Article 6 ECHR[7]. In particular, this phase arose as a consequence of the EC's nature of a "supranational" body, that is, independent from the Member States, as stated in Article 17 TUE. The "independence" feature was necessary, in the opinion of the drafters of the Treaty, in order to create a body which, operating independently from the Member States (but also from individuals), could protect the general interest of the Community, and not the interests of Member States or individuals[8]. However, the structure of the EC – set out so as to be independent – brings about negative consequences for investigative and penalty proceedings relating to Article 101 and 102 TFEU. That is due to the double role that the EC plays, in its independence, as both the "prosecutor" (in the identification of possible antitrust violations) as well as the "judge" (in ascertaining the infringement and imposing the relevant penalty)[9]. Hence, claims put forward in the 1980s – but held even now as in the case of the 2013 *Schindler* case[10] – stated that the entire system

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[5] See also Judgment of the Court of 17 December 1970 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11-70, Reports of Cases 1970, p. 1125.

[6] Judgment of the Court of 14 May 1974 *J. Nold, Kohlen- und Baustoffgrosshandlung v Commission of the European Communities*, Case 4-73, ECR 1974, p. 491, para 13. In particular, Mr. Nold alleged here the infringement of his right to property, recognized by the German *Grundgesetz*, by the decision of the Commission on Protection of Competition.

[7] See Judgment of the Court of 29 October 1980 *Heintz van Landewyck SARL and others v Commission of the European Communities*, Joined cases 209 to 215 and 218/78, Reports of Cases 1980 03125, page 10 and para 79.

[8] On the nature and role of the EC in antitrust law enforcement, please see L.F. Pace, *European Antitrust Law*, Edward Elgar Publishing, 2007, p. 26 and 199.

[9] See the proposal in 2010 of the separation of the EC's decisional from its prosecutorial power made in M. Merola, D. Waelbroeck (eds), *Towards an optimal enforcement of competition rules in Europe – Time to review of Regulation 1/2003?*, Bruylant 2010, p. 237.

[10] Judgment of the Court (Fifth Chamber) of 18 July 2013, *Schindler Holding Ltd and Others v European Commission*, Case C-501/11 P, not yet reported, para 23. See also W. Wils,

was in breach of Article 6 ECHR[11] because, according to these arguments, decisions regarding a quasi-criminal law, such as *antitrust* law, were issued by an authority that did not have the characteristics of an independent judge.

The thesis of the illegality under Article 6 ECHR was the result of an overly strict reading of the law and did not take into consideration the "checks and balances" of the European system, as ascertained by the Court itself in the *Schindler* judgment[12]. In spite of this, the above complaint was already in the 1980s a "cry of pain" by the companies resulting from the (alleged) "abuse" in the EC practice of its "conflict of interests". It is no coincidence that in order to find a partial solution to this issue, the institution of the Hearing Officer was established in 1981 with the aim of better protecting the procedural rights of investigated companies[13].

The third phase of the relationship between competition law and fundamental rights begun in the mid 2000s[14]. It concerns the claim of illegality for the breach of fundamental rights not of the European enforcement system as such, but of its individual aspects. This stage, as mentioned above, is in large part a consequence of the "war on cartels" waged by the EC and initiated after the reform of Regulation 1/2003. In the face of this, companies have sought – as a result of, *inter alia*, the high sanctions imposed by the EC – new forms of protection (or rather new grounds for the unlawfulness of the EC's

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The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker (2014) 37(1) *World Competition* 5.

[11] A statement is memorable delivered in 1996 by Claus-Didier Ehlermann – General Director of DG Comp at that time – during a conference organized by the Italian antitrust Authority in Rome, where he was one of the speakers, after an intervention in which the illegality of the role of the EC in the European antitrust enforcement system was alleged for the breach of Art. 6 ECHR. Ehlermann argued smiling: "*If this were true, a large part of the overall activities of the Commission would be unlawful*".

[12] Judgment of the Court, *Schindler Holding Ltd* (supra footnote 10), para 30.

[13] See G. Di Federico, *The Role of the Hearing Officer in Antitrust Cases. A Critical Assessment of the New Mandate and Practice After 2011*, Edward Elgar, forthcoming 2015. The Court held that the EC must ensure respect for the rights of the defense in the performance of its functions and, in particular, in administrative proceedings where sanctions may be imposed, in particular fines or penalty payments; v., inter alia, Judgment of the Court of 13 February 1979 *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, Case 85/76, Reports of Cases 1979 00461, para 9; Judgment of the Court of 9 November 1983 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, Case 322/81, Reports of Cases 1983 03461 para 7; Judgment of the Court of 21 September 1989 *Hoechst AG v Commission of the European Communities*, Joined cases 46/87 and 227/88, Reports of Cases 1989 02859, para 15; Judgment of the Court of 18 October 1989 *Orkem v Commission of the European Communities*, Case 374/87, Reports of Cases 1989 3283, para 32 and 33.

[14] On the timing of the new EC policy, see Judgment of the Court of 8 May 2013 *ENI SpA* (infra footnote 54).

decisions). Another reason for this new "climate" was the introduction by the Treaty of Lisbon of Article 6(2) TEU that set forth, for the first time, the legally binding nature of the Charter of Fundamental Rights of the European Union. The *Menarini* judgment of the European Court of Human Rights[15] constituted the third reason for the newest development of this relationship. It is well known that the Court argued in this case, by reference to an Italian *Antitrust* Authority's decision, that the rules on competition were to be considered quasi-criminal in nature because of – *inter alia* – the size of the fines imposed for their violations. Hence the organs implementing that law had to respect the rights protected by the ECHR.

3. The imputability of the infringement of Article 101 and 102 TFEU in corporate groups and the AEG presumption

The *AEG Telefunken* presumption is closely linked to the problem of the imputability of the violation of *antitrust* prohibitions in corporate groups.

The imputability of the infringement in corporate groups is of particular importance for the EC and for the companies themselves. In fact, the concrete identification of the company liable for the breach is relevant to different aspects of the case: the size of the sanction pursuant to Article 23 c. 2 Regulation 1/2003 (the attribution of the infringement to the parent company, rather than the subsidiaries, makes it possible to increase the basis for computing the fine, and, in turn, increase the value of the penalty imposed as it would be calculated with the maximum penalty "roof" of 10% of the total turnover of the corporate group); the identification of the addressee of the EC decision for its execution; the identification of the company that has to submit a request for leniency and its consequences; the passive legitimacy in action for damages, etc.

The problem of imputation of sanctions in the case of corporate groups, with special reference to the imputation of liability to the parent company, is characterized by the concept of an "undertaking".

The TFEU defines the addressee of the prohibitions under Article 101 and 102 TFEU as being an "undertaking" without providing any specification of

[15] ECHR Court, *A. Menarini Diagnostics Srl v. Italy*, second section, 27 September 2011 See C. Bellamy, "Menarini post ECHR and competition law: An overview of EU and national case-law", *eCompetitions* N ° 47946, 5 July 2012 See also D. Cardonnel, "The European Court of Human Rights rules on the standard of judicial review on ADOPTED cartel decisions by national competition authorities" (Menarini Diagnostics v. Italy), *Concurrences* N ° 42011.

its meaning[16]. The Court of Justice later on clarified that the concept of an "undertaking" traditionally covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed[17]. The Court has stated also that in this context the term "undertaking" must be understood as designating an economic unit even if legally that economic unit consists of several natural or legal persons[18] (as is the case in a corporate group). Moreover, if such an economic entity infringes competition rules, it is for that entity, consistently with the principle of personal liability, to answer for that infringement[19]. In other words, a legal person who is not the perpetrator of an infringement of competition rules may nevertheless be penalised for the unlawful conduct of another legal person, if both form part of the same economic entity and thus constitute the "undertaking" that infringed competition law[20]. As a consequence, the parent company is itself deemed to have infringed European antitrust rules and its liability for the infringement is wholly derived from that of its subsidiary[21]. The EC will thus be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary[22].

Regarding the imputability of sanctions in corporate groups, no doubt arises when both the parent and its subsidiary are involved in the *antitrust* violation. In such cases, it is indisputable that the responsibility is also on the part of the parent company[23].

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[16] On the interpretation of this notion see W. Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law & Economics*, Kluewer Law International 2002, p. 156.

[17] Judgment of the Court, *Schindler Holding Ltd* (supra footnote 10) para 53.

[18] Ibidem, para 53.

[19] Judgment of the Court of 14 July 1972 *Imperial Chemical Industries Ltd. v Commission of the European Communities*, Case 48-69, ECR 1972, p. 619, Judgment of the Court of 25 October 1983 *Allgemeine Elektrizitäts- Gesellschaft AEG-Telefunken AG v Commission of the European Communities*, Case 107/82, ECR 1983 p. 3151, para 49. See also Case C-90/09 P *General Química and Others* v *Commission* (infra footnote 54) para 34 and 35, and Joined Cases C-201/09 P and C-216/09 *ArcelorMittal Luxembourg* (infra footnote 54) para 95; *Schindler Holding Ltd* (supra footnote 10) para 53.

[20] Judgment of the Court of 10 April 2014 *Siemens AG Österreich* (infra footnote 54) 45.

[21] See, to this effect, *Commission v Tomkins*, Case C-286/11 P, 2013, para 43 and 49, and Judgment of the Court of 26 November 2013 *Kendrion* v *Commission*, Case C-50/12 P, 2013, para 55; Judgment of the Court of 10 April 2014, *Siemens AG Österreich* (infra footnote 54) para 47.

[22] See, *inter alia*, *ArcelorMittal*, Joined Cases C-201/09 P and C-216/09 P (infra footnote 54) para 98; Judgment of the Court of 10 April 2014 *Siemens AG Österreich* (infra footnote 54) para 48.

[23] Judgment of the Court (Fifth Chamber) of 16 November 2000, *NV Koninklijke KNP BT v Commission of the European Communities*, Case C-248/98 P, Reports of Cases 2000 I-09641; Judgment of the CFI (Third Chamber, extended composition) of 14 May 1998, *NV Koninklijke*

The situation is different when the parent company is not directly involved in the conduct in violation of Articles 101 or 102 TFEU, which is, in fact, perpetrated by a subsidiary that the parent company controls. In this case, the imputation to the parent company is a consequence of the fact that both are part to the same "undertaking".

In order to conclude that the two companies are part of the same "undertaking", the parent company must not only be able to have a "decisive influence" on the subsidiary, but it must also have effectively exercised it. The mere possibility for the parent company to have a certain influence over the subsidiary is not sufficient to define the existence of an "undertaking" pursuant to Article 101 and 102 TFEU[24] and thus, in turn, it is relevant for the imputability of the penalty to the parent company. The burden of proof of these two elements (decisive influence and effective exercise thereof) remains with the EC.

The peculiarity of the *AEG Telefunken* presumption case-law lies in that fact that it relates to the specific situation where the parent company has a 100% (or almost 100%) shareholding in the subsidiary that violated antitrust law. According to the case-law, the possibility of the parent having a decisive influence on the subsidiary is clear. However, differently from the first hypothesis, the approach of *AEG Telefunken* presumes, through a rebuttable presumption, that such influence is actually exercised and that therefore the two companies indeed constitute an "undertaking". The presumption places the EC, in order to charge the parent company for a violation perpetrated by its wholly owned subsidiary, in the "cosy" position of having only to prove that the parent owns a 100% (or almost 100%) shareholding in the subsidiary. The EC will then be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market[25].

KNP BT v Commission of the European Communities, Case T-309/94, Reports of Cases, 1998 II-01007.

[24] Judgment of the GC (Eighth Chamber) of 13 July 2011 *ThyssenKrupp Liften Ascenseurs NV* (T-144/07), *ThyssenKrupp Aufzüge GmbH and ThyssenKrupp Fahrtreppen GmbH* (T-147/07), *ThyssenKrupp Ascenseurs Luxembourg Sàrl* (T-148/07), *ThyssenKrupp Elevator AG* (T-149/07), *ThyssenKrupp AG* (T-150/07) and *ThyssenKrupp Liften BV* (T-154/07) *v European Commission*, Cases T-144/07, T-147/07, T-148/07, T-149/07, T-150/07 and T-154/07, Reports of Cases 2011 II-05129; Judgment of the GC (Eighth Chamber) of 13 July 2011 *General Technic-Otis Sàrl* (T-141/07), *General Technic Sàrl* (T-142/07), *Otis SA and Others* (T-145/07) and *United Technologies Corporation* (T-146/07) *v European Commission*, Cases T-141/07, T-142/07, T-145/07 and T-146/07, Reports of Cases 2011 II-04977.

[25] See Case 286/98 P *Stora* (infra footnote 54) para 29; *Akzo Nobel* (infra footnote 54) para 61; *General Química* (infra footnote 54) para 40; *ArcelorMittal* (infra footnote 54) para 98.

At a closer look, the *AEG Telefunken* presumption was successfully challenged by parent companies only in a very limited number of cases which, moreover, related to practices dating back many years[26].

4. The *AEG Telefunken* presumption, the principle of independence of the EU legal system and the principle of effective application of competition law

The heated discussions around the *AEG Telefunken* presumption are a consequence of its characteristics[27]. The effect of the presumption is that a company which has not directly perpetrated an antitrust violation may be sanctioned, on the basis of a presumption, with an amount of up to 10% of its worldwide turnover for the behaviour of a subsidiary, which is legally distinct from the parent company although wholly owned by it (in the Schindler case, the overall fine of the Schindler's group was more than 145 millions EUR)[28].

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[26] Commission Decision of 16 December 2003 Case COMP/E-1/38 240 *Industrial tubes*, para 479; Commission Decision of 20 October 2004 Case COMP/C.38.238/B.2 *Raw Tobacco Spain*, para 251; Commission Decision of 11 June 2002 Case COMP/36.571/D-1: *Austrian banks – 'Lombard Club'* (2004/138 / EC), para 376.

[27] See A. Montesa Lloreda, A. Givaja Sanz, "When Parents Pay for their Children's Wrongs: Attribution of Liability for EC Antitrust Infringements in Parent-subsidiary Scenarios" [in:] J. Rivas (ed.), (2006) 29(4) *World Competition Law and Economic Review*, Kluwer Law International 555-574; R. Burnley, "Group Liability for Antitrust Infringements: Responsibility and Accountability" (2010) 33(4) *World Competition* 595-614; K. Hofstetter, M. Ludescher, "Fines against parent Companies in EU Antitrust Law: Setting Incentives for 'Best Practice Compliance'" (2010) 33(1) *World Competition* 55-76; M. Beretta, P.M. Ferrari, "La presunzione di responsabilità delle società madri per le infrazioni alle regole di concorrenza commesse dalle proprie controllate" (2010) *Contratto e Impresa/Europa* 1; A. Riesenkampff, U. Krauthausen, "Liability of Parent Companies for Antitrust Violantions of their Subsidiaries" (2010) 31(1) *ECLR* 38-41; L. La Rocca, "The controversial issue of the parent-company liability for the violation of EC competition rules by the subsidiary" (2011) 32 *ECLR* 68; A. Svetlicinii, N. Sad, "Parental Liability for the Antitrust Infringements of Subsidiaries: A Rebuttable Presumption or Probatio Diabolica?" (2011) *ELR* 10; W. van Weert, A.L. Hamilton, "Parental liability. The General Química case adds another smallish piece to the puzzle" (2011) *Competition Law Insight* 3; N. Jalabert-Doury, "Imputabilité – Relations mère-filiale" (2011) *Concurrences* n. 2; L. De Sanctis, "L'imputabilità della responsabilità delle violazioni antitrust e i gruppi di società" [in:] L.F. Pace (a cura di), *Dizionario sistematico del diritto della concorrenza*, Jovene 2013; B. Cortese, "The Notion of Undertaking: Piercing the Corporate Veil in EU Competition Law – Parent Subsidiaries Relationship and Antitrust Liability" [in:] B. Cortese (ed.), *EU Competition Law – Between Public and Private Enforcement*, Wolters Kluwer 2014, p. 73.

[28] Judgment of the Court, *Schindler Holding Ltd* (supra footnote 54) para 13.

The *AEG Telefunken* presumption is a typical example (like the term "undertaking"[29]) of a legal notion defined in order to ensure the effective application of Treaty rules, and in particular those on competition, taking advantage of the principle of the independence of the European legal system[30]. Their interpretation can be understood only if one keeps in mind the specific nature of competition law, that is, to ascertain the "*actual conduct of undertakings on the market*"[31].

Regarding the term "undertaking", the *fictio iuris* of the term "undertaking", as a "single economic entity" composed of different legal entities, was intended from the outset to define a common concept in Europe with reference to the addressees of Treaty competition rules. This was meant to ensure, *inter alia*, that the laws of individual Member States would not prevent (or would reduce) the application of the prohibitions[32].

The *AEG Telefunken* presumption is a consequence of the concept of "undertaking" within the meaning of European law. In other words, it establishes a presumption that a separate legal person, as a result of its whole ownership of the subsidiary and thus being part of a "single economic entity", can be penalized for the wrongdoings of its subsidiarity. In this case, the *fictio iuris* is again aimed to ensure effective enforcement of competition law. What the presumption avoids in particular is, in the first place, the parent company taking advantage of the legal autonomy of its wholly owned subsidiary to (secretly) delegate to it the actual execution of an antitrust violation. If not prevented, this would have extremely favourable consequences for the parent company and the corporate group itself, since the fine for the infringement would be calculated within the 10% of the turnover limit of the subsidiary and not that of the parent. This would have resulted, in turn, in a substantial limitation (if not elimination) of the effectiveness of competition rules[33].

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[29] E.g., it was indeed difficult for Member States to accept that single individuals or even Member States' public bodies could fall into the definition of "undertaking" within the meaning of EU law when they, under the relevant national law, did not constitute an "undertakings". See e.g. Judgment of the Court (Sixth Chamber) of 23 April 1991 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, Case C-41/90, ECR 1991 I-1979.

[30] See, *inter alia*, *Van Gend & Loos v. Netherlands Inland Revenue Administration*, Case 26/62, ECR. English special edition 1963, p. 1, p. 3; *Flaminio Costa v. ENEL*, Case 6/64, ECR 1964, p. 1129; *Amministrazione delle finanze dello Stato v. SpA Simmenthal*, Case 106/77, ECR 1978, p. 629; *Molkerei – Zentrale Westfalen/Lippe GmbH v. Hauptzollamt Paderborn*, Case 28/67, ECR 1968, p. 192; *Andrea Francovich e Danila Bonifaci v. Italian Republic*, Joined Cases C-6/90, C-9/90 and C.R. 1991, p. I–5357.

[31] Opinion of AG Kokott, *Schindler Holding Ltd* (infra footnote 54) para 66.

[32] On See also Judgment of the Court of 1 February 1972, 49/71, *Hagen*, para 6.

[33] This is a key issue (often underestemated) for understanding the AEG Telefunken presumption jurisprudence. See, e.g., B. Cortese, "The Notion…" where he claims that the only aim of the *AEG Telefunken* case-law is to enhance the level of fines of the EC.

On the other hand, this presumption has a positive effect on the fining policy of the EC. Because of the participation of the parent company and the subsidiary in a "single economic entity" (an "undertaking"), and within the limits of the "rebuttal" provided by the subsidiary, it allows the EC to penalize "also" the parent company for the behaviour of its subsidiary. The EC can thus ensure the maximum deterrence effect of its infringement decisions, *inter alia* by calculating the value of the penalty up to the 10% of the worldwide turnover of the corporate group, rather than of the turnover of the subsidiary. In this sense, joint and several liability for penalties is of key importance to companies. Indeed, the objective of joint and several liability resides in the fact that it constitutes an additional legal device available to the EC in order to strengthen the effectiveness of its actions taken for the recovery of fines imposed for antitrust infringements. For the EC as the creditor of the debt represented by such fines, this mechanism reduces the risk of insolvency, which is part of the objective of deterrence generally pursued by competition law[34].

However, the possibility for the Court to draw from a legal term (such as "undertaking") autonomous concepts needed for the effectiveness of competition law is not without limits. For instance, as recently stated by the Court, the concept of joint and several liability for the payment of fines is not an autonomous concept in the EU legal system to be interpreted by reference to the objectives and system of competition law[35]. Hence, the internal allocation of the debt for the payment of which the companies concerned are held jointly and severally liable is determined by applying national law[36].

5. The AEG Telefunken presumption and the protection of fundamental rights

The clarity of the boundaries of the *AEG Telefunken* presumption jurisprudence is not immune to criticism. By pursuing the aim to ensure the effectiveness of competition law, European law (or rather, the jurisprudence of the Court of Justice) has deleted, with "a stroke of the pen" so to speak, traditional principles defined in EU Member States, first of all, the company-law principle of separation of liability[37].

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[34] Judgment of the Court of 10 April 2014, *Siemens AG Österreich* (infra footnote 54) para 59.

[35] Ibidem, para 67 .

[36] Ibidem, para 61.

[37] Opinion of AG Kokott, *Schindler Holding Ltd* (infra footnote 54) para 64.

It is no coincidence that in the relevant jurisprudence from 2011 onwards, in what might be seen as the third phase of the development of the *AEG Telefunken* presumption jurisprudence[38], pleas and grounds of appeals relating to breaches of fundamental rights are regularly to be found. These were proposed specifically with reference to those post-2005 decisions where the EC had begun to use the *AEG Telefunken* presumption in a systematic manner alongside a significant increase of the level of its sanctions.

Already in the *General Quimica* case of January 2011, the Court states that the *AEG Telefunken* presumption, "*given its rebuttable nature,* (…) *does not lead to the automatic attribution of liability to the parent company holding 100% of the capital of its subsidiary,* [because this] *would be contrary to the principle of personal responsibility on which EU competition law is based*"[39]. This way, the reference to general principles of Union law, also protected by fundamental rights (e.g. the principle of personal responsibility), enters for the first time into the Court's reasoning. It is worth keeping in mind that the Court annulled here the preceding judgment of the General Court due to lack of reasoning, and yet dismissed the original appeal on other grounds.

However, it is in the *Elf Aquitaine* judgment of September 2011[40] where, two days after the *Menarini* case was handed, the lawfulness of the *AEG Telefunken* presumption was challenged for the first time on the grounds of

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[38] Indeed in a first phase (the phase of the definition of the presumption), the Court limited itself to define the content of the presumption in the *AEG Telefunken* judgment (Judgment of the Court of 25 October 1983 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission of the European Communities*, Case 107/82, ECR 1983, p. 3151). In the *Stora* judgment, the Court emphasized afterwards its nature as a rebuttable presumption (Judgment of the Court of 16 November 2000 *Stora Kopparbergs Bergslags AB v Commission of the European Communities*, Case C-286/98 P, ECR 2000 I-9925).

In a second phase, the Court was asked to clarify the obligations of the EC regarding the presumption. In *Bolloré*, the CFI (now GC) had changed the structure of the presumption and claimed that in order to fulfill the presumption the EC had to prove not only the decisive influence by the parent but also its actual exercise (Judgment of the CFI (Fifth Chamber) of 26 April 2007 *Bolloré SA and Others v Commission of the European Communities*, Joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, ECR 2007 II-00947). Moreover both AG Mischo in the *Stora* judgment (Opinion of Mr AG Mischo delivered on 18 May 2000 *Stora*, infra footnote 54) and AG Bot in *Arcelor Mittal* (Opinion of Mr AG Bot delivered on 26 October 2010 *ArcelorMittal*, infra footnote 54) had raised criticisms on the matter. The question was then resolved by the Court in its judgment in *Akzo Nobel* (infra footnote 54) where it clarified that in order to fulfill the burden of proof pursuant to the presumption, the EC had to prove that the parent company holds a 100% shareholding in the subsidiary, an approach also suggested by AG Kokott in her Opinion (Opinion of AG Kokott delivered on 23 April 2009 *Akzo Nobel NV*, infra footnote 54).

[39] Judgment of the Court of 20 January 2011 *General Química* (infra footnote 54) para 52.

[40] Judgment of the Court (Second Chamber) of 29 September 2011 *Elf Aquitaine SA v European Commission*, Case C-521/09 P, ECR 2011 I-8947.

violation of fundamental rights. In particular, the *Elf Aquitaine* case gave rise to the allegation of illegality of the *AEG Telefunken* presumption for its violation of Article 6 ECHR, but also for the *"the institutional amalgamation of powers within the prosecuting authority"* (42), that is, the "conflict of interests" between the two souls of the EC (prosecutor and judge) mentioned above. Presented in this case were also other appeal grounds related to principles protected by fundamental rights. However, these were seen by the Court as new, and therefore inadmissible. This showed, on the other hand, that between the time of the action for annulment and that of the appeal, the discussion on the relationship between *antitrust* law and fundamental rights had led lawyers to formulate new grounds for the illegality of EC decisions, grounds not initially identified.

In the *Elf Aquitaine* case, the Court resolved the issue of the legality of the *AEG Telefunken* presumption by arguing that the aim of the appeal ground was not that of declaring the presumption unlawful as such. The objective of the parties, in the opinion of the Court, was to challenge an interpretation of *AEG Telefunken* that would violate the principle of the presumption of innocence[41]. Considering the appeal ground alleging the infringement of fundamental rights in particular, the Court invoked not only its own earlier jurisprudence but also the relevant rulings of the ECHR Court[42]. Concretely, dismissing the claim of illegality, the Court held that "*a presumption, even where it is difficult to rebut, remains within acceptable limits so long as it is proportionate to the legitimate aim pursued, it is possible to adduce evidence to the contrary and the rights of the defence are safeguarded*"[43]. It was said in particular that the presumption wants to strike a balance between different objectives, that is, on the one hand the importance of "*the objective of combatting conduct contrary to the competition rules, in particular to Article 101 TFEU, and of preventing a repetition of such conduct*"[44]. On the other hand*, "the importance of the requirements flowing from certain general principles of EU law such as the principle of the presumption of innocence, the principle that penalties should be applied solely to the offender, the principle of legal certainty and the principle of the rights of the defence, including the principle of equality of arms*"[45]. According to the Court, "*it is for that reason, among others, that* (…) *the presumption is rebuttable*"[46]. Justifying the purpose and the reasons for the features of the presumption, the Court argued also that the "*presumption is based on the fact*

[41] Ibidem, para 52.
[42] Ibidem, para 62.
[43] Ibidem.
[44] Ibidem, 59.
[45] Ibidem, 59.
[46] Ibidem, 59.

that, save in quite exceptional circumstances, a company holding all the capital of a subsidiary can, by dint of that shareholding alone, exercise decisive influence over that subsidiary's conduct"[47]. The reason, in particular, of the necessity of such presumption lies in the fact that "*it is within the sphere of operations of those entities against whom the presumption operates that evidence of the lack of actual exercise of that power to influence is generally apt to be found*"[48].

Considering the *Elf Aquitaine* judgment so far, the claim relating to the illegality of the *AEG Telefunken* presumption for breaches of fundamental rights would seem to be *prima facie* of no use for the appellant. Its effectiveness is revealed later on, however, when the issue is raised as to which level of reasoning is necessary for the EC to reject the elements in fact and in law submitted by the parent company in order to rebut the presumption. The Court held here that when "*a decision taken in application of the EU competition law rules relates to several addressees and raises a problem with regard to the imputability of the infringement, it must include* an adequate statement of reasons *with respect to each of its addressees, in particular those of them who, according to the decision, must bear the liability for the infringement*"[49]. From here, referring expressly to the *AEG Telefunken* presumption, the Court added that "*as regards, more specifically, a Commission decision which relies exclusively, with respect to certain addressees, on the presumption that they actually exercised decisive influence, the Commission is in any event required* – if it is not to render that presumption in reality irrebuttable – *to explain adequately to those addressees the reasons why the elements of fact and of law put forward did not suffice to rebut that presumption*"[50]. This way, the importance of the reference to the protection of fundamental rights is clearly shown, in particular in order to compel the EC to provide an "adequate" level of reasoning to keep that presumption in line with the protection of fundamental rights.

The importance of the position taken by the Court in this case was shown in subsequent EU jurisprudence. Indeed, after the the *Elf Aquitaine* ruling, the Court of Justice annulled a number of judgments of the General Court specifically because of the lack of reasoning on the part of both the EC and the

[47] Ibidem, 60.

[48] Ibidem, 60.

[49] Ibidem, para 152 emphasise added.

[50] Ibidem (emphasis added). The Court then concludes that: "For example, owing to the formulation of recital 258, it appears very difficult – impossible even – to ascertain in particular whether the body of indicia submitted by Elf Aquitaine in an attempt to rebut the presumption applied to it by the Commission was rejected because it failed to convince or because, in the Commission's eyes, the mere fact that Elf Aquitaine held 98% of Atofina's capital was sufficient for liability for Atofina's actions to be imputed to it, whatever the indicia that might have been provided by Elf Aquitaine in response to the statement of objections".

General Court in relation to the information submitted by parent companies in order to rebut the presumption[51].

The plea of illegality of the *AEG Telefunken* presumption for the breach of Article 6 ECHR was presented again in the *Schindler* case of 2013[52] and in the recent *FLSmidth* judgment of 2014[53]. In both cases, the plea on this point was rejected.

6. Conclusions

The increasingly frequent reference to the protection of fundamental rights in the application of European *antitrust* law is a trend that has grown strongly since the reform of Regulation 1/2003. The application of fundamental rights to antitrust law – unknown to this extent in the *antitrust* law experience of the United States – is caused by three main reasons.

First, the significant increase in the level of penalties imposed by the European Commission for violations of *antitrust* law resulting, *inter alia*, from the innovations contained in the guidelines on the matter.

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[51] See in particular, Judgment of the GC of 16 June 2011 *L'Air liquide* (infra footnote 54); Judgment of the GC of 15 September 2011 *Koninklijke Grolsch NV* (infra footnote 54); Judgment of the GC of 16 June 2011 *Edison SpA* (infra footnote 54); Judgment of the GC of 16 June 2011 *Gosselin Group NV* (infra footnote 54).

[52] Judgment of the Court (Fifth Chamber) of 18 July 2013 *Schindler Holding Ltd and Others v European Commission*, Case C-501/11 P, not yet reported. In this case, the plea has been raised on the assumption that it had not yet been assessed by the Court. Just as in the judgment in *Elf Aquitaine,* and not surprisingly, also *Schindler's* first ground of appeal related to the radical illegality for breach of Art. 6 ECHR of the decision of the EC in view of its "conflict of interest" in its "two souls" (prosecutor and judge). At para 24 of the judgment, the Court said: "The appellants contest the GC's response to the plea concerning infringement of Article 6 of the ECHR, by which they contended that the Commission's procedure infringes the principle of the separation of powers and does not comply with the principles of the rule of law that are applicable to criminal procedures under that provision". This ground was later held as unfounded recalling *expresis verbis* the *Menarini* judgment (para 30-38). Regarding the plea of illegality of the *AEG Telefunken* presumption for the violation of Art. 6 ECHR, the Court expressly refers to the motivation and reasoning as well as the EU and ECHR case-law of the *Elf Aquitaine* case (para 107-110).

[53] Judgment of the Court (First Chamber) of 30 April 2014 *FLSmidth & Co. A/S v European Commission*, Case C-238/12 P, not yet reported. In this case, the plea was raised for the third time alleging the illegality the *AEG Telefunken* presumption for breach of fundamental rights. In this case, the Court answered succinctly in order to clarify that the question was to be considered solved. It argued "*it should be pointed out that that presumption results from settled case-law (…) and that it does not in any way infringe the rights conferred by Article 48 of the Charter and Article 6(2) of the ECHR*" (para 25).

Second, because of the EC's nature as a "supranational/independent" authority and the existence of a "conflict of interests" with regard to its two "souls" – the "prosecutor" and the "judge". The increase in the level of fines has made (once again) some critical aspects of the European antitrust enforcement system even clearer. On closer inspection, the EU had tried to mitigate this issue (especially with reference to the protection of procedural rights) already as early as the 1980s through the establishment of the Hearing Officer.

Third, it is caused by the introduction of Article 6(2) TEU, as amended by the Lisbon Treaty, and the related binding nature of the Charter of Fundamental Rights of the European Union which is set out therein. Hence, greater importance and attention is now given to the control of violations of rights protected by the Charter (as well as the ECHR) in EC decisions, also with regard to competition law.

The importance of this trend is evident in the development of the application of the *AEG Telefunken* presumption. The presumption is based on the concept of "undertaking" in European Competition Law and it takes advantage of the principle of the independence of the EU legal system. The *AEG Telefunken* presumption, as well as the term "undertaking", were both devised in order to ensure effective application of EU competition law. The relevant consequence of the *AEG Telefunken* presumption is that a parent company (distinct from the wholly owned subsidiary that actually violated antitrust rules) could be penalised with a fine of up to 10% of its worldwide turnover for the behaviour of its subsidiary only on the basis of a presumption that the parent company constitutes with the given subsidiary a single economic entity, that is an "undertaking" pursuant to Article 101 and 102 TFEU.

The Court of Justice has recently ascertained the legality of such a presumption even under the ECHR. Still, review grounds based on the protection of fundamental rights have generated positive consequences for companies that have claimed such violation, especially with regard to the level of the EC's reasoning. In fact, reference in the jurisprudence of the Court to the protection of fundamental rights has compelled the EC to provide a higher standard of reasoning in its decisions. This is true in particular with reference to the reasoning related to the rejection of the elements of fact and law presented by parent companies in order to rebut the *AEG Telefunken* presumption. The fact is telling that the Court sees limited reasoning by the EC or by the GC as a risk of transforming *AEG Telefunken* from a presumption to a case of strict liability (a violation of the principle of the presumption of innocence). It shows the importance that the Court places on fundamental rights, also in the form of general principles of EU law, *vis a vis* the principle of the effectiveness of competition law.

In this sense, the protection of fundamental rights in the application of European antitrust rules is a new legal tool to rectify (as much as possible) the EC's "conflict of interests" in the European antitrust enforcement system[54].

[54] ANNEX (the cases are listed chronologically) Opinion of AG Mischo delivered on 18 May 2000 *Stora Kopparbergs Bergslags AB v Commission of the European Communities*, Case C-286/98 P, ECR 2000 I-09925; Judgment of the Court (Fifth Chamber) of 16 November 2000 *Stora Kopparbergs Bergslags AB v Commission of the European Communities*, Case C-286/98 P, ECR 2000 I-09925; Judgment of the Court (Fifth Chamber) of 2 October 2003 *Siderúrgica Aristrain Madrid SL v Commission of the European Communities*, Case C-196/99 P, ECR 2003 I-11005; Judgment of the CFI (Fifth Chamber) of 15 September 2005 *DaimlerChrysler AG v Commission of the European Communities*, Case T-325/01, ECR 2005 II-03319; Judgment of the CFI (Third Chamber) of 27 September 2006 *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v Commission of the European Communities*, Case T-314/01, ECR 2006 II-03085; Judgment of the CFI (Fifth Chamber) of 26 April 2007 *Bolloré SA and Others v Commission of the European Communities*, Joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, ECR 2007 II-00947; Judgment of the Court (Third Chamber) of 3 September 2009 *Papierfabrik August Koehler AG* (C-322/07 P), *Bolloré SA* (C-327/07 P) *and Distribuidora Vizcaína de Papeles SL* (C-338/07 P) *v Commission of the European Communities*, Joined cases C-322/07 P, C-327/07 P and C-338/07 P, ECR 2009 I-07191; Opinion of AG Kokott delivered on 23 April 2009 *Akzo Nobel NV and Others v Commission of the European Communities*, Case C-97/08 P, ECR 2009 I-08237; Judgment of the Court (Third Chamber) of 10 September 2009 *Akzo Nobel NV and Others v Commission of the European Communities*, Case C-97/08 P, ECR 2009 I-08237; Judgment of the Court (Third Chamber) of 3 September 2009 *Papierfabrik August Koehler AG* (C-322/07 P), *Bolloré SA* (C-327/07 P) *and Distribuidora Vizcaína de Papeles SL* (C-338/07 P) *v Commission of the European Communities*, Joined cases C-322/07 P, C-327/07 P and C-338/07 P, ECR 2009 I-07191; Judgment of the Court (Second Chamber) of 1 July 2010 *Knauf Gips KG v European Commission*, Case C-407/08 P, ECR 2010 I-06375; Opinion of Mr AG Mazák delivered on 14 September 2010 *General Química SA and Others v European Commission*, Case C-90/09 P, ECR 2011 I-00001; Opinion of Mr AG Bot delivered on 26 October 2010 *ArcelorMittal Luxembourg SA v European; Commission* (C-201/09 P) *and European Commission v ArcelorMittal Luxembourg SA and Others* (C-216/09 P), Joined cases C-201/09 P and C-216/09 P, ECR 2011 I-02239; Judgment of the Court (Grand Chamber) of 29 March 2011 *ArcelorMittal Luxembourg SA v European Commission* (C-201/09 P) *and European Commission v ArcelorMittal Luxembourg SA and Others* (C-216/09 P), Joined cases C-201/09 P and C-216/09 P, ECR 2011 I-02239; Judgment of the Court (First Chamber) of 20 January 2011 *General Química SA and Others v European Commission*, Case C-90/09 P, ECR 2011 I-00001; Judgment of the GC (Eighth Chamber) of 24 March 2011 *Pegler Ltd v European Commission*, Case T-386/06, ECR 2011 II-01267; Judgment of the GC (Eighth Chamber) of 24 March 2011, *Tomkins plc v European Commission*, Case T-382/06, ECR 2011 II-01157; Judgment of the Court (Grand Chamber) of 29 March 2011 *ArcelorMittal Luxembourg SA v European Commission* (C-201/09 P) *and European Commission v ArcelorMittal Luxembourg SA and Others* (C-216/09 P), Joined cases C-201/09 P and C-216/09 P.; Judgment of the GC (Fourth Chamber) of 7 June 2011 *Arkema France, Altuglas International SA and Altumax Europe SAS v European Commission*, Case T-217/06, ECR 2011 II-02593; Judgment of the GC (Sixth Chamber, extended composition) of 16 June 2011 *SNIA SpA v European Commission*, Case T-194/06, ECR 2011 II-03119; Judgment of the GC (Sixth Chamber, extended composition) of 16 June 2011 *L'Air liquide, société anonyme pour l'étude et l'exploitation des procédés Georges Claude v European*

Commission, Case T-185/06, Reports of Cases, 2011 II-02809; Judgment of the GC (Eighth Chamber) of 16 June 2011 *Gosselin Group NV* (T-208/08) *and Stichting Administratiekantoor Portielje* (T-209/08) *v European Commission*, Joined cases T-208/08 and T-209/08, ECR 2011 II-03639; Judgment of the GC (Sixth Chamber, extended composition) of 16 June 2011 *Edison SpA v European Commission*, Case T-196/06, ECR 2011 II-03149; Judgment of the GC (Sixth Chamber, extended composition) of 16 June 2011 *FMC Foret SA v European Commission*, Case T-191/06, ECR 2011 II-02959; Judgment of the GC (Eighth Chamber) of 13 July 2011 *Schindler Holding Ltd and Others v European Commission*, Case T-138/07, ECR 2011 II-04819; Judgment of the GC (First Chamber) of 13 July 2011 *Polimeri Europa SpA v European Commission*, Case T-59/07, ECR 2011 II-04687; Judgment of the GC (First Chamber) of 13 July 2011 *Polimeri Europa SpA v European Commission*, Case T-59/07, ECR 2011 II-04687; Judgment of the GC (First Chamber) of 13 July 2011 *Eni SpA v European Commission*, Case T-39/07, ECR 2011 II-04457; Judgment of the GC (Third Chamber) of 9 September 2011 *Deltafina SpA v European Commission*, Case T-12/06, ECR 2011 II-05639; Judgment of the GC (Sixth Chamber, extended composition) of 15 September 2011 *Koninklijke Grolsch NV v European Commission*, Case T-234/07, ECR 2011 II-06169; Judgment of the Court (Second Chamber) of 29 September 2011 *Elf Aquitaine SA v European Commission*, Case C-521/09 P, ECR 2011 I-08947; Judgment of the GC (Third Chamber) of 5 October 2011 *Transcatab SpA v European Commission, Case T-39/06*, ECR 2011 II-06831; Opinion of AG Kokott delivered on 12 January 2012 *Alliance One International Inc. and Standard Commercial Tobacco Co. Inc. v European Commission and European Commission v Alliance One International Inc. and Others*, Joined cases C-628/10 P and C-14/11 P; Judgment of the Court (Grand Chamber) of 19 July 2012 *Alliance One International Inc. and Standard Commercial Tobacco Co. Inc. v European Commission and European Commission v Alliance One International Inc. and Others*, Joined cases C-628/10 P and C-14/11 P; Judgment of the Court (Grand Chamber) of 22 January 2013 *European Commission v Tomkins plc*, Case C-286/11 P; Judgment of the GC (Sixth Chamber) of 27 September 2012 *Nynäs Petroleum AB and Nynas Belgium AB v European Commission*, Case T-347/06; Judgment of the GC (Sixth Chamber) of 27 September 2012 *Ballast Nedam NV v European Commission*, Case T-361/06; Judgment of the GC (Sixth Chamber) of 27 September 2012 *Ballast Nedam Infra BV v European Commission*, Case T-362/06; Opinion of AG Kokott delivered on 28 February 2013 *Bundeswettbewerbsbehörde and Bundeskartellanwalt v Schenker & Co. AG and Others*, Case C-681/11; Opinion of AG Kokott delivered on 18 April 2013 *Schindler Holding Ltd and Others v European Commission*, Case C-501/11 P; Judgment of the Court (First Chamber) of 8 May 2013 *ENI SpA v European Commission*, Case C-508/11 P; Judgment of the Court (First Chamber) of 13 June 2013 *Versalis SpA v European Commission*, Case C-511/11 P; Judgment of the Court (Third Chamber) of 11 July 2013 *European Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV*, Case C-440/11 P; Judgment of the Court (Fifth Chamber) of 18 July 2013 *Schindler Holding Ltd and Others v European Commission*, Case C-501/11 P ; Opinion of Mr AG Mengozzi delivered on 19 September 2013 *European Commission v Siemens AG Österreich and Others* (C-231/11 P) *and Siemens Transmission & Distribution Ltd and Others v European Commission* (C-232/11 P and C-233/11 P), Joined cases C-231/11 P to C-233/11 P; Judgment of the Court (Ninth Chamber) of 26 September 2013 *The Dow Chemical Company v European Commission*, Case C-179/12 P; Judgment of the Court (Fourth Chamber) of 10 April 2014 *European Commission v Siemens AG Österreich and Others* (C-231/11 P) *and Siemens Transmission & Distribution Ltd and Others v European Commission* (C-232/11 P and C-233/11 P), Joined cases C-231/11 P to C-233/11 P; Judgment of the Court (First Chamber) of 30 April 2014 *FLSmidth & Co. A/S v European Commission*, Case C-238/12 P.

Package on Actions for Damages Based on Breaches of EU Competition Rules: Can One Size Fit All?

by

Sofia Oliveira Pais[*] and Anna Piszcz[**]

CONTENTS

Abstract

On 17 April 2014, the Proposal for a Directive on antitrust damages actions was accepted by the European Parliament and sent to the EU Council of Ministers for final approval. In addition, a Recommendation was adopted in 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States to meet the need for a coherent European approach to antitrust private enforcement. This package comes at a time when private antitrust enforcement is rapidly evolving in a number of Member States. At the same time however, it establishes several legal solutions that do not fit well with existing

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national instruments. The aim of this article is to address, in particular, Portuguese and Polish experiences on a number of specific issues surrounding antitrust private enforcement, such as collective redress and contingency fees. Some doubts will also be raised concerning the solutions established in the European package, suggesting that national experiences should not be overlooked.

Résumé

Le 17 avril 2014, la proposition de la directive relative aux actions antitrust en dommages et intérêts a été acceptée par le Parlement européen et envoyé au Conseil de l'UE pour l'adoption finale. En outre, une recommandation a été adoptée en 2013 sur des principes communs applicables aux méchanismes de recours collectif en cassation et en réparation dans les États membres pour répondre à la nécessité d'une approche européenne cohérente à l'application privée antitrust. Ce paquet est livré à un moment où l'application privée antitrust évolue rapidement dans un certain nombre d'États membres. Mais en même temps, il établit plusieurs solutions juridiques qui ne correspondent pas bien avec les instruments nationaux existants. Le but de cet article est d'examiner, en particulier, les expériences portugais et polonais sur un certain nombre de questions spécifiques entourant l'application privée antitrust, tels que le recours collectif en cessation et des honoraires. Des doutes seront également soulevés concernant les solutions établies dans le cadre du paquet européen, en suggèrant que les expériences nationales ne doivent pas être négligées.

Classifications and key words: private enforcement; antitrust damages; EU competition rules; Commission package; collective redress; contingency fees

I. Antitrust private enforcement in the EU context

In the United States of America, private enforcement of antitrust is usually considered a mature system[1] which constitutes more than 90% of all antitrust cases. However, even though it apparently lacks an empirical

[1] In the ironic words of Albert Foer and Jonathan Cuneo, the "US in undoubtedly the leader in private enforcement, but much of the world seems to interpret the US experience as a 'toxic litigation cocktail' to be avoided rather than emulated", *The International Handbook on Private Enforcement of Competition Law*, ed. by A. Foer and J.W. Cuneo, Edward Elgar Publishing 2012, p. xii. In the European context, on the other hand, the view that public enforcement would be much better than private enforcement was, apparently, well developed at least in the beginning of the EU; see, for instance, W.P.J. Wils, "Should Private Antitrust Enforcement Be Encouraged in Europe?" (2003) 26(3) *World Competition* 473.

basis[2], there is a common criticism of private actions, particularly class action, in that settlements are "judicial blackmail"[3] based not on the merit of the action but rather on the fear of an unpredictable judgement. In the light of the above, EU policy-makers should proceed cautiously in adopting American antitrust principles and the instrument of class action. In fact, while its litigation culture and the characteristics of US civil procedure have indeed favoured a well-developed system of private enforcement, they have, nevertheless, also allowed some excesses which are difficult to revert.

By contrast, competition law has been mainly enforced by public authorities (DG Competition)[4] in the European Union. Nevertheless, the Commission has, apparently, encouraged private antitrust enforcement for several years now, in order to strengthen the effectiveness of competition rules and optimize the use of its scarce resources[5]. Furthermore, the European Court of Justice (ECJ) ruled in the *Courage Crehan* case[6] that full effectiveness of antitrust rules would "be put at risk if it were not open to any individual to claim damages for loss caused to him" by conducts liable to restrict competition. Victim compensation and deterrence would, therefore, be the aims of private damages actions, which need to be strengthened in order to overcome the state of "astonishing diversity and total underdevelopment"[7] of private enforcement in Europe (even if recent research may challenge those conclusions[8]).

According to the Commission, up to an estimated 20 billion EUR per year are not recovered through the EU in damages from competition infringements[9].

[2] According to R.H. Lande this "view provides no systematic empirical basis for its factual predicates", cf. "Benefits of private enforcement: empirical background" [in:] *The International Handbook…*, op. cit., p. 4, note 6.

[3] *Castano v. American Tobacco Co*., 84 F.3d 734, 746 (5th Cir. 1996).

[4] A.P. Komninos, "Public and Private Antitrust Enforcement in Europe: Complement? Overlap?" (2006) 3(1) *Competition Law Review* 6.

[5] European Commission Green Paper, "Damages actions for breach of the EC antitrust rules", 19.12.2005, COM (2006) 672 final and the previous Ashurst Report "Study on the conditions of claims for damages in case of infringements of EC Competition rules", available http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf (20.05.2014).

[6] ECJ judgment of 20 September 2001, C-453/99, ECR I-6297, paras 26-27.

[7] Ashurst study, op. cit., p. 1.

[8] According to C. Hodges, in contrast with the Ashurst study, the findings of the research reported in the book edited by B. Rodgers (*Competition Law Comparative Private Enforcement and Collective Redress across the EU*, Wolters Kluwer, International Competition Law Series, 2012), show "that there is considerably more private enforcement of competition law than had been previously imagined"), cf. "Fast, Effective and Low Redress: How do public and private enforcement and ADR compare?" [in:] *Competition Law Comparative…*, op. cit., p. 255.

[9] N. Kroes, European Commissioner for Competition Policy, White Paper on Antitrust Damages Actions, Brussels 4.11.2008, p. 3, available at http://ec.europa.eu/competition/speeches/text/juri_speech_en.pdf (20.05.2014).

Similarly, out of the 54 final cartel and antitrust prohibition decisions taken by the Commission in the period 2006–2012 "only 15 were followed by one or more follow-on actions for damages in one or more Member States". The majority of the latter was brought in a limited number of countries only, mainly the UK, Germany and the Netherlands[10].

In this context, it was not surprising that the European Commission issued on 11 June 2013 a Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union[11] (hereafter: Damages Directive). The draft Directive's first aim is, on one hand, to "optimize" the interaction between private and public enforcement, notably as regards the protection of leniency programmes. On the other hand, it is to ensure effective damages actions before national courts of EU Member States. On 17 April 2014, the Proposal of the Damages Directive was accepted by the European Parliament and sent to the EU Council of Ministers for final approval. To meet the need for a coherent European approach to private enforcement of competition law[12], the Commission adopted in addition a non-binding Communication and a Practical Guide on quantifying of harm in antitrust infringements[13], and a Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (hereafter: Recommendation)[14]. This package comes at a time when private antitrust enforcement is rapidly evolving in some Member States. It establishes, however, several solutions that do not fit well with existing national instruments including Portuguese experiences on the model of collective redress and Polish practice regarding contingency fees.

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[10] Commission Staff Working Document: Impact assessment report - Damages actions for breach of the EU antitrust rules Accompanying the proposal for a Directive of the European Parliament and the Council, Strasbourg, 11.06.2013 SWD (2013) 203 final no. 52.

[11] COM(2013) 404 final, (Damages Directive). Not yet Published in the Official Journal as of 11.10.2014.

[12] Although the Recommendation applies to "consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection [and] in any other areas where collective claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant" (para 7), this paper will focus on competition issues.

[13] C (2013) 3440, 11.06.2013.

[14] 2013/396/EU, OJ L 201/60, 26.07.2013.

II. Collective redress

1. Model of collective redress – the Portuguese experience

One of the key issues of the debate concerning the enhancement of private enforcement of competition law concerns "class actions". Class actions played a central role in the American system on collective redress for antitrust infringements, but raise several doubts in the EU context.

According to the Commission, collective redress is "a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action"[15]. It has several advantages, such as facilitating access to justice in cases where low damages are not worth pursuing through individual claims. However, those measures must not attract abusive litigation and should not provide any economic incentives to bring speculative claims (as is the case in the US)[16].

To attain those goals, the Recommendation puts forward a set of principles relating to judicial as well as out-of-court collective redress, that should be common across the EU, taking into account the legal traditions of EU Member States and the need to prevent abuses. One of the main concerns of the Recommendation relates to the legal standing necessary to bring a collective action. The Commission speaks for an opt-in approach to representative actions which contrasts the opt-out system effective in the US and some Member States, including Portugal.

Clearly, a representative action is "brought by a representative entity (can also be a public authority) on behalf of a defined group of individuals or legal persons who claim to have been harmed by the same alleged infringement"[17]. It can follow the opt-out model where the judgement is binding on all individuals that belong to the defined group except for those who explicitly opted out. Alternatively, it can follow the opt-in model where the judgement is binding on those who opted in, while all other individuals remain free to pursue their damages claims individually[18]. The Commission favours the opt-in model even if experience shows that it is not very effective as claimants are usually lazy,

[15] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, "Towards a European Horizontal Framework for Collective Redress" (hereafter: Communication), COM (2013) 401 final, para. 1.2.

[16] Communication, para 3.

[17] Communication, para 3.3.

[18] Communication, para 3.4.

especially when damages are low, and will thus fail to opt-in[19]. The opt-in model is favoured by the Commission because it is compatible with the legal traditions of the Member States, respects the freedom of potential claimants to decide whether to take part in the litigation or not, and avoids abuses, such as overcompensating class representatives[20]. In fact, opt-out group actions seem to be most useful where individual claims are difficult to prove or when the value of such claims is too low to motivate consumers to participate, reducing, in addition, transaction and information costs[21]. Furthermore, recent surveys on relevant American jurisprudence show that the standpoint taken by the Commission fails to consider the evolution of the jurisprudence of US Federal Courts which tries to establish "strict safeguards" to minimize "the risks of 'unfairness' and 'defendant's blackmail'"[22].

Nevertheless, the Recommendation favours the opt-in model and the Commission has already explained that "any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice"[23].

Portugal is one of the EU Member States that has an opt-out collective redress model called '*Ação Popular*' (Popular Action, hereafter: PA). The PA has not been used frequently, even if it has been considered "the most extensive form of collective action based on the 'opt-out model' available in the EU"[24].

The PA is mentioned in Article 52(3) of the Portuguese Constitution: "Everyone shall be granted the right of popular actions, to include the right to apply for the adequate compensation for an aggrieved party or parties, in

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[19] *Towards*…, op. cit., pp. 11–12. In fact, studies show that the participation rate in the opt-in model is usually less than 1% and in the opt-out model more than 97%. See BEUC, The European Consumers' Association, "European Group Action Ten Golden Rules", at R. Gaudet, "Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience" (2009) 30(3) *European Competition Law Review* 108.

[20] These arguments have already been presented by the Commission in the White Paper, but – as Gaudet already criticized – the Commission "did not explain how this might occur", R. Gaudet, "Turning…", op. cit., p. 107–108.

[21] J. Douglas Richards, "Aggregation of claims" [in:] *The International Handbook…*, op. cit., p. 129.

[22] A. Andreangeli, "A view from across the Atlantic: Recent developments in the Case-Law of the US Federal Courts on Class Certification in Antitrust Cases" [in:] *Competition Law Comparative Private Enforcement and Collective Redress across the EU*, Wolters Kluwer, International Competition Law Series 2012, (ed.) B. Rodgers, p. 249.

[23] Communication, para 1.3.

[24] C. Leskinen, "Collective Actions: Rethinking Funding and National Cost Rules" (2011) 8(1) *The Competition Law Review* 91, who mentions, besides Portugal, the existence of opt-out collective actions in the Netherlands and Denmark. See also Gaudet, "Turning…", op. cit., p. 111.

such cases and under such terms as the law may determine either personally or via associations that purport to defend the interests in question. That right shall be exercised namely to (…) promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life or the preservation for environment and the cultural heritage".

This constitutional right was implemented by Law 83/95 of 31 August 1995 (Popular Action Act, hereafter: PAA). It should be noted that the PAA has a broad scope and that the list of protected interests contained therein is not exhaustive[25]. However, although the PAA is applicable to the protection of diffuse collective and homogenous individual interests, it does not explicitly refer to the protection of competition. Nevertheless, the compensation of damages arising from antitrust infringements can be sought through the PA mechanism as the list of interests in Article 1 PAA is not exhaustive and the Portuguese Supreme Court did not refuse that solution[26].

Special procedural rules apply also, different from common declaratory actions, concerning collection of evidence, suspensory effect, and court costs. Article 17 PAA provides that "[i]n the popular action and within the key issues defined by the parties, it is up to the judge's own initiative to collect evidence, and [the judge] is not bound by the initiative of the parties". Article 18 PAA adds that "[e]ven if a particular appeal has no suspensive effect, in general terms, the judge may, in a class action, give it that effect, to prevent damage irreparable or difficult to repair". Finally, Article 20 PAA concerns court costs and expenses. Accordingly, the claimant is exempt from the payment of costs if the application is partially granted; if the claim is totally unsuccessful, the claimant will be obliged to pay an amount fixed by the judge between 10% and 50% of the costs that would be normally payable, taking into account the claimant's economic situation and the formal or substantive reason for the

[25] On this topic see H. Sousa Antunes, "Class Actions, Group Litigation and Other Forms of Collective Litigation (Portuguese Report)" (2009) 622 *The Annals of the American Academy of Political and Social Science* 161, S. Oliveira Pais, "A união faz a força? Breves reflexões sobre os mecanismos colectivos de reparação no contexto da aplicação privada do direito da concorrência da União" (artigo) [in:] *Liber Amicorum em Homenagem ao Professor Doutor Mota Campos*, Coimbra editora 2013, p. 873; S. Oliveira Pais, "Entre clemência e responsabilidade – Uma história de sucesso? – Ac. do Tribunal de Justiça (Grande Secção), de 14 de Junho de 2011, Proc. C-360/09" (2012) 37 *Cadernos de Direito Privado* 1; L. Rossi, M. Sousa Ferro, "Private enforcement of competition law in Portugal (II): Actio Populari – Facts, fictions and dreams" (2013) IV(13) *Revista de Concorrência e Regulação* 35.

[26] In fact, we agree with L. Rossi and M. Sousa Ferro when they suggest that the Supreme Court in its decision of 7.10.2003 confirmed that the Popular Action may apply to promote competition, cf., "Private enforcement…", op. cit., pp. 49–50. In addition, it should be mentioned that as there are no specific provisions concerning the enforcement of competition law, general provisions, such as Articles 483 and 562 (rules on tort liability) of the Portuguese Civil Code, will apply.

dismissal. Furthermore, it is the court that establishes attorney fees to reflect the complexity and the amount of the claim (Article 21 PAA).

In terms of substantive issues, legal standing and how compensation should be decided in the PA are probably the most controversial concepts in the Portuguese context.

Standing to initiate a PA is granted to: 1) any citizen, 2) a legally constituted association or foundation (as long as it has legal personality, its powers expressly include interests covered by the PA, and if it is not engaged in any type of professional business competing with companies or liberal professionals), and 3) the public prosecutor's office, which may replace the claimants if the contested behaviour endangers the interests involved (Articles 2 and 3 PAA). In addition, the application is subject to preliminary assessment and may be dismissed by the judge if its success is considered unlikely (Article 13 PAA). But, if the action does proceed, the claimants will represent all holders of rights or interests who suffered damages as a result of the given antitrust infringements and did not opt-out.

It is worth stressing that companies, even small and medium ones, do not have direct legal standing and can only seek compensation through individuals, associations or foundations.

It is also worth noting that the PAA does not establish a minimum number of claimants, as opposed to the American class action experience. In fact, in the US, Rule 23 of Federal Rules of Civil Procedure establishes certain requirements for a case to proceed as an opt-out class action. These include: 1) numerosity ("the class is so numerous that joinder of all members is impracticable"[27]); 2) commonality ("there are questions of law or fact common to the class"[28]); 3) typicality ("the claims or defenses of the representative parties are typical of the claims or defenses of the class"[29]); 4) adequacy of representation ("the representative parties will fairly and adequately protect the interests of the class[30]); 5) predominance ("questions of law or fact common to the members of the class predominant over any questions affecting only individual members"[31]); and 6) superiority ("a class action is superior to other available methods for fairly and efficiently adjudicating the controversy"[32]). Analysing these requirements in the light of US experiences, J. Douglas Richard concluded that predominance is the most controversial

[27] Rule 23 (a) (1).
[28] Rule 23 (a) (2).
[29] Rule 23 (a) (3).
[30] Rule 23 (a) (4).
[31] Rule 23 (b) (3).
[32] Rule 23 (b) (3).

requirement in antitrust class actions. The easiest to satisfy is numerosity, conventionally mentioned as benchmark forty "overcharged purchasers"[33]

The PAA did not set up all these requirements – it did not establish a minimum number of claimants. Still, there is apparently a general consensus that legal standing "should be restricted to holders of "diffuse collective" or "homogeneous individual" interests that are threatened or harmed"[34]. As such, the numerosity requirement was not established. The question will become increasingly relevant as the PA mechanism may, and should, encompass nowadays also the protection of effective competition.

On the other hand, the PAA, like traditional American class actions, tries to protect the interests of those who have not opted out, controlling the adequacy of representation. The need to ensure that the claimant acts as a representative, and does not favour its own interests sacrificing the interests of other members of the class, justifies some of the solutions established in the PAA. First, within the scope of judicial review, the Public Prosecutor, besides representing the State or other public authorities authorized by law, may substitute the applicant of a withdrawn suit. The Public Prosecutor may also act against transactions or injurious behaviours concerning the interests of those that did not opt-out (Article 16 PAA). Second, the judge plays a fundamental role in the application of the Portuguese mechanism as he/she may dismiss the petition on the ground that "it is manifestly unlikely to merit the application" (Article 13 PAA). The judge can collect evidence and is not bound by the initiative of the parties (Article 17 PAA), he/she decides on the court costs and expenses, as well as on the need to give the action a suspensive effect in order to prevent irreparable damages or difficult to repair (Article 18 PAA). The Portuguese solutions, apparently, fit well with those proposed by some authors that support "strong judicial checks as to admissibility of each action" in order to avoid abuses such as opportunistic behaviour of the lawyer' representing the class[35].

The other controversial issue in the PAA is how to decide compensation for damages when only some of the injured parties are individually identified. According to Article 22(2) PAA, "[c]ompensation for infringement of interests of holders not individually identified is fixed in total" by the court. In addition, the right to damages shall be extinguished within three years from the final judgment that has recognized the damage; the rights corresponding to prescribed amounts shall be delivered to the Ministry of Justice, which will create a special account and allocate the payment of attorney fees and to support access to the courts (Article 22.º n.ºsº4 and n.º 5 PAA).

[33] J. Douglas Richards, "Aggregation of…", op. cit., p. 129.
[34] H.S. Antunes, "Class Actions…", op. cit., p. 163.
[35] A. Andreangeli, "A view from…", op. cit., p. 247.

Doubts arise, however, about the possibility of allowing an entity another other than the court to distribute the total compensation among the injured parties that come forward in the prescribed 3 year period. The PAA does not clarify this issue. It has been suggested[36] that one of the solutions would be to apply Article 31 of the Securities Code, which provides: "[T]he conviction obtained should indicate the entity in charge of the receipt and management of the indemnity due to those shareholders not individually identified, according to the circumstances (…)". In competition cases, consumer associations might be the most adequate entity to distribute the total amount of the compensation. However, as the law does not provide such solution, this will depend on the court's decision.

Finally, concerning the practical relevance of the PAA, consumer associations were able to initiate law suits in Portugal and the instrument of the PA has been successfully used for that purpose. The most relevant case here is *DECO vs Portugal Telecom*, where competition law was invoked, even if the case was decided on other grounds. In this case, the telecoms incumbent imposed an unlawful "activation charge" on all clients concerning all phone calls; DECO (a consumer association) sued Portugal Telecom on behalf of all these clients. In spite of the argument presented by DECO that the contested practice should be considered an abuse of a dominant position, Portuguese courts[37] overlooked that argument and decided to consider the application successful on other grounds[38]. Following this judgement, DECO and Portugal Telecom arrived at a settlement at an estimated 120 million EUR. This amount was not, however, paid in direct payments but in free national calls for all Portugal Telecom's clients on several consecutive Sundays.

2. Contingency fees – the Polish experience

Another concern raised by the Commission in its Recommendation involves lawyers' remuneration. Section 29 of the Recommendation states that „[t]he Member States should ensure that the lawyers' remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties". However, litigation would always go against the interests of at least one party

[36] S. Rossi, M. Sousa Ferro, "Private enforcement…", op. cit., pp. 78–79.

[37] The case took approximately 4 years, finally the Supreme Court decided in 2003: Supreme Court Decision – Portuguese Consumer Protection Association (DECO) v Portugal Telecom (7.10.2003).

[38] Note, however, that, as Rossi and Ferro argued – cf. cit., p. 66, implicitly this judgement confirmed that the PA may be used in antitrust private enforcement cases.

involved in the dispute (especially since those interests are diverse). Litigation should be a last resort because of the high legal costs involved and protracted proceedings. It seems that it would clarify more than it would confuse to say that lawyers' remuneration should not create an incentive to start litigation unnecessary for (sound) administration of justice.

Section 30 of the Recommendation specifies further that „[t]he Member States should not permit contingency fees which risk creating such an incentive. The Member States that exceptionally allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to full compensation of the members of the claimant party". In the Communication, contingency fees are depicted in three aspects: 1) as one of the features of the US legal system that "have made class actions a particularly powerful instrument that is, however, feared by those on the defending side, namely trade and industry as it can be used as a forceful tool to compel them to settle a case, which may not necessarily be well-founded" (para 2.2.2); 2) as one of the details noted by the European Parliament in its 2012 Resolution[39] and spoken of by some stakeholders who responded the Commission's 2011 public consultation on collective redress; they consider excluding contingency fees from the scope of the EU horizontal framework as an important safeguard against abusive litigation (paras 2.3 and 3.9.1); and 3) as a beneficial feature, that is, a useful method of financing collective actions – according to other stakeholders (para 3.9.1).

The concept of contingency fees has recently been established in Poland in the legal framework for collective redress. Group actions and their features, such as contingency fees, emerged in Poland a few years ago. The Polish Parliament adopted on 17 December 2009 the Act on the Pursuit of Claims in Group Proceedings (hereafter: APCGP)[40]. This legislative development was in line with the Commission's continuous efforts to facilitate access to justice, including effective redress. Just one year before, the Commission published its Green Paper on consumer collective redress[41]. The Polish legislature chose an opt-in model, as opposed to the opt-out system which exists in some European countries, including Portugal as shown above. The possibility to opt-in and to benefit from collective redress in accordance with the APCGP does not apply to group lawsuits seeking to protect personal rights[42].

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[39] The European Parliament's resolution "Towards a Coherent European Approach to Collective Redress" of 2.02.2012, 2011/2089(INI), available at http://parltrack.euwiki.org/dossier/2011/2089%28INI%29 (1.08.2014).

[40] Journal of Laws 2010 No. 7, item 44. The Act came into force on 19.07.2010.

[41] COM(2008)794, 27.11.2008.

[42] See in more detail A. Piszcz, "'Class Actions' in the Court Culture of Eastern Europe" [in:] L. Ervo, A. Nylund (eds), *The Future of Civil Litigation – Access to Courts and Court*

Article 5 APCGP provides that "[t]he agreement regulating the remuneration of the legal representative may determine the remuneration proportionally to the amount awarded in favour of the claimant, but not beyond 20% of the said amount". American-style contingency fees do not seem to fit into the Polish legal environment. Polish ethics rules place limits on the use of contingency fees. Remuneration proportional to the amount awarded in favour of a claimant cannot be used as the only form of remuneration. However, it is permissible to agree on an additional payment to accompany basic remuneration, which would depend on the positive result of the proceedings. On the other hand, it is unclear – and even doubtful – whether contingency fees agreed upon pursuant to Article 5 APCGP can be charged to a losing defendant according to the "loser pays" principle. It seems that the court cannot charge more than the maximum amounts stipulated in the fees regulations[43] with respect of individual actions[44].

The explanatory notes to the draft APCGP clarify that the legal basis for contingency fees was introduced because of the need to make professional lawyers interested in engaging in complex group proceedings[45]. Class counsel is expected to do a remarkable job of representing group interests. The authors

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Connected mediation in the Nordic Countries, Springer International Publishing Switzerland, Cham 2014, pp. 368–369.

[43] Regulation of the Minister of Justice of 28.09.2002 regulating the issue of fees for advocates' activities and incurring by the State Treasury the costs of unpaid *pro bono* legal aid (*rozporządzenie Ministra Sprawiedliwości z dnia 3 października 2002 roku w sprawie opłat za czynności adwokackie oraz ponoszenia przez Skarb Państwa kosztów nieopłaconej pomocy prawnej udzielonej z urzędu*), consolidated text Journal of Laws 2013, item 461; Regulation of the Minister of Justice of 28.09.2002 regulating the issue of fees for legal counsels' activities and incurring by the State Treasury the costs of unpaid *pro bono* legal aid (*rozporządzenie Ministra Sprawiedliwości z dnia 28 września 2002 roku w sprawie opłat za czynności radców prawnych oraz ponoszenia przez Skarb Państwa kosztów nieopłaconej pomocy prawnej udzielonej z urzędu*), consolidated text Journal of Laws 2013, item 490.

[44] See also M. Sieradzka, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz*, Warszawa Wolters Kluwer 2010, pp. 143–144; T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz*, Warszawa CH Beck 2010, pp. 165–166; T. Ereciński, P. Grzegorczyk, "Effective protection of diverse interests in civil proceedings on the example of Polish Act on Group Action" [in:] *Recent trends in economy and efficiency of civil procedure*, Vilnius University Press, Vilnius 2013, p. 38. On the other hand, P. Pietkiewicz is of the opinion that contingency fees cannot be charged to a losing defendant even in part; P. Pietkiewicz [in:] M. Rejdak, P. Pietkiewicz, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz*, LexisNexis, Warszawa 2011, p. 130.

[45] See http://orka.sejm.gov.pl/proc6.nsf/opisy/1829.htm (1.08.2014). Still, sometimes explanatory notes to draft bills do not state in full the legal, policy and other reasons for its preparation (sometimes there are also some "hidden" reasons). Another question is whether one can have the comfort of believing that legislature is rational.

of the draft were afraid that few lawyers would be interested in taking on such cases unless they were financially incentivised by the APCGP itself.

Might that view be considered naive? Such an assessment would be too harsh. First, it should be emphasised that the introduction of the APCGP did not cause a flood of group litigations in Polish courts. Newest statistics released by the Ministry of Justice[46] reveal that 21 group action suits were filed in 2010 (all civil suits), increased to 38 (37 civil suits and one commercial suit) in 2011, and grew once more in 2012 totalling 39 (35 civil suits and four commercial suits). Further on, the statistics unveil a surprising new tendency: 2013 has been a landmark year with only 22 group action suits (all civil suits). In addition, advancing group claims based specifically on competition law infringements seems extremely unpopular. Not only do injured persons fail to use their privileges under the APCGP, preferring to simply suffer their losses resulting from antitrust violations, they do not even turn to individual private antitrust actions, which have rarely been "tested" in Poland so far[47]. Polish consumers seem to recognise the advantages of being part of Groupon-esque programmes, but they do not seem very eager to apply the "there is power in togetherness" logic to their claims[48]. The existence of a legal basis for contingency fees in group proceedings has not prevented the drop in the number of group action suits that has occurred after the first few court rulings on group cases were delivered, nor has it averted the apparent lack of collective antitrust actions.

The second problem concerns the way in which the Commission "utilises" the right to full compensation in the Recommendation. Section 30 requires those Member States that decide to exceptionally allow for contingency fees to set out "appropriate" national rules governing their use in collective redress cases (is Article 5 APCGP "appropriate"?). In particular, the right to full compensation of the members of the claimant party should be taken into account. Many Member States, including Poland, recognise the principle of full compensation in their substantive civil laws. Moreover, its regulation is going to be harmonised. Yet this is going to happen in the field of private antitrust enforcement (see Article 2 section 1 of the Damages Directive). The Recommendation is intended to have a much broader scope of application.

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[46] "Pozwy zbiorowe w latach 2010–2013", http://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/ (1.08.2014).

[47] Compare A. Jurkowska-Gomułka, "Private Enforcement of Competition Law in Polish Courts: The Story of an (Almost) Lost Hope for Development" (2013) 6(8) *YARS* 110. See also A. Jurkowska, "Antitrust Private Enforcement – Case of Poland" (2008) 1(1) *YARS* 59 et seq.

[48] A. Piszcz, "Has class-action culture already hit Poland?" [in:] M. Etel, I. Kraśnicka, A. Piszcz (eds), *Court Culture – Conciliation Culture or Litigation Culture?*, Białystok 2014, p. 138.

The question then arises: does the Commission – placing the right to full compensation in Section 30 of the Recommendation (soft law instrument!) – want to introduce this right (principle) into all Member States through a back door? Or, perhaps, should this right be taken into account only by those Member States which already have it in their national laws but not by others?

The Polish version of contingency fees (in group proceedings) should be defended, if only it could save the use of collective redress mechanisms in Poland. Does the Recommendation allow for any such "defence" by a Member State, other than simple disrespect for the Recommendation which is, after all, only a soft law instrument? A short review of the Recommendation leads to the conclusion that it seems to leave some "back doors" open for national solutions different from those being recommended by the Commission. One of them seems to lie in Section 2 of the Recommendation where it is suggested that the principles for collective redress mechanisms should "be common across the Union, while respecting the different legal traditions of the Member States". The Commission seems thus to be willing to integrate its current visions for collective redress with national legal traditions of EU Member States. The longer contingency fees will exist in Poland, the stronger they might contribute to the Polish legal tradition.

The second "back door" for exceptions to the principles set out by the Recommendation, by law or by court order, is envisaged in some instances where such exceptions are duly justified by reasons of sound administration of justice (see Sections 21, 22, 23 and recital 20 of the Preamble of the Recommendation). However, this rule refers only to the constitution of the claimant party and admissibility of collective actions, not to lawyers' remuneration. Nevertheless, it will be very interesting to see how the notion of sound administration of justice will be interpreted. The question here is, in particular, whether it will be taken to mean that what is "sound administration of justice" is different in various Member States (like legal traditions are different) or that there is, in fact, only one standard thereof for all Member States (the "average", a common denominator for e.g. Italian and Swedish administration of justice).

Finally, there is an open "back door" in Section 30 of the Recommendation. But what does it mean to take "into account […] the right to full compensation"? In Poland, the fees regulations[49] stipulate what maximum fees can be charged to a losing party by the court. Since those maximum amounts are relatively low in many categories of cases, it is often true that the actual fees paid to a lawyer are higher than the ones reimbursed later from the party obliged to do so by the court. Does it mean that Polish solutions regarding all court proceedings

[49] See footnote 43.

do not take into account the principle of full compensation? One should not underestimate here the value of another principle of civil law, namely the freedom of contract. It lets a party who ultimately wins a case to agree to pay its lawyers more than what the court can charge to the opposing party. So, why should it not be possible to do this in the form of contingency fees (in case of group proceedings)? Why should the latter be treated differently from the perspective of the right to full compensation? Surely, these questions are justified with regard to opt-in group proceedings. On the other hand, the opt-out model does not offer a comparable freedom of contract for group (class) members with respect to lawyers' remuneration. It should be argued, however, that contingency legal fees may contribute to abusive litigation but only in conjunction with the opt-out system[50].

To sum it up, the Recommendation needs to be changed in some respects if it is to be accepted by all Member States. Adjusting their laws to the Recommendation would be a bit easier if at least the Damages Directive did not contradict the Commission's emphasis on collective redress. Recital 7 of the Preamble of the Recommendation lists competition and consumer protection alongside environmental protection, protection of personal data, financial services legislation and investor protection as areas where supplementary private enforcement of rights granted under EU law in the form of collective redress is of value. At the same time, however, Recital 12 of the Preamble to the Damages Directive declares: "(…) This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 of the Treaty (…)". It is worth adding that the quoted text was already present in the very first version of the draft Damages Directive circulated at the same time as the publication of the Commission's Recommendation on its website.

III. Actions for damages based on breaches of EU competition rules

1. Prohibition of overcompensation

Pursuant to the above-mentioned Article 2 of the Damages Directive:
"1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.

[50] See also summary of the Competition Law Association Panel Session "The dynamic between UK and EU Private Actions Reforms" of 9.09.2013, p. 4; http://www.competitionlawassociation.org.uk/new/events.htm (1.08.2014).

2. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus payment of interest.
3. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages".

The principle of full compensation is one of the major principles of civil law in continental Europe. Notably, exceptions to this principle exist for instance in the field of intellectual property protection. The most impressive examples of legal solutions capable of overcompensating persons injured by competition law infringement can be found outside continental Europe. In England and Wales, non-compensatory damages can be awarded in addition to compensatory damages[51]. One of the latest developments in English private antitrust enforcement was the judgment of the Competition Appeal Tribunal (hereafter: CAT) related to a damages claim submitted by 2 Travel Group PLC (in liquidation) against Cardiff City Transport Services Limited[52]. It was the first CAT ruling to award antitrust damages concerning the infringement of the prohibition of the abuse of a dominant position (in national law). At the same time, it was the first ruling (in England) to award exemplary damages to an applicant injured by an antitrust infringement. The applicant was awarded GBP 33.818,79 in compensatory damages plus exemplary damages of GBP 60.000,00. One of the reasons behind such a decision was that the relevant national competition authority (hereafter: NCA) did not fine the defendant for the above infringement; the violation was qualified as conduct of minor significance. Of particular importance is the English standpoint that the principle of *non bis in idem* precludes the award of exemplary damages in cases where the defendants have already been fined (or had fines imposed and then reduced or commuted)[53].

All of the debate seems to centre on the function(s) of antitrust damages. According to the CAT, the imposition of fines and an award of exemplary damages serve the same aim: namely to punish and deter anti-competitive behaviour[54]. Not only should injured persons be compensated by infringers of competition rules, the latter should also be punished because they deserve it. Under English laws, courts that decide on antitrust damages are competent to

[51] See C.A. Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA*, OUP, New York 1999, p. 201.

[52] Judgment of 5.07.2012 in Case 1178/5/7/11. For more information visit http://www.catribunal.org.uk/238-7662/Judgment.html (1.08.2014).

[53] See the CAT judgment of 5.07.2012, para. 491; R. Whish, *Competition Law*, Oxford NY OUP 2009, p. 303.

[54] See the CAT judgment of 5.07.2012, para. 491.

question the decision of the NCA that there was no need to punish and deter anti-competitive behaviour; courts are capable of making corrections thereto in the form of an award of exemplary damages. The EU moved towards the continental standard, namely the prohibition of overcompensation, whether by means of punitive, multiple or other types of damages, and England will be obliged to fully comply with the EU approach (unless it disregards the Recommendation).

The Damages Directive shall set a very definite boundary between public and private antitrust enforcement. EU institutions do not want national courts to make the above-mentioned corrections to public enforcement decisions (with respect to Articles 101 and 102 TFEU) – they do not want public antitrust enforcement functions to be complemented in the above manner. But is an absolute guarantee of the inviolability of the boundary between public and private antitrust enforcement necessary? Certainly, national courts should not be permitted to perform such a "corrective" function in a case of leniency-based immunity from fines. Private enforcement should not interfere with leniency programmes; it should not undermine the effectiveness of public antitrust enforcement. But if an NCA is able to desist from the imposition of fines because of the low turnover of an infringer (in such circumstances a fine could neither punish nor deter anti-competitive behaviour), why not allow for an award of exemplary damages later when the court is deciding on an application for damages and the infringer's financial standing is not as weak as it was earlier?

As a rule, Polish laws do not seem to allow for overcompensation in private antitrust enforcement. However, also Polish legal provisions might generate legal interpretation problems in the light of Article 2 of the Damages Directive. First, there is still no unambiguous answer to the question identified under Article 2 APCGP, that is, whether standardisation of group claims can be seen as an exception to the principle of full compensation. If so, does it only allow for under-compensation or also for overcompensation[55]. Another problem that may appear in Poland after the implementation of the Damages Directive is how to treat cases where the infringement of EU competition rules in the Polish territory constitutes at the same time an act of unfair competition. In case of such conjunction, an injured person has the right to pursue claims determined by Article 18 of the Act of 1993 on Combating Unfair

[55] The insights into this problem are provided in e.g. T. Jaworski, P. Radzimierski, *Ustawa o…*, op. cit., p. 109 et seq.; M. Rejdak, P. Pietkiewicz, *Ustawa o…*, op. cit., p. 74 et seq.; A. Jurkowska-Gomułka, *Publiczne i prywatne egzekwowanie zakazów praktyk ograniczających konkurencję*, Warszawa Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego 2013, p. 204.

Competition[56] including an award of an adequate amount for a determined social goal connected with the support of Polish culture or related to the protection of national heritage (where the act of unfair competition has been intentional). It seems that the focus here should be on an injured person, and not on the infringer. Just because the latter is obliged to pay more than "exact" compensation, this does not necessarily mean that the injured person is overcompensated; there is no strong link of this type because whom the money is paid to should also be taken into account. However, even if the injury was sustained by a social organisation, which applied for, and indeed received, an award of an adequate amount of money for its own social goal (apart from compensation), it would still be fair to say that the organisation was not being overcompensated. Such an award, despite being given directly to an injured party, would have, however, a different "destination" in terms of its function (different than compensation of an injured party as it is with English exemplary damages).

2. Joint and several liability

One of the biggest changes required by the Damages Directive, at least with respect to Polish laws, is going to relate to joint and several liability. Article 11 section 1 states that "Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law (…)". Polish laws contain no particular legal basis for joint and several liability of co-infringers of competition law. A general legal basis can now be found in Article 441 § 1 of the Civil Code[57] which stipulates that if several persons are liable for harm caused by tort, their liability shall be joint and several[58]. The concept of "unity of harm" is a prerequisite for joint and several liability[59]. This feature exists if the harm is indivisible by its nature, that is, committing the same tort by co-infringers is interrelated with the indivisibility of consequences resulted from it. Such "unity of harm" exists where it results from the joint operation of harmful factors so that it is impossible to distinguish which factor caused/ contributed to what part of the harm. It is up to the circumstances of the case to determine that in order for the harm to appear, harmful factors had to coexist. The implementation of Article 11 section 1 of the Damages

[56] Consolidated text Journal of Laws of 2003 No. 153, item 1503, as amended.

[57] Consolidated text Journal of Laws 2014, item 121, as amended.

[58] See also P. Podrecki, "Civil Law Actions in the Context of Competition Restricting Practices under Polish Law" (2009) 2(2) *YARS* 87.

[59] Supreme Court judgment of 20.11.2002 in Case II CKN 859/00.

Directive into Polish laws will certainly clarify whether liability for competition law infringements is joint and several. Such a provision will also not be regarded as a "strange" legal transplant.

To say the same of the implementation into Polish laws of Article 11 section 2 of the Damages Directive may be somewhat less grounded. This provision was inserted into the draft almost at the last minute. Referring to the limitations of joint and several liability of small and medium-sized enterprises (SMEs), it constitutes a kind of *de minimis* rule. Member States shall ensure that where the infringer is a SME, it shall be liable only to its own direct and indirect purchasers under some specified conditions. Polish law does not know any similar limitations of civil liability. The above concept (the *de minimis* rule) seems an example of unprecedented mixture of civil (private) legal provisions and regulatory rules. It is not the first time for an EU directive to require national legislatures to intervene in private laws for some EU policy reasons. There is a strong case for such requirement when it comes to leniency applicants (which will be discussed below). It is understandable that a limitation of civil liability of leniency applicants[60] (despite being at the same time a limitation for private antitrust enforcement) may create an incentive for companies to cooperate with competition authorities. As such, it might considerably improve the efficiency of public antitrust enforcement. But is there any solid rationale behind the limitations of civil liability of SMEs? The economic importance of micro-enterprises and SMEs is unquestionable; on the other hand, one of their main problems is often their lack of knowledge about competition rules. However, tinkering with their civil liability does not seem an appropriate form of public support for SMEs. For economic reasons, however important they might be, EU institutions are improving the situation of some SMEs. Yet at the same time, they may make it far more difficult for injured persons to get compensation[61], including injured entities such as other SMEs and even weaker market participants such as consumers etc. The above *de minimis* rule on joint and several liability is simply favouring some SMEs.

[60] According to Howard, it is a sensible reinforcement to the attractiveness of the leniency regime; A. Howard, "Too little, too late? The European Commission's Legislative Proposals on Anti-Trust Damages Actions" (2013) 4(6) *Journal of European Competition Law & Practice* 458.

[61] A similar concern was expressed by Kersting with respect to the limitation of civil liability of leniency applicants ("While it does generally make sense to privilege successful leniency applicants with regard to their civil liability, it is problematic to do so at the expense of the injured parties. (…) According to Article 11(2) some victims can only claim compensation from successful immunity applicants if they prove that they cannot obtain full compensation from the other cartelists. This puts a significant burden on them which renders their right to full compensation less effective."); see Ch. Kersting, "Removing the Tension Between Public and Private Enforcement: Disclosure and Privileges for Successful Leniency Applicants" (2014) 5(1) *Journal of European Competition Law & Practice* 4.

It is worth mentioning, however, that it will not be easy for SMEs to meet the conditions stipulated in Article 11 section 2 (and, first of all, to even interpret them[62]). One of the conditions is that "the application of the normal rules of joint and several liability would irretrievably jeopardize its [enterprise's] economic viability and cause its assets to lose all their value". A difficulty will probably be hidden in the adjective "all". It will not be easy for a SME to prove that all its assets would lose their entire value if normal liability rules were applied.

Another challenge for the Polish legislature will be to implement Article 11 section 3 of the Damages Directive, which relates to limitations of joint and several liability of leniency applicants and, more precisely, immunity recipients. Pursuant to Article 4(19) of the Damages Directive, the term "'immunity recipient' means an undertaking or a natural person which has been granted immunity from fines by a competition authority under a leniency programme". It does not cover undertakings and persons who have been granted a partial fine reduction. Leniency programmes are defined in Article 4(15) of the Damages Directive as "a programme concerning the application of Article 101 TFEU or a corresponding provision under national law on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority (…)". Finally, the term cartel shall be understood here as an agreement or concerted practice between two or more competitors[63]. Recital 34 of the Preamble to the Damages Directive clarifies that it is appropriate to protect immunity recipients from undue exposure to damages claims because they „play a key role in detecting secret cartel infringements and in bringing these infringements to an end, thereby often mitigating the harm which could have been caused had the infringement continued". However, as Schwab rightly observed, it is hard to diagnose "undue exposure to damages claims" seeing as so far no evidence has come to light to suggest that the proposed Directive will lead to immunity recipients being the first, or only target to be sued[64].

Pursuant to Article 11 section 3 of the Damages Directive "(…) Member States shall ensure that an immunity recipient is jointly and severally liable: (a) to its direct or indirect purchasers or providers; and (b) to other injured parties only where full compensation cannot be obtained from the other

[62] Member States will need almost technical guidance on a wide range of issues relating to those conditions.

[63] Art. 4(14) of the Damages Directive.

[64] A. Schwab, "Finding the Right Balance – the Deliberations of the European Parliament on the Draft Legislation Regarding Damage Claims" (2014) 5(2) *Journal of European Competition Law & Practice* 66.

undertakings that were involved in the same infringement of competition law (…)". As Howard rightly asked with regard to the first wording of the liability privilege (where words "are unable" were used instead of "cannot"), in what circumstances will it be "impossible" for claimants to obtain compensation from other infringers[65]? It is unclear whether "cannot" refers to a legal ban (prohibition) or a practical impediment (such as one of the infringers going into liquidation) or both.

There are apparent tendencies of the EU and its Member States to converge in many areas of competition law and many national antitrust concepts closely resemble their EU prototypes. Nevertheless, the Polish leniency programme, set out in the 2007 Competition and Consumers Protection Act[66], differs from its EU equivalent to a considerable extent. First and foremost, an important dimension of Polish leniency is that it refers not only to cartels but also to other agreements (and practices), including vertical agreements. This particular discrepancy will remain even after the recent amendment of the Polish programme, which is going to come into effect as of 18.01.2015 (the amendment introduces another variant of leniency, namely the leniency plus programme). So, what should be the scope of the rule implementing Article 11 section 3 of the Damages Directive? Shall the Polish legislature extend it beyond those cartel participants that have received immunity from fines?

The discussed provision is specifically "tailored" to cartel participants. It is not impossible, however, for a participant in a secret vertical agreement covered by Article 101 TFEU (as well as the Polish Competition Act of 2007) to report an infringement to the Polish NCA under its leniency programme. Such entity shall be granted immunity from antitrust fines but not from normal (regular) joint and several liability. In fact, this is an excellent opportunity to ask: do NCAs need such leniency applications? Do "non-cartel" infringers deserve incentives and privileges similar to those granted to cartel participants? After all, it can be argued that cartel practices (to which the liability privilege is attached) are much more dangerous to market competition than other anticompetitive agreements. Still, the possibility of extending the liability privilege to cover non-cartel leniency applicants seems doubtful. Article 11 section 3 of the Damages Directive seems to be conceived as a full harmonisation clause (rather than a minimum harmonisation clause). It does not involve expressions such as "at least"[67], "wider"[68] or any other word that would suggest that Member States can extend the scope of the

[65] A. Howard, "Too little…", op. cit., p. 458.

[66] Competition and Consumers Protection Act of 16 February 2007 (Journal of Laws 2007 No. 50, item 331, as amended).

[67] See Art. 9 section 2, Art. 10 section 3.

[68] See Art. 5 section 8.

liability privilege (and establish a higher standard of protection of entities cooperating with competition authorities). Of course, Member States are free to do this with respect to competition law infringements of a purely national scope. However, it seems much more rational for Member States to have identical, or almost identical, solutions with respect to infringements of EU and national antitrust rules. Putting it colloquially, if we dig dipper and look wider, we shall notice that perhaps it is too early for the harmonisation of the liability privilege seeing as Member States are allowed to maintain differences with respect to national leniency programmes.

3. Effect of national antitrust decisions

Last but not least, the effect of national antirust decisions on private antitrust enforcement is an example of a solution where the Council and the Parliament have somewhat decided that one "size" cannot fit all, despite the fact that the Commission was initially of a different opinion. EU institutions gave a proper consideration to a range of options in this context. First, the Commission's version of the draft Damages Directive of June 2013 repeated the scheme of Article 16 of Regulation 1/2003[69]. Accordingly, Article 9 sentence 1 of the draft Damages Directive stated originally that: "Member States shall ensure that, where national courts rule, in actions for damages under Article 101 or 102 of the Treaty or under national competition law, on agreements, decisions or practices which are already the subject of a final infringement decision by a national competition authority or by a review court, those courts cannot take decisions running counter to such finding of an infringement". The draft provided therefore for a (German-like) cross-border binding effect of national antitrust decisions. However, national judiciaries tend to enjoy much discretion with regard to findings contained in infringement decisions adopted in other Member States. Many of them leave no room for any schemes other than the non-cross-border binding effect of national decisions (e.g. England and Wales)[70]. Importantly, it was not until 2005 that Germany introduced cross-border binding effect of national antitrust decisions into its Act against Restraints of Competition, amongst some other important innovations affecting the national system of private antitrust enforcement.

The German "product" was not desired to be taken as an EU-wide model. After works in the Council, Article 9 of the draft Damages Directive was transformed in November 2013; the authors of the revised draft introduced

[69] 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 (OJ L 1, 4.01.2003).

[70] See also A. Howard, "Too little…", op. cit., p. 457.

a double standard in two separate sections concerning – respectively – the non-cross-border and the cross-border effect of national decisions. Emphasis was placed on the probative effect of national decisions instead of their binding effect. Section 1 sentence 1 argued that "Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 of the Treaty or under national competition law". Instead of the requirement that court rulings cannot run counter to a finding of an infringement, the new Article 9 section 1 provided for an irrefutable (irrebuttable, absolute) presumption of an infringement. With respect to the cross-border effect of national decisions, Article 9 section 2 stated that "Member States shall ensure that a final decision (…) given in another Member State can be presented before their national courts as evidence, among other, of the fact that an infringement of competition law has occurred".

The newest version of Article 9 of the Damages Directive, ultimately adopted by the Parliament in April 2014, differs from the one of November 2013 in that in section 2 it says that "Member States shall ensure that a final decision (…) given in another Member State may, in accordance with their respective national law, be presented before their national courts as at least *prima facie* evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other material brought by the parties". Article 9 section 2 constitutes a minimum harmonisation clause that accounts for an "at least half-probative" cross-border effect of national antitrust decisions.

It seems that the reason for such clause lies in the fear of the differences existing in some procedural standards between Member States. It might therefore happen that a Member State would be bound by a "foreign" (other Member State) decision adopted in circumstances in which such decision would not have been adopted in this Member State. In the draft report on the proposal for the Damages Directive, the Committee on Economic and Monetary Affairs in the European Parliament argued that "the binding effect shall not apply in cases where obvious errors occurred during the investigation of facts or where the rights of the defendant were not duly respected during the procedure before the national competition authority or competition court"[71]. However, taking this into account, EU institutions decided not to declare that decisions of other EU NCAs' may be non-binding in all Member States. They gave Member States a choice whether they want their courts

[71] Draft Report of 3.10.2013, available http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-516.968+01+DOC+PDF+V0//EN&language=EN, p. 37 (1.08.2014).

to be: 1) bound by those decisions; 2) governed in their assessments by an irrefutable or rebuttable presumption; 3) obliged to treat them as a piece of evidence and to freely assess their weight and probative value; 4) obliged to treat them as *prima facie* evidence. Member States that have one of these solutions in place already shall be considered as complying with Article 9 section 2 of the Damages Directive.

Polish civil procedure law recognises only the binding effect of criminal court rulings, but not of decisions issued by administrative bodies (such as NCAs). Whereas, for instance, in civil cases, courts are bound by findings of a criminal court ruling regarding bid-rigging, at the same time they may be presented with an administrative decision as only evidence which may be assessed along with any other material brought by the parties[72]. Polish law has no provisions on the binding effect of decisions of NCAs, not even with respect to the Polish NCA, let alone those of other Member States. It is worth adding that jurisprudence thereon has so far not been uniform[73].

Hypothetically speaking, Poland seems to be in a *tabula rasa* situation and free to select one of above-mentioned competing solutions. Should the legislator choose the minimal solution in the form of *prima facie* evidence? If so, this approach would face a fundamental difficulty. So far, *prima facie* evidence has not been codified in Polish civil procedure at all. In fact, it has been used by courts in cases concerning injuries that occurred during medical treatment[74]. The first central difficulty here is that neither judges nor scholars are unanimous on what *prima facie* evidence is in Polish legal culture. Some argue that it is similar to the *de facto* presumption (Article 231 of the Civil Procedure Code[75]). Others believe that *prima facie* evidence makes the existence of certain facts only plausible[76].

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[72] See resolutions of the Supreme Court of resolutions of 16.06.1994, Case II PZP 4/94, and of 9.10.2007, Case III CZP 46/07.

[73] A. Jurkowska-Gomułka, "W stronę umocnienia prywatnoprawnego wdrażania zakazów praktyk ograniczających konkurencję – glosa do uchwały SN z 23.07.2008 r. (III CZP 52/08)" (2010) 5 *Europejski Przegląd Sądowy* 43-48; A. Piszcz, "Still-unpopular Sanctions: Developments in Private Antitrust Enforcement in Poland After the 2008 White Paper" (2012) 5(7) *YARS* 62-66; A. Piszcz, "What type of sanctions? Prospects of private enforcement of EU competition law in Poland" [in:] *Proceedings of the 55th International Scientific Conference of Daugavpils University*, Daugavpils Universitāte Akadēmiskais Apgāds "Saule", Daugavpils 2014, pp. 602–603; M. Sieradzka, "Dochodzenie roszczeń za naruszenie unijnych i krajowych reguł konkurencji a kwestie prejudycjalności rozstrzygnięć organów ochrony konkurencji" (2010) 12 *Przegląd Prawa Handlowego* 51-53.

[74] See M. Białkowski, "Dowód *prima facie* w postępowaniu cywilnym dotyczącym szkód powstałych w związku z leczeniem" (2014) 3-4 *Palestra* 115-125.

[75] Consolidated text Journal of Laws of 2014, item 101, as amended; (hereafter: CPC).

[76] See Art. 243 CPC.

Which national approach should be taken as a model for the interpretation of the notion of *prima facie* evidence in light of the Damages Directive (how is this notion construed in other Member States)? Its interpretation as making the existence of a given fact plausible would have large practical consequences. The creation of a legal rule whereby decisions issued by other EU NCAs make an infringement of competition law plausible will not improve the claimants' position. To do so, such rule would have to be accompanied by a provision stating that making an infringement plausible is sufficient, without the need of evidence. Otherwise, decisions of other EU NCAs' would only be a "beginning of the proof" and eventually, an infringement of competition law would have to be proven. From this point of view, one could imagine that the version of Article 9 section 2 that was devised in November 2013, which left no room for such doubts, would be much easier to comply with by all Member States.

It could certainly be argued that the Polish legislator does not have to choose the minimal solution, especially considering it seems so troublesome from the perspective of the national legal system. The highest standard solution (German-like) might be chosen instead or one of the options in-between. Of course, this is the quintessential advantage of the "minimum" harmonisation approach. However, this analysis leads to one far-reaching question. Is Article 9 section 2 of the Damages Directive going to contribute to the phenomenon of forum shopping[77]? Is it capable of producing such a side effect? If claimants had at their disposal a final infringement decision adopted by any EU NCA, then, from the perspective of the effects of such decision, they would favour jurisdictions where courts are bound by such decisions. Going to a national judiciary that may freely assess the weight and probative value of such decisions would risk that an infringement might ultimately not be proven. It is likely that such situation will follow the transposition of the Damages Directive into national laws. However, harmonisation efforts were not meant to promote or encourage forum shopping and yet EU institutions must be prepared for it if considerable legal differences among the Member States remain. It is fair to be concerned how the different rules of the 28 Member States will provide for legal certainty for parties in cross-border litigations.

[77] This phenomenon is analysed in many aspects in: J. Basedow, S. Francq, L. Idot, *International Antitrust Litigation: Conflict of Laws and Coordination*, Hart Publishing, Oxfrod––Portland 2012, pp. 6–7, 46–47, 52–53, 409–410 etc.

IV. Conclusions

In recent years, private antitrust enforcement has been one of the primary concerns of public discussions in the EU forum. The Recommendation and the Damages Directive will not automatically improve efficiency of private antitrust enforcement in Europe – they need to be implemented first. Their transposition will require Member States to conduct an intensive scrutiny of legal areas such as civil law, procedural law and competition law. Private antitrust enforcement is thus going to become a more highly regulated and codified field in EU Member States.

It was argued, on the basis of Polish experiences, that contingency fees with reasonable legal boundaries may be helpful in case of opt-in group proceedings, especially if the use of this instrument is diminishing. The Portuguese experience clearly suggests that the PA mechanism is potentially important. The existing model strengthens access to justice and effective redress, even if the current framework retains many limitations: scarce resources of consumer associations (contingency fee arrangements or *pactum de quota litis* fees are prohibited in Portugal), length of the proceedings, and uncertainties surrounding certain aspects of the PA, which may be clarified by juridical interpretation in the likely event that the PAA will not be revised in the near future[78].

Furthermore, the Recommendation is not binding on EU Member States – it states that Member States can follow a different solution as long as it is justified. Only time will thus tell to what an extent will collective redress mechanisms be adopted throughout the EU. It remains to be seen also if there is a risk that Member States' solutions will differ to a large extent in terms of their effectiveness.

The Damages Directive, as a legally binding act, is of different nature. Member States will have to transpose it into their national legal systems. However, the above analysis of selected issues (prohibition of overcompensation, joint and several liability, effect of national decisions) shows that 28 national solutions create a puzzle that can pose difficulties when being harmonised according to the EU model. This is so especially because the latter is imperfect to some extent also. Some reservations can be expressed as to the use of minimum harmonisation clauses and the full harmonisation approach. It can be expected that literature will provide extensive critical commentary to some solutions provided in the Damages Directive.

[78] There are particularly doubts concerning the decision and distribution of total compensation, which can be solved by the courts, applying the legal techniques of interpretations. This solution seems the most likely in the near future, although some voices suggest that "it would be useful if the PAA were revised", see Rossi – Ferro, op. cit., pp. 77–78.

Increasing Use of "Negotiated" Instruments of European Competition Law Enforcement towards Foreign Companies

by

Ewelina D. Sage*

CONTENTS

Abstract

This paper considers the increasing use of "negotiated" instruments of European competition law (ECL) enforcement as illustrated by the example of the European Commission's (EC) enforcement practice directed at firms of American and East Asian origin. The paper first defines the notion of "negotiated" instruments of ECL enforcement as a non-confrontational enforcement method that centres on

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the existence of a public-private dialogue and mutual will to solve the contested issue, which in turn facilitate mutual benefits in enforcement outcomes (e.g. faster market improvements *v.* no fines). Three key "negotiated" instruments of ECL enforcement are presented next: conditional merger clearances, commitments decisions, as well as leniency and the settlement procedure. The EC's decision to introduce negotiated enforcement instruments into its toolkit has been largely embraced by the market. Their ever growing practical application suggests that public-private dialogue is becoming a rule, rather than an exception, in public enforcement of ECL. This thesis is illustrated by a selection of ECL cases involving US (e.g. Microsoft) and East Asian (e.g. Samsung, Sony) companies which chose to cooperate with the EC in order to generate tangible benefits for themselves, which are largely precluded in a more adversarial procedure.

Résumé

Cet article examine l'utilisation croissante de l'application des instruments européens «négociés» du droit de la concurrence (ECL) comme il est illustré par la pratique de l'application de la Commission européenne (CE) dirigée vers les entreprises d'origine américaine et asiatique (Asie de l'Est). L'article définit d'abord la notion d'instruments «négociés» de l'application de l'ECL comme une méthode d'application non conflictuelle qui se concentre sur l'existence d'un dialogue public-privé et la volonté commune de résoudre la question en litige, qui, en revenche, facilite les avantages mutuels dans les résultats de l'application (par exemple, des améliorations plus rapides du marché v. aucunes amendes). Trois instruments «négociés» de l'application de l'ECL principaux sont présentés ci-dessous: les autorisations conditionnelles de fusion, les décisions d'engagement, ainsi que la coopération et la procédure de règlement. La décision de la CE à introduire des instruments négociés de l'application dans sa boîte à outils (toolkit) a été largement acceptée par le marché. Leur application pratique en croissance constante suggère que le dialogue public-privé devient une règle, plutôt que d'une exemption, en application publique de l'ECL. Cette thèse est illustrée par une sélection de cas d'ECL concernant les entreprises en provenvence des États-Unis (par exemple Microsoft) et de l'Asie de l'Est (par exemple Samsung, Sony) qui ont choisi de coopérer avec la Commission européenne afin de générer des bénéfices tangibles pour eux-mêmes, qui sont en grande partie exclue dans une procédure plus contradictoire.

Classifications and key words: European competition law, cooperation, negotiations, dialogue, conditional merger clearances, commitments decisions, leniency, settlement, US companies, East Asian companies, Japanese companies, South Korean companies

I. Introduction

Many important issues come to mind when considering current competition policy problems[1] in general, and European competition law[2] (hereafter: ECL) in particular. Among the most noticeable developments in the enforcement practice[3] of the European Commission (hereafter: EC) is its large number of increasingly global cartel cases, which very often relate to East Asian companies, Japanese in particular (e.g. Mitsubishi, Hitachi)[4]. At the same time, many foreign companies, mostly American (e.g. Google) and East Asian (e.g. Samsung), have recently received key decisions based on Article 102 TFEU (e.g. Microsoft) and the EU Merger Regulation (e.g. Sony)[5]. It is also noticeable that the EC has handled many of these cases with "negotiated" instruments of ECL enforcement – conditional merger clearances, commitments decisions, as well as leniency and the settlement procedure.

Competition law is characterised by its extraterritorial applicability whereby the origin of the company/companies involved or the actual location of the practice are largely irrelevant when deciding whether a given set of competition rules must be complied with. The extraterritorial application doctrine has been widely discussed and disputed[6] yet it is hard to argue now that if a company

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[1] E.g. procedural fairness was the subject of the 9th Annual ASCOLA Conference held in Warsaw in June 2014.

[2] ECL is understood here as Articles 101 and 102 TFEU and the rules contained in the Merger Regulation as well as all of their implementing laws.

[3] ECL is enforced by public authorities (EC and National Competition Authorities of EU Member States) as well as via private enforcement before national courts. Private enforcement remains outside the scope of this paper; for recent literature on this topic see, e.g., K. Huschelrath, H. Schweitzer, *Public and Private Enforcement of Competition Law in Europe: Legal and Economic Perspectives*, Springer 2014; B. Cortese (ed.), *EU Competition Law: Between Public and Private Enforcement*, Kluwer Int. 2013; A. Jurkowska-Gomulka, *Publiczne i prywatne egzekwowanie zakazow praktyk ograniczajacych konkurencje* [*Public and Private enforcement of antirust prohibitions*], Warsaw 2013.

[4] More than 1/3 of all cartel decisions issued by the EC in the last 15 years involved Japanese companies.

[5] The thesis of this paper is presented on the example of a selection of cases involving companies of US and East Asian origin (primarily Japanese and South Korean). Focusing on ECL enforcement towards "foreign" companies reflects the growing internationalisation of the EC's enforcement practice; focusing on companies from these two geographic regions reflects the fact that they amount to the majority of the EC's "foreign" cases.

[6] Starting with Case 48/69 *ICI v. Commission* [1972] ECR 619 and Case 6/72 *Continental Can v. Commission* [1973] ECR 215 on multilateral and unilateral restrictive practices respectively followed by key developments in Wood Pulp I, Cases 89/85 etc. *Ahlstrom v. Commission* [1988] ECR 5193 and CFI judgment T-102/96 *Gencor v. Commission* [1999] ECR II-753; for more on extraterritoriality see, e.g., P. Roth, V. Rose (eds), *Bellamy & Child: European Community Law*

wishes to partake in the Internal Market, then it must comply with the law governing it[7]. Firms active on the EU Internal Market have to comply with ECL in their everyday business activities if the applicable jurisdictional criteria are met[8]. This fact is both undisputed in legal and doctrinal terms as well as increasingly known to the companies themselves[9]. Importantly, increasing globalisation has made it essential for foreign companies to also realise that they might be breaking ECL even if they have little or even no activity on the Internal Market.

The extraterritorial applicability of ECL is crucial in today's global economy. Most global leaders in the economy-driving information sector are not European, such as the American giants Apple, Google, Intel or Microsoft, and yet their actions fundamentally shape the Internal Market. For that reason alone they must comply with ECL, and if they don't, they find themselves subject to public enforcement. Apple was among the addressees of a commitments decision in 2012 concerning retail prices of e-books[10]. Microsoft[11] has been subject to two major tying cases – one infringement decision in 2004 and one commitments decision in 2009. It also received a fine in 2013 for non-compliance with the 2009 decision. Confirmed by the General Court, Intel[12] received the largest individual ECL fine so far for the

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of Competition 6th (ed.), Oxford 2013, p. 66 (1.110-1.114); R. Whish, D. Bailey, *Competition law* 7th edition, Oxford 2012, p. 495; L. Ritter, *European Competition law. A practitioner's Guide* 3rd edition, Kluwer Law International 2005, p. 71.

[7] Aside from ECL, primarily state aid rules and free movement rules.

[8] "Effect on trade between Member States" for Art.101/102 TFEU and "EU dimension" for concentrations.

[9] Kameoka states that competition law awareness is relatively high in Japan but whether that would extend to ECL is unclear; see E. Kameoka, *Competition Law and Policy in Japan and the EU*, Edward Elgar Cheltenham 2014, p. 125.

[10] EC decision of 12 December 2012 *E-Books* (COMP/39.847) 2013 OJ C 73/07 addressed to Apple and 4 publishers (Hachette, Harper Collins, Holtzbrinck/Macmillan, Simon & Schuster); Penguin (5th publisher involved) was subject to a separate commitments decision of 25 July 2013; note also that Apple has avoided an official ECL investigation in relation to iTunes service despite early complaints about its EU pricing policy.

[11] EC decision of 24 March 2004 *Microsoft* (COMP/C-3/37.792) (2007) OJ L 32/23 (hereafter: *Microsoft 2004*) and EC decision of 16 December 2009 *Microsoft (Tying)* (COMP/39.530) (2010) OJ C36/06 (hereafter: *Microsoft (Tying)*; see also EC decision of 06 March 2013 *addressed to Microsoft Corporation for failure to comply with a commitment made binding by a Commission decision pursuant to Article 9 of Council Regulation (EC) No 1/2003* (Case AT.39530 – *Microsoft (Tying)* (2013) OJ C120/15 (hereafter: *Microsoft (Tying) FINE*), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39530/39530_3162_3.pdf.

[12] Intel's infringement decision covered two forms of abuse: conditional rebates and so-called naked restrictions, it was accompanied by a fine of 1060 mln EUR; EC decision of 13 May 2009 *Intel* (COMP/C-3/37.990) (2009) OJ C 227/13, upheld by the General Court (GC) on 12 June 2014 Case T-286/09 *Intel v Commission*, not yet reported.

widespread abuse of its dominant position, and the focus is now firmly on Google. Although the EC acknowledged that Google was not liable for the infringement committed by its subsidiary Motorola[13], the EC is investigating a range of Google's own practices. Most notably, the EC was expected to soon close its investigation into Google's vertical search engines, but recent reports suggest that a final decision has been postponed[14]. Google is also known to be the subject on an investigation in relation to the Android operating system.

At the same time, many East Asian companies have found themselves surprised over the last 15 years at the onslaught of ECL investigations and the steep growth of ECL fines. The Korean giant Samsung has been subject to a record breaking 5 ECL decisions in 4 years, including 4 cartels cases and the April 2014 decision based on Article 102 TFEU[15]. In fact, Samsung's recent commitments decision was among the most anticipated ECL cases of 2014[16]. Japanese companies alone received 9% of all European cartel fines (1.6 billion EUR) since 1999[17]. The European decisions in the infamous LCD cartel case covered a number of Taiwanese companies[18]. Considering that the wide-spread investigation into possible cartels concerning specific car parts is

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[13] EC decision of 24 April 2014 *Motorola – Enforcement of GPRS standard essential patents* (Case AT.39985), para 17 (hereafter: *Motorola 2014*), available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39985; the Google/Motorola Mobility concentration was unconditionally cleared by the EC on 13 February 2012 making Google Motorola's parent company for only 7 days before the infringement was ended, EC decision of 13 February 2012 *Google/Motorola Mobility* (COMP/M.6381), available at http://ec.europa.eu/competition/mergers/cases/decisions/ m6381_20120213 _20310_2277480_EN.pdf.

[14] J. Almunia, "EC competition policy and sectoral challenges", speech Fordham 12 September 2014, p. 5, available at http://europa.eu/rapid/press-release_SPEECH-14-592_en.htm; see also http://www.theguardian.com/technology/2014/sep/08/european-commission-reopens-google-antitrust-investigation-after-political-storm-over-proposed-settlement.

[15] 4 cartels: *DRAMS* (2010), LCD (2010), *TV and computer monitor tubes* (2012), *Smart Chip* (2014) as well as the recent commitments decision concerning *Mobile Essential Patents* (2014).

[16] EC decision of 29 April 2014 *Samsung – Enforcement of UMTS Standard Essential Patents* (AT.39939) (hereafter: *Samsung 2014*), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf. The *Samsung 2014* decision was greatly anticipated alongside, among other things, the aforementioned *Motorola 2014* case and the ultimately still unresolved investigation into Google's vertical search engines.

[17] A. Italianer, "European competition policy and Japan", speech Tokyo 22 November 2013, p. 11, available at http://ec.europa.eu/competition/speeches/text/sp2013_10_en.pdf.

[18] EC decision of 08 December 2010 *LCD – Liquid Crystal Displays (LCD)* (COMP/39.309), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39309/39309_3643_4.pdf; EC decision of 05 December 2012 *TV and computer monitor tubes* (COMP/39.437) OJ 2013/C 303./06.

ongoing, more East-Asian cases are likely to follow[19]. Incidentally, some of the resulting cases might relate to small markets with little overall turnover[20], meaning that those involved might not even realise that they are breaching ECL at all, or of the extent of the possible financial repercussions.

While the recent proliferation of major "foreign" ECL cases is clearly visible, it is essential to stress that a large number of these exclusively, mostly or partially non-EU cases have been dealt with by the EC with the use of "negotiated" instruments of ECL enforcement. In light of this, the purpose of this paper is to offer an overview of an example of cases that show a particularly strong tendency to engage in public-private dialogue in order to resolve the identified competition problem. The paper will focus on cases involving companies originating from the US and from the East Asian region, mostly Japan and South Korea, as they constitute some of Europe's most important trading partners. The paper shows that the EC has taken a conscious decision to introduce an element of "negotiations" (public-private dialogue, cooperation) into ECL enforcement. Its resulting enforcement practice shows that instruments with "negotiated" characteristics are an increasingly used, if not the preferred method of ECL enforcement by the EC. This development is in part at least caused by the fact that "negotiated" enforcement has been largely embraced by global market players.

Outlined first are the legislative origins of "negotiated" ECL enforcement (II.1.). Conditional merger clearances will be considered next as the oldest "negotiated" enforcement tool in existence as well as the source of "remedies" (II.2). Assessed next are commitments decisions (II.3.) considering their relationship to individual exemptions and infringement decisions. Leniency will be covered last (II.4) stressing that its partially "negotiated" character can be completed by the settlement procedure[21].

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[19] Cars are clearly among the most important components of Japanese exports; see T. Takigawa, "Japan" [in:] M. Williams (ed.), *The Political Economy of Competition Law in Asia*, Edward Elgar Cheltenham 2013, p. 15.

[20] A. Italianer, "European competition policy…", op. cit.; see also E. Kameoka, *Competition Law*…, op. cit, pp. 51–53.

[21] The scope of this paper is limited to those aspects of conditional merger clearances, commitments decisions and EU leniency/settlement which are directly relevant to their shared "negotiated" characteristics**;** the thesis has been formulated in light of the changing enforcement practice of the EC as illustrated by a selection of EC decisions issued to US, Japanese and Korean firms.

II. The use of "negotiated" instruments of ECL enforcement towards foreign firms

1. "Negotiated" enforcement instruments

Foreign companies are most visibly affected by ECL in the context of its public enforcement by the EC. Although the latter is no longer the only authority entitled to enforce ECL[22], it remains the central figure in the European Competition Network and as such, developments that originate in its enforcement practice form a road-sign likely to be followed by National Competition Authorities (hereafter: NCAs) of EU Member States also.

The enforcement of ECL has originally been predominantly reactive and repressive. Discovery and evidencing were difficult and time consuming resulting in a limited number of cases. Moreover, seeing as competition law is firmly based in economics, which is not an exact science, proving a violation within an administrative procedure of an adversarial character was always under the threat of juridical review. As a result, many long-standing, wide-spread cartels were only recently uncovered, stopped and penalised[23], mostly thanks to the voluntary input of market players. The original enforcement approach changed in the 1990s as the proficiency in competition law matters grew in market players. It is this increasing legal awareness that became essential for the successful application of conditional merger clearances and individual exemptions (from what is now Article 101 TFEU). It was the use of these very enforcement mechanisms that gradually paved the way to the current, largely pro-active state of ECL enforcement[24] that often resembles a negotiation between multiple (not quite equal) parties with different interests that must be balanced against each other. Indeed, what conditional merger clearances and individual exemption decisions had in common was that they did not have an adversary character but developed as "negotiated" enforcement instruments. They were based on:

a. the existence of a dialogue between the enforcer and scrutinised companies;

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[22] Art. 101/102 TFEU are enforced also by National Competition Authorities (NCAs) of EU Member States.

[23] Mostly thanks to leniency e.g. the Animal Feed Phosphates cartel lasted for 35 years, the International Removal Services, Marine Hoses and Pre-Stressing Steel cartels lasted for up to 20 years each.

[24] For a detailed analysis of the growing pro-activeness in ECL enforcement by the EC before 2004 see E.D. Sage, "Community Competition law and Multimedia", DPhil Thesis, Oxford University Faculty of Law 2005, available at http://www.ewelinasage.co.uk/publications.

b. mutual will to solve the identified competition problems;
c. mutual gain from using a non-confrontational enforcement method.

The above three characteristics were "transferred", and further strengthened, into the new ECL enforcement order that coincided with the mass EU enlargement of 2004[25]. Conditional merger clearances were not only preserved, their use remains a preferred method of ECL enforcement with respect to problematic concentrations. While the use of individual exemptions ceased after 2004[26], their negotiation-based elements were transferred into the new enforcement instrument of "commitments decisions", which applies not only to cases based on Article 101 but also those based on Article 102 TFEU. Although less pronounced, similar considerations form the basis of two other enforcement instruments introduced in the EU over the last 15 years – the leniency programme and the settlement procedure[27].

2. Conditional merger clearances

The introduction in 1989 of the 1st European Merger Regulation (hereafter: MR) marked a fundamental change in the enforcement patterns of competition law in Europe. Unlike the provisions in the founding Treaty, the enforcement of which is largely conditional on the existence of an illegal practice, the MR was designed to be enforced pre-emptively with no reference to "illegality"[28]. The EC (with its sole jurisdiction to enforce the MR) can thus not treat those subject to a merger investigation as alleged offenders. It can be argued therefore that the economic rights of the parties are equally

[25] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereafter: Regulation1/2003) (2003) OJ L 1/1.

[26] Note, according to Whish & Bailey: "It is no longer correct to say that agreements are given individual exemptions: they either do, or do not, satisfy Article 101(3)", R. Whish, D. Bailey, *Competition law*…, op. cit., p. 152.

[27] Incidentally, Lee lists the Korean consent order system (resembles commitments decisions), its leniency and advance rulings (resemble individual exemptions) as tree different enforcement instruments under the heading "Facilitation of engagement of corporations". Their use reflects a change in policy whereby efficient/effective investigation is only possible with the cooperation of market players; J. Lee, "Korea" [in:] M. Williams (ed.), *The Political*…, op. cit., pp. 76–80.

[28] Note that while Takigawa speaks of legality/unlawfulness of mergers in Japan that in itself does not negate the fact that he also clearly stresses the role of informal consultations in the pre-notification stage; see T. Takigawa "Japan…", op. cit., p. 39; note, informal pre-notification consultations will no longer apply after the recent AMA amendment, see S. Hayashi, "A Study on the 2013 Amendment to the Antimonopoly Act of Japan – Procedural Fairness under the Japanese Antimonopoly Act" (2014) 7(10) *YARS*.

important, and worth protecting, as the rights of others, including the market overall, consumers or other market participants. This, in itself, suggests that the EC must in each case balance all affected rights, for which there proved to be no better way than to engage in a wide-spread dialogue with all those affected by the operation.

2.1. "Negotiated" character of conditional clearances

In truth, the vast majority of EU merger notifications are easily cleared, they do not need to be subject to much of a public-private discussion as they do not pose any competition concerns[29]. However, negotiations are at the heart of the assessment of problematic operations, especially in the context of merger remedies, that is, specific conditions and/or obligations offered by the parties in order to gain clearance of a merger[30]. When the competition authority identifies potential threats to competition generated by a forthcoming merger, it would enter into a dialogue with the parties based on the mutual will of both sides to solve the identified problems. While the enforcer should be driven by the thought that mergers are essential to the economy and that the rights of the parties should not be restricted any more than absolutely necessary, the merging parties seek clearance of their operation and for that they are willing to "negotiate" and give concessions. Those negotiations involve, most importantly, the formulation of merger remedies meant to address (counteract) the identified competition concerns without negating the primary aim of the concentration.

In light of this, the remaining question is whether clearing the operation would be mutually beneficial to the EC and to the parties, in other words, would it be in the public as well as in the private interest of the parties. To answer this question it is essential to note that remedies are also often offered in cases ultimately ending in a merger prohibition (or notification withdrawal). An open dialogue and mutual will to solve the identified problems might very well also exist in such cases, but the "negotiated" character of merger prohibitions is ultimately negated by the failure of the operation because a ban does not "benefit" the unsuccessful private parties. For this reason,

[29] In truth, only less the 5% of notified concentrations go to Phase II, and remedies are ultimately submitted in about 40% of those cases

[30] It is worth noting that before the 2011 reform, the chance of offering remedies in Phase I could be discussed already before the notification making it easier for firms to comply with the 20 days limit which used to be placed on offering remedies in Phase I; see A.G. Toth (ed.), *The Oxford Encyclopedia of European Community Law*, OUP Oxford 2008, p. 520; E. Kameoka, *Competition Law and Policy…*, op. cit., p. 104.

only conditional clearances based on Article 8(2) MR can be considered a "negotiated" enforcement instrument under the MR[31].

Unsurprisingly, merger prohibitions are avoided in the ECL enforcement practice as they constitute the most severe invasion into the economic freedom of undertakings – a ban on their forthcoming operation. With very few ECL prohibitions up to date, it is fair to say that conditional clearances are the clearly "preferred" enforcement method for problematic concentrations under the MR[32], seeing as they reflect the fact that both sides can "negotiate" a satisfactory solution (where the merger would be allowed to proceed under conditions acceptable to both the public and private side).

2.2. Merger remedies

The key role played by public-private dialogue in the design of conditional clearances is thus easily identifiable. A vivid example of extensive negotiations over structural remedies involving foreign firms[33] can be found in the *Panasonic*/*Sanyo*[34] merger of 2010 which proved particularly interesting as alternative objects of divestiture were ultimately approved as equally capable of resolving the identified competition problem[35]. The "negotiated" character of conditional clearances lends itself very well to deal with the specifics of given circumstance and so, for instance, the *Cisco*/*Tandberg*[36] merger was cleared not subject to "physical" divestments, but to the transfer of intellectual property rights (the "TIP" protocol). While the most recent *Kuraray*/*GLSV*[37] case provides a clear example of partial divestment, Toshiba's commitment

[31] This paper looks exclusively at the "negotiated" aspects of conditional clearances; for a comprehensive analysis of this legal instrument see T. Skoczny, *Zgody szczególne w prawie kontroli koncentracji* [*Special clearances in merger control law*], Warsaw 2013, p. 262 *et seq*.; generally see, e.g., I. Kokkoris, H. Shelanski, *EU Merger Control: A Legal and Economic Analysis*, OUP Oxford 2014; on the notion of remedies see e.g. L. Ortiz Blanco (ed.), *EU Competition Procedure*, OUP, Oxford 2013, p. 770 *et seq*.

[32] See T. Skoczny, *Special clearances…*, op. cit., pp. 39–40.

[33] Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 OJ C267/1 para 33; see also R. Whish, D. Bailey, *Competition law…*, op. cit., p. 884 *et seq.*

[34] EC decisions of 29 September 2009 *Panasonic*/*Sanyo* (COMP/M.5421) (2009) OJ C322/13; see R. Devai, T.P. Maass, D. Magos, R. Thomas, "Merger Case M.5421 Panasonic/Sanyo – Batteries included or 'lost in translation'?" (2010) (1) *Competition Policy Newsletter* 60-63.

[35] *Panasonic*/*Sanyo*, para 223.

[36] EC decision of 29 March 2010 *Cisco*/*Tandberg* (Case COMP/M.5669), available at http://ec.europa.eu/competition/mergers/cases/decisions/M5669_20100329 _20212_ 253140_EN.pdf.

[37] EC decision of 29 April 2014 *Kuraray*/ *GLSV Business* (Case COMP/M.7115), available at http://ec.europa.eu/competition/mergers/cases/decisions/m7115_20140429_20212_3758673_EN.pdf.

to amend its contractual arrangements with other shareholders in one of the *Global Nuclear Fuels* joint ventures[38] is a good example of behavioural remedies imposed in the framework of ECL enforcement to foreign companies.

One of the cases to mention here is the infamous *AOL/Time Warner*[39] merger which is known for the key importance of "negotiations" in the design process of remedies imposed by the EC in order to prevent potential foreclosure of music downloading. Negotiations were fundamental here for the formulation of the clearance which was ultimately made conditional upon AOL cutting its structural and lessening its contractual links with Bertelsmann (a 3rd party) in order to force a separation of the content rights held by AOL/TW and Bertelsmann preventing, in turn, excessive concentration of music rights. AOL/TW was also obliged not to engage in proprietary formatting of Bertelsmann's music post-merger – a fundamentally behavioural remedy meant to keep the music downloading market open. However, the impact of the public-private negotiations conducted in this case went further, as the parties were made aware that they would also have to give up Time Warner's parallel acquisition of EMI. In a move that avoided a merger prohibition, and thus saved considerable resources on both sides, the notification of the *Time Warner/EMI* merger was thus withdrawn in light of the EC's objection to excessive market concentration.

The *AOL/TW* merger marks the first "digital music" case in Europe. It shows the fears of the EC that excessive concentration on the side of global music companies could foreclose the emerging downloading market. Keeping the music market competitive (5 major labels on the content level) was thus seen as an effective remedy against market power spill-over into the downloading market. What followed were the greatly contested clearance of the *Sony/BMG* joint venture[40] and the very detailed conditional clearance of

[38] EC decision of 19 September 2006 *Toshiba/Westinghouse* (Case COMP/M.4153) (2007) OJ C10/1.

[39] The AOL/TW merger is a good example of extensive structural and behavioural remedies being imposed in order to counteract the perceived threat to competition posed by the operation whereby AOL was obliged to, for instance, loosen its contractual links with Bertelsmann (not a party to the operation); the parties were also banned from formatting their music in a proprietary manner to prevent "mass adoption of digital download delivery standards", see point 55 of the EC decision of 28 April 2000 *AOL/Time Warner* (COMP/M.1845), available at http://ec.europa.eu/competition/mergers/cases/decisions/m1845_en.pdf. Note, a Time Warner/EMI merger had also been notified but had to be abandoned in order for the AOL/TW concentration to be cleared see *Time Warner/EMI* (Case COMP/M.1852) (2000) OJ 180/06.

[40] EC decision of 19 July 2004 in *Sony/BMG* joint venture (COMP/M.3333), available at http://ec.europa.eu/competition/mergers/cases/decisions/m3333_20040719_590_en.pdf. The joint venture was first approved by the EC in 2004 but then appealed by IMPALA and ultimately annulled by the CFI on 13 July 2006 (T-464/04) ECR 2006 II-2289 which found manifest errors on the side of the EC. The case was later subject to an exceptionally detailed

Universal/BMG Music Publishing[41]. The latter is noteworthy primarily because of the extensive use of questionnaires sent to a multitude of 3rd parties in order to seek their input[42].

The consolidation process culminated with the 2012 conditional clearances of Sony's acquisition of EMI's publishing business[43] and Universal's acquisition of EMI's recording business[44]. Permitting the combination of 2 out of 4 remaining majors would surely result in unilateral negative effects on competition (increase market concentration). Yet the possibility of public-private dialogue allowed the EC and the companies involved to identify at least some of the problems faced by the music industry overall, and EMI in particular. Clearing the operation was thus "necessary" but excessive foreclosure had to be avoided. In order to do so, both of the conditional clearances are characterised by very detailed divestment lists[45]. Not without relevance was also the special social importance of music, which shaped the obligation to sell the identified assets to a "professional" music entity, rather than an external body which did not have the expertise to properly utilise and protect the assets (such as an investment fund for instance)[46]. Both decisions also contained a variety of behavioural remedies that responded to 3rd party concerns such as the prohibition to re-sign EMI's divested artists or its obligation to licence its recording to "Now this is what I call music" for 10 years after the merger. "Negotiated" instruments of ECL enforcement have thus proven instrumental in supervising the evolution of the global music market while still allowing a decrease in the number of major labels

economic re-assessment by the EC focusing on coordinated effects but the joint venture was once again cleared on 03 October 2007; available at http://ec.europa.eu/competition/mergers/cases/decisions/m3333_20071003_590_en.pdf.

[41] EC decision of 22 May 2007 *Universal/BMG Music Publishing* (COMP/M.4404), available at http://ec.europa.eu/competition/mergers/cases/decisions/m4404_20070522_20600_en.pdf.

[42] Separate questionnaires were sent to authors, competitors (other majors), competitors (independents), customers, collecting societies etc. The EC market tested the 1st and 2nd remedy package and only approved the 3rd (final) offer; *Universal/BMG* paras 394,406, 411.

[43] EC decision of 19 April 2012 *Sony/Mubadala Development/EMI Music Publishing (*COMP/M.6459), available at http://ec.europa.eu/competition/mergers/cases/decisions/m6459_20120419_20212_ 2499936_ EN.pdf.

[44] EC decision of 21 September 2012 *Universal/EMI* (COMP/M.6458), available at http://ec.europa.eu/competition/mergers/cases/decisions/m6458_20120921_20600_3188150_EN.pdf.

[45] Listing individual Artists such as Andrea Bocelli or Ozzy Osbourne; see *Sony/EMI* pp. 96–117, David Guetta or Pink Floyd; see *Universal/EMI* p. 398.

[46] The Purchaser must have "…proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors"; see *Sony/EMI* para 90.

from 5 to 3[47] in a little over a decade, on terms acceptable to both sides and addressing at least some of the concerns of 3rd parties.

In conclusion it is worth noting two other aspects of the "negotiated" nature of conditional clearances, which also largely applies to commitments decisions and leniency and the settlement procedure. The aforementioned public private dialogue is not limited to the enforcement agency and the merging companies. Equally important is the detailed input sought from interested 3rd parties within the market test procedure[48]. In fact, not only are other stakeholders consulted on their views concerning the likely effects of the concentration itself, they are also extensively consulted on the appropriateness of the proposed remedies. Moreover, many large mergers have such wide-spread consequences that international cooperation between enforcement agencies is crucial to the success of the pre-emptive control process. The Panasonic/Sanyo merger proved just that, where the EC cooperated with a number of foreign competition agencies including the US and Japanese authorities[49], in particular as far as the coordination of effective remedies was concerned. Indeed, wide-spread international cooperation is also being increasingly employed with East Asian authorities[50]. Commissioner Almunia estimated recently that the EC cooperates with external enforcement agencies in "30% of unilateral conduct cases, about half of its major merger investigations, and 60% of cartel decisions"[51].

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[47] Three major global music labels: [French] Universal (including EMI music recording business; part of the Vivendi group), [Japanese] Sony (comprising Bertelsmann and EMI music publishing business) and [American] Warner.

[48] Point 35 Preamble MR.

[49] Based on the framework provided by the Agreement Concerning Cooperation on Anti-competitive Activities was signed in 2003 between the EU and Japan.

[50] EC decision of 26 November 2013 *Life Technologies/Thermo Fisher* (COMP/M.6944), available at http://ec.europa.eu/competition/mergers/cases/decisions/m6944_20131126_20212_3661859_EN.pdf which was assessed by most key competition law jurisdictions including South Korea and Japan. Similarly for Libor, Euribor and car parts cartels.

[51] J. Almunia, "Keeping the global playing field level", speech Marrakech 23 April 2014, available at http://europa.eu/rapid/press-release_SPEECH-14-332_en.htm; see also P. Lowe "International Cooperation between competition agencies: Achievements and challenges", speech Seoul 05 September 2006, who spoke of the goals to be achieved – which are now largely being implemented, available at http://ec.europa.eu/competition/speeches/text/sp2005_021_en.pdf.

3. Commitments decisions

3.1. Origin and characteristics of commitments decisions

While conditional merger clearances were not greatly affected by the ECL reform of 2004[52], the new framework brought with it the elimination of the EU individual exemption procedure and the formal introduction of commitments decisions (based on Article 9 Regulation 1/2003)[53]. The key feature of this new enforcement instrument[54] is that the EC imposes with its decision binding commitments on the scrutinised undertaking without however establishing that the addressee had actually committed an ECL violation and without imposing a fine.

By contrast, infringement decisions based now on Article 7 Regulation 1/2003 definitely establish that a violation occurred (a fact which can be overturned in judicial review) and contain a cease & desist order if the infringement continues. Infringement decisions usually also impose a fine (albeit they do not have to as shown by the 2014 Motorola decision) and may contain conduct remedies (behavioural conditions/obligations meant to protect competition). What the two instruments do have in common is that they intend to put an end to a specific ECL infringement. However, while the role of commitments decisions is primarily to facilitate accurate pro-competitive changes, infringement decisions have a mostly penal/deterrent and precedence setting function. In fulfilling its role, commitments decisions are, without a doubt, the key negotiated instrument of ECL enforcement right

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[52] On relevant procedural changes affecting conditional clearances/remedies see L. Ortiz Blanco (ed.), *EU Competition…*, op. cit. pp. 770–772.

[53] For an early take on the introduction of commitments decisions see J. Temple-Lang, "Commitment Decisions and Settlement With Antitrust Authorities and Private Parties Under European Antitrust Law" [in:] *International Antitrust Law & Policy: Fordham Corporate Law 2005* where the word "settlement" is used in a similar manner to what is here referred to as negotiations (in light of the fact that a separate "settlement" procedure now exists in the EU). For a general overview of commitments decisions see, e.g., L. Ortiz Blanco (ed.), *EU Competition…*, op. cit. and C. Kerse, N. Khan, *EU Antitrust Procedure*, Sweet & Maxwell 2012.

[54] Before the introduction of commitments decisions, the EC is known to have dealt with many of its antitrust concerns in an informal manner – the popularity of this greatly pragmatic approach, with all its advantages and disadvantages, largely explains the introduction of formal commitments decisions. Interestingly, the use of informal case resolutions continued even after 2004 as illustrated by Apple which made "voluntary adjustments" to its iTunes pricing policy; see "Antitrust: European Commission welcomes Apple's announcement to equalise prices for music downloads from iTunes in Europe" Press Release 09 January 2008 http://europa.eu/rapid/press-release_IP-08-22_en.htm. Generally on "voluntary adjustments" see L. Ortiz Blanco (ed.), *EU Competition…*, op. cit., p. 571.

now – in the words of the EC itself – they "allow for the quicker resolution of competition concerns on a more cooperative basis"[55].

Commitments decisions have their roots in other ECL enforcement instruments. An Article 9 Regulation 1/2003 procedure starts similarly to an infringement case (based on Article 7) in that the authority comes to the preliminary conclusion that a violation of ECL might have occurred. At this point, a commitments procedure resembles the past approach to individual exemptions[56] where the public and private side negotiate a workable solution to the identified problems. Experiences accumulated with conditional merger clearances are also relevant. Although most commitments turn out to be behavioural in nature, but Article 9 "decisions have allowed for more structural remedies to be adopted in anti-trust cases. As a result, there is a form of convergence between remedies in anti-trust cases and remedies in merger cases"[57].

The use of Article 9 Regulation 1/2003 in cases analogous to those that used to be assessed under the individual exemption procedure (Article 101(3) TFEU) does not raise concerns. In fact, the new instrument seems to have outright taken over the characteristics and pro-active role fulfilled earlier by Article 101(3) procedures. This realisation is best shown by the close similarity between the *UEFA Champions League* case of 2003[58] (individual exemption) and the *Bundesliga* case of 2005[59] (notified under the old procedure but ultimately closed as the 1st ever decision based on Article 9 Regulation 1/2003)[60]. Both of these decisions ultimately enable a football association's joint selling of media rights scheme under a set of specific conditions and obligations. Yet the scope of the applicability of Article 9 is far wider than that of individual exemption procedures, and its applicability to more severe

[55] COM(2014) 453 Communication from the Commission to the European Parliament and the Council Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives para 21(hereafter: Communication on Regulation 1/2003).

[56] Still, while Whish/Bailey admit that there is certain resemblance between commitments decisions and individual exemption decisions, they nevertheless state they are conceptually different because while the former close cases without any definite findings, the latter did established the inapplicability of Article 101(1) because of the fulfilment of Article 101(3) criteria; see R. Whish, D. Bailey, *Competition Law*…, op. cit., p. 168.

[57] Staff Document on Regulation 1/2003 para 188.

[58] EC decision of 23 July 2003 *Joint selling of the commercial rights of the UEFA Champions League* (COMP/C.2-37.398), OJ L 291, 08/11/2003, pp. 25–55.

[59] EC decision of 19 January 2005 *Joint selling of the media rights to the German Bundesliga* (COMP/C-2/37.214), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/37214/37214_90_1.pdf.

[60] Followed also by EC decision of 23 March 2006 *Join selling of the football right to the FA Premier League* (COMP/C-2/38.173), available at http://ec.europa.eu/competition/antitrust /cases/dec_docs/38173/38173_134_9.pdf.

multilateral restraints is not as clear. This issue is well illustrated by the mixed-origin *BA/AA/Iberia* case[61] for instance. The EC's decision not to end the horizontal joint venture, despite its extensive market consequences, and to accept commitments instead was strongly opposed by Virgin[62].

The new framework extended the possibility of a public-private dialogue in ECL enforcement to potential abuse cases as well. The American beverage giant Coca-Cola became the first recipient of a commitments decision based on Article 102 TFEU in June 2005 concerning its distribution system[63]. Since Article 102 TFEU enforcement was until 2004 largely reactive and repressive, allowing for public-private negotiations in unilateral cases proved very successful indeed. Three times as many commitments decisions (most recently Samsung[64]) have been issued over the last decade than infringement decisions[65] (most recently towards Motorola[66]) in Article 102 TFEU cases. That in itself suggests the growing conviction of the advantages offered by the commitments procedure (even if an infringement procedure offers the benefit of judicial review and thus being cleared). As Competition Commissioner Almunia said: "most companies implicated in anti-competitive practices go for the solution that can best protect their interests and reputation"[67] – and that now often proves to be a commitments procedure.

This observation is illustrated by the two European Microsoft cases – the *Microsoft 2004* infringement decision (among other things, Media Player tying) and the *Microsoft (Tying)* commitments decision from 2009 (Internet Explorer tying)[68]. Although both relate to tying, the attitude and role played in the investigation and decision-making process by Microsoft are fundamentally different. The first case was a firm example of adversarial ECL enforcement

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[61] EC decision of 14 July 2010 *BA/AA/IB* (COMP/39.596), available at http://ec.europa.eu/competition/antitrust/cases/dec_ docs/39596/39596_4342_9.pdf .

[62] Virgin complained about the revenue sharing joint venture see http://ec.europa.eu/competition/antitrust/ cases/dec_docs/39596/39596_4997_5.pdf

[63] EC decision of 22 June 2005 *Coca-Cola* (COMP/A.39.116/B2), available at http://ec.europa.eu/competition/antitrust/ cases/dec_docs/39116/39116_258_4.pdf; incidentally, the case was based on jointly dominance of Coca-Cola and 3 of its bottlers – joint dominance being a particularly difficult issue to prove making the use of a commitments procedure far easier for the Commission than an infringement case, see paras 23-25.

[64] Available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf.

[65] 2004 *PO/Clearstream*; 2005 *Prokent/Tomra*; 2007 *Telefonica*; 2009 *Intel*; 2011 *Telekomunikacja Polska*; 2014 *OPCOM/Romanian Power Exchange*; 2014 *Motorola 2014*.

[66] Available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39985.

[67] J. Almunia, "Remedies, commitments and settlements in antitrust", speech Brussels 08 March 2013, p. 3, available at http://europa.eu/rapid/press-release_SPEECH-13-210_en.htm.

[68] *Microsoft 2004*, *Microsoft (Tying)* and *Microsoft (Tying) FINE*.

– Microsoft was treated as a major offender. The company image suffered greatly, it received a huge fine, and became the first ever subject to conduct remedies under ECL. By contrast, suspected once again of tying in 2008, Microsoft's attitude could not have been more cooperative. It did not negate its practices but immediately offered to design effective commitments which largely considered the input of 3rd parties. The EC decided therefore to approve them in 2009 in light of Microsoft's cooperative attitude and the fact that an effective remedy was found. The entire procedure took an amazing two years with little, if any, harm to the company image. The fact that the second case ended with an Article 9 decision shows both Microsoft's and the EC's will to resolve the identified issue in a more constructive manner.

Incidentally, Microsoft was fined in 2013 for its failure to comply with the 2009 commitments which it not only voluntarily offered, but in fact designed. Microsoft's failure to accurately communicate the importance of the implementation of the commitment has ultimately cost the company 561 mln EUR – a fine that it had originally managed to avoid thanks to the benefits of the commitments procedure. This case unfortunately suggests that for the success of "negotiated" enforcement, it might not be sufficient for the public and private side to cooperate, internal dialogue and strengthening of the competition culture inside the corporate structures might also be necessary. If complying with self-designed remedies proved so difficult for a company as large and experienced as Microsoft, how much more difficult could it prove to be for an East Asian company, for instance, struggling with severe language barriers?

It is worth stressing next that although the legal scope of the Article 9 Regulation 1/2003 procedure is very wide, because it can be applied in both Article 101 and 102 TFEU cases, its practical scope is more limited. According to Regulation 1/2003 itself, the procedure was designed for cases that did not warrant a fine[69] – certainly therefore it was never meant for major violations such as cartels. What about other serious cases however? Microsoft, for instance, received in 2004 a large fine for its abuses, which included tying, so the illegal act clearly warranted a fine. Yet an analogous practice was addressed by a commitments decision in 2009 posing the question, what has changed? It could be argued that the use of Article 9 procedures has since proven the preferred method of ECL enforcement – if the company duly cooperates with the investigation and promptly offers appropriate commitments, the EC is likely to accept them. Indeed, rather than mentioning the necessity of fines, it is now said that "a pre-requisite for engaging in the commitment path is that effective, clear and precise remedies are identified, and effectively offered, by the parties"[70].

[69] Recital 13, Regulation 1/2003.

[70] Staff Document on Regulation 1/2003 para 187.

3.2. Advantages of commitments decisions in Article 102 TFEU cases

So why have commitments decisions proven so successful, outnumbering infringement decisions in all types of cases but cartels? Their advantages are diverse for both the public (EC as the main enforcer) and private side. First of all, they are fundamentally "negotiated" in nature allowing both sides to compensate for their respective information deficiencies. They allow the enforcers to uncover how the market works and allow companies to find out how best to align their practices with ECL requirements. Indeed, commitments decisions can only be formulated in negotiations – refusal to cooperate by the alleged offender, which might firmly oppose the accusations hoping to prove its point before the EC or later in juridical review – automatically precludes the use of Article 9. Considering the three elements mentioned above, the existence of an open dialogue is thus essential (although might not be sufficient) to the success of this procedure. Equally important is the mutual will to solve the identified competition problems, albeit the commitment level of the companies can differ considerably depending on the circumstances.

It is clear that the commitments procedure can be mutually beneficial, for instance, as shown by the *Microsoft (Tying)* investigation, if it considerably shortens the time needed to close a case. The recently closed *Samsung* case also took a mere two years. However, the need to design and market-test remedies (as well as possibly re-design and repeatedly market-test) means that time savings are by no means ensured in an Article 9 Regulation 1/2003 procedure[71]. On the other hand, public interest might be well served because judicial challenges are less likely, a fact which not only saves resources but also ensures faster implementation of the remedial measures. However, commitments decisions have a serious drawback – they neither definitely "clear" a given practice, nor do they formally prove an infringement. Therefore, they provide little, if any, legal certainty for anyone involved or interested in the case. As a result, they might not preclude private enforcement, but they certainly make it far more difficult[72].

The commitments procedure was designed as a more flexible enforcement tool than infringement decisions[73], which retained their adversary and penal

[71] For example, the *Microsoft (Tying)* decision came less than two years since the opening of the proceedings; by contrast, the current Google case opened in 2010 and said to be ready to close in 2014, yet with new changing market circumstances the decision has now been indefinitely postponed.

[72] Article 9 decisions do not facilitate follow-on actions; also, they are usually less detailed than an infringement case and thus offer less information about the practices for private claimants to build their case on.

[73] Incidentally, the Commission recently stressed that infringement decisions are still its most important enforcement tool presumably because of their use in cartels cases; Communication

character. Still, without a truly negotiated enforcement tool for abuse cases, even the use of infringement decisions had to evolve. That realisation is shown by the *Microsoft 2004* decision where the use of positive (prescriptive rather than prohibitive) conduct remedies was meant to respond to competition concerns which could not be elevated by a simple cease and desist order[74]. Among the key advantages of commitments decisions is therefore that the alleged offender can design tailor-made remedies that can address the identified competition problems far more accurately than if they were "imposed" upon it as conduct remedies. If a company designs the remedy itself, it is more likely to consider all business and legal aspects of the case, which will in turn greatly improve its understanding of ECL principles and help identify potential problem areas in its business practices. The company can benefit from being able to consider its own convenience and future plans, issues unlikely to be taken into account by the authorities when designing conduct remedies.

Statistics clearly show that the importance of commitments decisions is growing. Until December 2013, the EC issued a total of 78 Article 7 decisions, 60 of which concerned cartels. This leaves only 18 non-cartel infringement decisions based on Articles 101 and/or 102 TFEU in nearly 10 years – as opposed to 33 commitments decisions issued in the same time[75]. Infringement decisions are currently issued for lack of effective remedies[76], to penalise and deter a particularly grave infringement[77] or to create a precedent[78]. It is interesting to note that some industry sectors seem more likely to benefit from commitments decisions (energy, media and automobile industries) while others were so far only ever subject to infringement decisions (pharmaceuticals and telecoms).

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[74] Commission imposed positive, behavioural conduct remedies on Microsoft in its *Microsoft 2004* decision. Incidentally, despite the availability of Article 9, the Commission issued an infringement decision with conduct remedies in EC decision of 19 December 2007 *MasterCard* (COMP/34.579), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/34579/34579_1889_2.pdf and EC decision of 16 July 2008 *CISAC* (COMP/38.698), available at http://ec.europa.eu/competition/antitrust/cases/ dec_docs/38698/38698_4567_1.pdf; on the respective advantages and disadvantages of Article 7 and Article 9 decisions see A. Italianer, "To commit or not to commit, that is the question", speech Brussels 11 December 2013, available at http://ec.europa.eu/competition/speeches/text/sp2013_11_en.pdf.

[75] Commission Staff Document on Regulation 1/2003 para 184-186.

[76] E.g. TP case where the only "remedy" to the identified problem was to stop the actual violation, EC decision of 22 June 2011 *Telekomunikacja Polska* (COMP/39.525), available at http://ec.europa.eu/competition/ elojade/isef/case_details. cfm?proc_code=1_39525.

[77] E.g. pay to delay in pharmaceuticals see, e.g., Press Release: Antitrust: Commission fines Lundbeck and other pharma companies for delaying market entry of generic medicines (IP/13/563 OF19/06/2013) available at http://europa.eu/rapid/press-release_IP-13-563_en.htm?locale=FR.

[78] E.g. *Motorola 2014*.

3.3. Newest developments: *Motorola 2014* and *Samsung 2014*

Noted in conclusion must be two EC decisions issued simultaneously on 29 April 2014, Motorola's infringement decision and Samsung's commitments decision, that deal with a novel aspect of ECL's interaction with national IPRs laws – the use of injunctions on the basis of standard essential patents (hereafter: SEPs). It is fair to say that the EC used these two cases together to end Europe's mobile phone "patents wars".

The two cases have a lot in common in economic and legal terms and thus their assessments were similar with respect to market definition, dominance and abuse issues[79]. What set them apart was that Motorola's conduct was considered largely historical in nature[80] as it ceased after the merger with Google. Since the issue was considered a serious, but not immediate, threat to competition, Motorola's conduct was dealt with by a detailed infringement decision meant to act as a clear precedent for the entire industry to follow. Indeed, the decision is said to provide "a 'safe harbour' for standard implementers who are willing to take a licence on FRAND terms"[81]. By contrast, and despite the fact that Samsung has long since withdrawn the contested injunction applications, the EC seemed to fear that the Korean giant could re-engage in the contested practices at any time. Hence, it sought to eliminate the concerns it had specifically towards Samsung as quickly and efficiently as possible – by way of tailor-made commitments. Because of the more "immediate" danger posed by Samsung, the decision implements "the 'safe harbour' concept established in the Motorola decision in practical terms"[82].

The Samsung case is the most recent example of the use of "negotiated" instruments of ECL enforcement towards foreign firms acting directly inside the Internal Market, and within the boundaries provided by the legal regimes

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on Regulation 1/2003 para 19; Commission Staff Working Document: Ten Years of Antitrust Enforcement under Regulation 1/2003 *Accompanying the document* Communication from the Commission to the European Parliament and Council Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives{COM(2014) 453} {SWD(2014) 231 (hereafter: Staff Document on Regulation 1/2003) para 184.

[79] They clarified, in essence, that while ECL does not consider the use of injunctions as an abuse in itself, it can become one in exceptional circumstances including the existence of standard setting and the investigated company's commitment to licence its SEPs on FRAND terms.

[80] *Motorola 2014*, para 17.

[81] FRAND means fair, reasonable, and non-discriminatory terms; EC Press Release, "Antitrust decisions on standard essential patents (SEPs) – Motorola Mobility and Samsung Electronics – Frequently asked questions", p. 2, available at http://europa.eu/rapid/press-release_MEMO-14-322_en.htm.

[82] Ibid.

of EU Member States. Interestingly also, the EC decision specifically states that Samsung disagreed with the accusations[83], and yet it still chose to use a negotiated enforcement instrument despite the fact that it could have insisted on pursuing an adversarial procedure and contest the EC decision before the courts. The Samsung case illustrates therefore that negotiated instruments are becoming the preferred method of ECL enforcement not just for the EC but also for companies.

Incidentally, and despite the fact that fines are almost always imposed in Article 7 decisions, Motorola escaped without a penalty due to the novel nature of the contested legal problem. It is an issue which lies at the intersection of ECL enforcement and IPRs laws, which remain firmly in the ambit of individual Member States and have thus generated divergent approaches from national judiciaries. The Motorola decision shows therefore the flexibility, or even an evolution of Article 7 cases as well – it addresses the need to create a clear legal precedent without pursuing its traditionally penal objectives. One has to wonder therefore, can "negotiations" become part of infringement procedures also if the latter are not bound by the need to punish the offender, but are mostly driven by the need to provide legal clarity in the ever more complex global economy? Are we seeing another step towards an even more "negotiated" enforcement of ECL?

4. Leniency and the settlement procedure

4.1. "Negotiated" aspects of leniency and settlement

Europe's first leniency was introduced in 1996, replaced in 2002 and most recently renewed in 2006[84]. With numerous applications per year[85], the procedure has proven immensely successful; most cartel investigations

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[83] "Samsung disagrees with the Commission's assessment set out in the Statement of Objections. It nevertheless has offered commitments under Article 9(1) of Regulation (EC) No 1/2003 to meet the concerns expressed to it by the Commission". *Samsung 2014*, para 6.

[84] Commission Notice on Immunity from fines and reduction of fines in cartel cases OJ C 298, 08 December 2006, pp. 17–22; replacing 2002 Commission notice on immunity from fines and reduction of fines in cartel cases OJ C 45, 19 February 2002, pp. 3–5; replacing 1996 Commission Notice on the non-imposition or reduction of fines in cartel cases OJ C 207, 18 July 1996 pp. 4–6; This paper focuses on the "negotiated" aspect of leniency and settlement; generally on leniency see, e.g. T. Calvani, T.H. Calvani, "Cartel sanctions and deterrence", (2011) 56(2) *Antitrust Bulletin*; N.H. Miller, "Strategic Leniency and cartel enforcement", (2009) 99 *American Economic review*.

[85] Average 4 per month; J. Almunia, "Fighting against cartels: A priority for the present and for the future", speech Brussels 03 April 2014, p. 3, available at http://europa.eu/rapid/press-release_SPEECH-14-281_en.htm.

now start with a leniency application[86]. The negotiated nature of leniency as a valid ECL enforcement instrument is perhaps not as intuitively recognisable as that of conditional merger clearances or commitments decisions, but it exists nevertheless. The basic assumption behind leniency is that immunity from fines and sizable fine reductions are offered to whistle-blowers – cartel participants that inform the authorities of the existence of a cartel and provide evidence of its practices. Despite their cooperation, leniency applicants receive an infringement decision with all its other effects such as damage to the corporate image and the possibility of follow on private claims.

The leniency procedure is firmly based on a public-private dialogue – it is the essence of leniency for companies to approach the authorities and try to "negotiate" the best solution possible in the circumstances. Commissioner Almunia noted in 2011 that the policy change whereby the elements for the calculation of the fine will be indicated already in the Statement of Objections, "will open a channel for dialogue with the parties and will give them a better idea, at an early stage, of the size of the fine that may be imposed on them"[87].

It is also clear that leniency offers major mutual gains for both the public and the private side. Discovery is greatly improved for enforcers and advantages in procuring evidence of collusive wrong-doings are huge, considering that much of it is hand-delivered by the leniency applicants. The gain for the parties is mostly re-active, monetary damage control – eliminating, or at least reducing, the fine they must pay for their wrongdoing. Whistle-blowing can, however, also be as much about escaping fines, as it is about staying ahead of competitors or even getting them into trouble. A cartel member might therefore approach the authorities when the cartel reaches the end of its usefulness[88] and/or if a "new" business strategy would benefit from the misfortune of other cartels members.

Nevertheless, the "negotiated" character of leniency is only partial because, unlike in mergers or commitments cases, leniency applicants usually do not have a supreme future goal worth negotiating over (such as the approval of a merger or escaping an infringement decision). For this reason, their will to solve the identified competition problem (cartel) is either non-existent, or at least far less pronounced than in the two above-mentioned enforcement instruments. In most cases, enforcers can expect that the level of cooperation of leniency applicants will only be sufficient to achieve their immediate objective – immunity from fines or a fine reduction associated with the scrutinised cartel.

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[86] A. Italianer, "European competition policy…", op. cit., p. 9.

[87] J. Almunia "Cartels: the priority in competition enforcement", speech Berlin 14/04/11, p. 3, available at http://europa.eu/rapid/press-release_SPEECH-11-268_en.htm?locale=en.

[88] E.g. EC decision of 13 April 2011 *Consumer detergents* (COMP/39579), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39579/39579_2633_5.pdf.

It will generally amount to no more than that which is necessary, seeing as being too open with the authorities might very well result in the discovery of other ECL infringements which the applicant might not want disclosed.

Additional incentives were created by the introduction of settlement in 2008[89]. Its primary purpose is to shorten and simplify the administrative procedure to the benefit of both the public and the private side. To do so, parties must admit to the violation and assume responsibility for it. In return, they receive a 10% fine reduction for parties willing to settle the dispute, even if they have already received a fine reduction thanks to leniency. Furthermore, the resulting infringement decision is not only reached more quickly than a normal cartel case[90], the decision itself is also less detailed, limiting the basis for follow on claims. Judicial review is also far less likely as the addressees have admitted their involvement in the infringement and agreed to the terms of the decision[91]. The use of settlement visibly strengthens therefore the negotiated character of leniency as it provides the parties with the opportunity to further limit the adversarial aspects of cartel investigations.

The settlement procedure is proving successful – the EC is hoping to use it in about half of its cartel cases[92]. Yet although the recent *Steel Abrasive* cartel represents the 13th settlement decision since 2010, 4 of them were hybrid cases where some cartel members decided to settle while others did not. Considering that the majority of cartels are not being settled at all, this shows that there will always be some companies which do not wish to "negotiate" or, even more

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[89] Commission Regulation (EC) No. 622/2008 of 30/06/08 amending Regulation (EC) No. 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ L 171, 01 July 2008, pp. 3–5; Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases, OJ C 167, 02 July 2008, pp. 1–6; generally on settlement see, e.g. R. Gamble, "'Speaking (formally) with the enemy' – cartel settlements evolve" (2011) 32(9) *ECLR*; U. Soltesz, Von Kockritz, "EU cartel settlement in practice – the future of EU cartel law enforcement?" (2011) 32(5) *ECLR*; M. Motta, "Settlement in cartel cases" [in:] C.D. Ehlerman, M. Marquis (eds) *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law*, Oxford 2009; K. Mehta, M.L.T. Centella, "Settlement procedure in EU cartel cases" (2008) available at http://professorgeradin.blogs.com/professor_geradins_weblog/files/settlements_paper_mehta_and_tierno.

[90] Just over 3 years rather than usual just over 5 years see A. Italianer, "European competition policy…", op. cit., p. 15; note that the 3rd settlement in the *Consumer Detergent* case was reached in only a year and a half!

[91] Societe Generale has challenged its settlement decision in the *Euribor* cartel (EC decision of 04 December 2013, Case 39914) with respect to the method of calculating its fine; available at http://www.bloomberg.com/news/2014-02-19/socgen-appeals-eu-calculation-of-613-5-million-euribor-fine.html.

[92] J. Almunia, "Remedies, commitments…", op. cit., p. 6; J. Almunia, "Fighting against…", op. cit., p. 3.

likely, to admit to having committed a competition law violation. Interestingly, the most recent *Smart Card Chip* cartel shows that open settlement discussions can also falter if companies fail to cooperate to the expected standard.

4.2. East-Asian cartels

The introduction of leniency in Europe has generated an almost instant effect on the discovery rates of cartels including those involving East Asian companies, Japanese in particular. In 1999, the EC fined four Japanese firms for the first time for their involvement in the *Seamless Steel Tubes* cartel[93]. Most likely due to its early origin, this is the only East Asian case to date where none of the companies applied for leniency. Yet the advantages offered by the programme were soon recognised. In the *Graphite Electrode* cartel[94] of 2001, Showa Denko was the first to approach the EC and received the largest fine reduction awarded until then (70%). The infamous *Vitamins* cartel[95] brought with it Europe's first immunity (Aventis) as well as fine reductions for the three scrutinised Japanese companies, including Takeda. It only took another year and four more related cases[96] for the very same Takeda to use its experiences and gain immunity for its role in the uncovering of the *Food Flavour Enhancers* cartel, which crucially also involved two South Korean companies. Once again, the usefulness of leniency was quickly recognised by Korea's Daesang (50% fine reduction).

The *Gas Insulated Switchgear* cartel[97] of 2007 proved of key importance in this context. East Asian companies infringed ECL primarily though market sharing cartels whereby they stayed out of the Internal Market in return for European companies staying out of Asia. The GIS decision was the first to impose a fine on East Asian companies even though they had nearly no EEA turnover in the cartelised products[98]. The GIS case is thus crucial because it clarifies, as confirmed by the General Court[99], that ECL cartel fines can be imposed despite the lack on an actual presence on the Internal Market (if the

[93] EC decision of 08 December 1999 *Seamless Steel Tubes* (IV/E-1/35.860-B), OJ 2003 L 140, p. 1.

[94] EC decision of 18 July 2001 *Graphite Electrode* (COMP/E-1/36.490) (2002) OJ L 100/1.

[95] EC decision of 21 November 2001 *Vitamins* (COMP/37512) (2003) OJ L6/1.

[96] *Carbonless Paper*; *Sodium Gluconate*; *Animal Feed*; *Speciality Graphites*.

[97] EC decision of 24 January 2007 *Gas Insulated Switchgear* (COMP/F/38.899) (2008) OJ C5/7.

[98] Another 4 Japanese companies were fined (with some reductions) in the *Sorbates* cartel of 2003.

[99] GC judgment of 12 July 2011 *Toshiba v. Commission* T-113/07 ECR 2011 II-3989.

latter is caused by a market sharing cartel). The *Videotape Producers*[100] cartel is worth noting as it shows that the EC can, and will act in an adversarial manner in certain circumstances for instance to send a strong message to foreign companies concerning their duty to comply with ECL. Here, Sony's fine was increased by 30% for, among other things, obstructing an EC inspection.

The *DRAM* [101] (Dynamic Random Access Memory) cartel of 2010 stands out from the many cartels that followed[102] as ECL's first settlement – a procedure which proved very popular with East Asian companies[103]. The DRAM decision also marks the beginning of a set of high-tech cases which brought with them the notable expansion of the subjects of ECL cartel cases to include not just Japanese but also Korean and Taiwanese companies. Following the Japanese example, other East Asian companies soon became aware of the benefits offered by EU leniency. In the *LCD* (Liquid Crystal Display) cartel[104], leniency was used by both the Korean (Samsung received immunity; LG received a 50% fine reduction) and two of the Taiwanese companies including Chunghwa. With this new experience, Chunghwa successfully applied for immunity in the 2012 *CRT* (TV and computer monitor tubes) cartel[105], leaving Samsung behind, albeit the giant still managed to receive a sizable 40% reduction. By contrast, with no leniency at all, LG Electronics received in this case one of the EU's largest individual cartel fines so far (nearly 700 mln EUR)[106].

Aside from electronic goods, East Asia is also well known for its car manufacturing business. After opening a major investigation in this field, the

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[100] EC decision of 20 November 2007 *Professional Videotape* (COMP/38.432) para 219-227, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38432/38432_526_5.pdf.

[101] Although both Korean companies received fine reductions under the leniency programme, as did some of the Japanese participants, ultimately it was the US-base Micron that managed to receive immunity followed by the second largest fine reduction granted to the German Infineon. Although it was again Lufthansa that got immunity in the Air Cargo cartel, Japan Air managed to get the second biggest reduction of 25%, EC decision of 09 November 2010 *AIRFREIGHT* (AT.39258), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39258/39258_ 6547_3.pdf.

[102] 2007 *Flat Glass;* 2007 *Chloroprene rubber*, 2008 *Synthetic rubber*; 2009 Marine Hoses; 2009 Power Transformers.

[103] Panasonic got 40% off for its participation in the *Refrigerator Compressors* cartel settlement of 2011, EC decision of 07 December 2011 *Refrigerator Compressors* (COMP 39.600), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39600/39600_2147_3.pdf.

[104] EC decision of 08 December 2010 *LCD – Liquid Crystal Displays (LCD)* (COMP/39.309), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39309/39309_3643_4.pdf.

[105] EC decision of 05 December 2012 *TV and computer monitor tubes* (COMP/39.437) OJ 2013/C 303/07.

[106] Incidentally, CRT is the only case so far with no successful leniency application from any of the Japanese participants, which included Panasonic and Toshiba, both of which have had experiences with EU leniency before.

EC has issued three car-parts decisions already[107], unsurprisingly two of which focus on East Asia – the 2013 *Wire Harness* cartel and the 2014 *Car and Truck Bearing* cartel[108]. Japanese companies used leniency in both cases, gaining immunity from fines (e.g. Sumitomo) and fine reductions. Moreover, both cases were settled showing that Japanese companies are visibly aware of the benefits offered by the new procedure. Incidentally, Sumitomo was among the two Asian companies that managed to get a fine reduction in the 2014 *High Voltage Power Cables* cartel[109] (with 6 EU, 3 Japanese and 2 Korean companies) suggesting once again that past experiences with leniency facilitate its successful use in the future[110].

With cartels becoming more international, but also cartel discovery improving notably world-wide, it is not completely surprising to see such extensive enforcement of ECL against East Asian companies. In truth, Japan alone is the EU's seventh largest export destination and the EU is Japan's third[111]. But the noticeably large proportion of EU cartel cases with a Japanese focus might actually reflect the fact that cartels were encouraged in Japan after the war to boost the national economy. That could have made Japanese companies culturally accustomed to their existence and use. It was thus not until EU leniency generated the first European cartel cases that Japanese companies became aware of the limitation placed upon them by ECL in light of its extra-territorial applicability. It then took several more years for them to fully acknowledge ECL's fight against global market sharing. East Asian companies were however very quick to recognise the advantages offered by the "negotiated" features of EU leniency, and more recently, settlement, and soon became proficient in using these enforcement tools to their advantage. It is worth noting in conclusion that the above statistics also suggest that a company that has cooperated with the authority with respect to one of its

[107] The *Flexible Foam* cartel had no Asian participants; EC decision of 29 January 2014 *Polyurethane foam* (AT.39801), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/ 39801/39801_2457_8.pdf.

[108] EC decision of 10 July 2013 *Automotive Wire Harnesses* (AT.39748*),* available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39748/39748_3865_3.pdf; EC decision of 19 March 2014 *Bearings* (COMP/39922), available at http://ec.europa.eu/competition/antitrust/cases/ dec_docs/39922/39922_2067_2.pdf.

[109] Analogue to the GIS cartel and Fining Guidelines point 18, the Commission imposed fines despite the Asian parities absence from the Internal Market by attributing to them sales according to respective share of sales in the nearly global market.

[110] The most recent *Smart Card Chips* cartel decision was another example of a successful use of leniency by East Asian companies seeing as Hitachi and Mitsubishi's joint venture received immunity. Samsung has once again received a fine reduction (30%). It is, however, also an example of an unsuccessful settlement – the procedure was discontinued in 2012, see EC decision of 03 September 2014 *Smart Card Chips* (COMP/39574) not yet reported.

[111] A. Italianer, "European competition policy…", op. cit.

infringements is likely to approach the EC again, and be more successful next time. This realisation suggests that "negotiated" enforcement instruments might have an additional key advantage for the public side – they exercise a positive impact on global ECL compliance by helping companies identify their infringements as well as giving them a clear incentive to cease them. This might apply especially well to smaller foreign firms which might still not know of the restrictions placed upon their activities by ECL.

III. Conclusions

The enforcement of European Competition Law by the European Commission towards foreign firms seems to largely centre on the element of public-private "negotiations". The EC engages in extensive talks with those that "might have infringed" ECL and those that wish to implement a problematic concentration (via commitments decisions & conditional merger clearances) with the view to allow them to continue their business activities but in a pro-competitive manner. Dialogue is particularly important when companies design, and often repeatedly re-design, remedies and commitments, which can also be shaped by 3rd party input. The EC encourages companies to tell on their co-conspirators, giving them the chance to escape or reduce their fines if they duly cooperate in a cartel investigation (leniency). Fine reductions are simultaneously offered to those that clearly admit to an infringement and are willing to settle (settlement).

Rather than infringement decisions or merger prohibitions, the EC seems to favour "negotiated" enforcement instruments which can offer faster, more accurate solutions to identified competition problems, which greatly improve discovery of ECL infringements world-wide, and which save administrative resources. Yet the success of "negotiated" ECL enforcement instruments could only have occurred thanks to the positive response it received from global market players. Businesses, clearly including foreign companies, be it American giants or East Asian high tech firms, have recognised the benefits of non-adversarial enforcement methods: lesser or even no fines, shorter and thus cheaper proceedings, less damage to the company image, less disclosure of company information, and avoiding a declaration that an infringement occurred, which can facilitate private damages claims.

In truth, however, "negotiated" enforcements have significant drawbacks also[112]. These include the lack of penalty and corporate stigma for likely

[112] For a theoretical analysis of the concept of "negotiated" enforcement of competition rules, including in particular a comparison between the classic and the negotiated enforcement

offenders and arguably less of a deterrent effect for other market players. They provide also less legal security – while they clearly contribute to the clarification of overall market conditions, they fail to specify how, and according to which criteria, the EC would have assessed the given conduct. As such, commitments decisions do not contribute to the development of legal "precedents" and lower the transparency of the EC's enforcement practice on the whole. Nevertheless, the long list of advantages of public private dialogue for both the enforcer (here, the EC) and the investigated entities makes it unsurprising that the "negotiated" approach has become such a major part of the EC's enforcement practice, also, or maybe in particular, towards foreign firms.

approach, see T. Skoczny, "Negotiated enforcement of competition law – theoretical concept", forthcoming in *YARS* 2015.

Enforcement of Competition Rules in the Association Agreement between the EU & Ukraine

by

Kseniya Smyrnova*

CONTENTS

Abstract

This article analyzes the legal preconditions for the harmonization of Ukrainian legislation in the field of competition law with the law of the European Union. Due to its evolution, it is noticeable that competition law has been, and remains, a priority in the harmonization process of Ukrainian legislation. This paper provides a detailed analysis of competition related provisions of the Association Agreement. The latter contains norms on the obligatory approximation of substantial competition law provisions and sets out the necessity to transform their enforcement system. Special attention is paid to the analysis of state aid which currently remains unregulated in Ukraine.

Résumé

Cet article analyse les conditions juridiques préalables rélatives à l'harmonisation de la législation ukrainienne dans le domaine du droit de la concurrence avec le droit

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de l'Union européenne. En raison de son évolution, il est à noter que le droit de la concurrence a été, et demeure, une priorité dans le processus d'harmonisation de la législation ukrainienne. Cet article fournit une analyse détaillée des dispositions relatives à la concurrence de l'Accord d'association. Ce dernier contient des normes concernant le rapprochement obligatoire des dispositions substantielles de droit de la concurrence et énonce la nécessité de transformer leur système d'application. Une attention particulière est accordée à l'analyse des aides d'État, actuellement pas réglementées en Ukraine.

Classifications and key words: competition law; European Union; Ukraine; Association Agreement; Antimonopoly Committee of Ukraine; harmonization; state aid; transparency

1. Preliminary process of harmonization of Ukrainian competition law

After Ukraine declared its independence and embarked on democratic reforms in 1991, a transition is taking place from a centrally planned economy to economic liberalization, which leads to a transformation of its legal rules on the protection of competition.

As comparing with other countries with competition protection systems, UNCTAD noted that Ukraine has begun the process of competition law adoption and the formation of its implementation policy in very difficult initial conditions. Economic and political circumstances in Ukraine, as well as in other former Soviet republics, have been particularly tough. At the same time, Ukraine adopted its competition law system at the beginning of a period of rapid growth in a number of jurisdictions with competition laws throughout the world. As UNCTAD experts stressed, the journey towards an effective competition policy system in Ukraine has been arduous[1]. In the early 2000s, various market reforms and de-monopolization measures were taken, and nevertheless the economy of Ukraine still features exceptionally high levels of concentration unrelated to superior economic performance.

Nevertheless, the process of harmonization of national legislation with European law has been, and remains, one of the key areas of cooperation between Ukraine and the EU. Harmonization defines the conditions for further deepening of economic and sectorial cooperation and creates legal preconditions for the next stage of European economic integration.

[1] See Voluntary Peer Review of Competition Law and Policy: Ukraine Overview, UNCTAD, 2013 (available at http://unctad.org/en/PublicationsLibrary/ditcclp2013d3_overview_en.pdf).

Nevertheless, the rules contained in the Partnership & Cooperation Agreement[2] (hereafter: PCA) signed in 1994, have a "soft law" character – the PCA did not place Ukraine under a strict obligation to harmonize its legislation. At the same time however, the special Article 51 PCA stressed that competition was one of the priorities of harmonization.

An essential condition for the functioning of a market economy is its effective legal regulation. Legal rules on competition are one of the fundamental principles of a free market economy. So competition law seems to be the core element of a free market economy, especially considering the perspective of a free trade area between Ukraine and the EU.

Due to Ukraine's integration policy, its accession to the WTO in 2008[3], entering into force of the Free Trade Agreement (hereafter: FTA) with EFTA countries in 2012[4], signing of the Association Agreement[5] with the EU (its political part was signed in March 2014, the entire Agreement was signed on 27 June 2014, and it was, simultaneous, ratified by European Parliament and Ukrainian parliament on 16 September 2014), the review and analysis of EU's competition policy is becoming increasingly important for Ukraine. Almost all these trade relations lead to the need to enforce appropriate competition transparency mechanisms. By the way, the FTA with EFTA countries also consists of strict rules on competition that aim to ensure that trade liberalization under the agreement is not hampered by practices of enterprises that may prevent, restrict or distort competition[6].

The harmonization process of Ukrainian competition law with that of the EU started in the beginning of 2000s as illustrated by the promulgation of a new Law on the Protection of Economic Competition[7] which entered into force in 2002 and was designed in light of the main principles of EU competition law. Since then, this Law was repeatedly amended to improve the national

[2] The Partnership and Cooperation Agreement between EC & its Member States & Ukraine was concluded in 1994 and entered into force in March 1998. The PCA formed the legal basis of EU-Ukraine relations, providing for cooperation in a wide range of areas. It was concluded for the term of 10 years but Art.101 PCA provided for the process of its automatic prolongation in case of the absence of a denunciation notice.

[3] Law of Ukraine of 10 April 2008 No 250-VI "On ratification of Protocol of Ukraine's accession to the WTO" (Verhovna Rada Bulletin 2008, No. 23, item 213).

[4] Law of Ukraine of 07 December 2011 No 4091-VI "On ratification of Free Trade Agreement between Ukraine and Member States of EFTA" (Official Journal of Ukraine 13.01.2012, No. 1, item 9).

[5] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (OJ [2014] L 161).

[6] Art.7 FTA with EFTA covers incompatible anticompetitive practices that shall also apply to the activities of public undertakings.

[7] Law of Ukraine of 11 January 2001 No 2210-III "On the Protection of Economic Competition" (Official Journal of Ukraine 2001, No. 7, item 51).

system for the monitoring of competition law compliance. Incidentally, almost all of the subsequent changes to this Law, as well as other acts issued by the Ukrainian competition authority – the Antimonopoly Committee of Ukraine[8] (hereafter: AMCU) were introduced because of EU competition law. This realisation is best illustrated by the Act on Immunity from Fines[9] which was adopted in Ukraine in 2012 under the general framework norm[10] of the Law on the Protection of Economic Competition. Still, Ukrainian leniency provides protection solely to the first applicant, unlike most other leniency programmes. As such, it spreads even greater uncertainty among the members of a cartel, since only one undertaking has the possibility to cooperate and to receive immunity from fines. By the way, since the issuance of the new Ukrainian leniency act, there have been no leniency applications.

2. Association Agreement between the EU & Ukraine: a new step forward

The formal termination of the PCA in 2008 led to the necessity of concluding a new cooperation agreement between its parties. Discussions on what was to become the new and enhanced agreement between Ukraine and the European Union were determined during the EU-Ukraine Paris Summit[11] where it was decided that the PCA should be followed by an association agreement. On 19 December 2011, at a summit in Kiev, Ukrainian and EU representatives

[8] The AMCU was founded in November 1993 pursuant to the AMCU Law. By legislation adopted in 2011, the AMCU became a central executive body with a special status. The AMCU is currently governed by a Chair and eight State Commissioners. The AMCU Chair is appointed by the President of Ukraine with the approval of the Parliament (Verkhovna Rada) for a term of seven years (Art. 9 of the AMCU Law). The President may dismiss the Chair with the Verkhovna Rada's approval. State Commissioners and First Deputy and Deputy-Chair are appointed by the President upon submission of the Prime Minister based on the AMCU Chair's proposals. The AMCU has 27 territorial offices with individual enforcement competences. The Chair has the power to appoint and dismiss the heads of these bodies. The OECD Peer Review on Ukraine recommended in 2008 that the State provide adequate resources to assure that the AMCU can maintain high standards of performance in accomplishing its mission. This recommendation remains to be fulfilled and its attainment is crucial for the AMCU to perform its tasks effectively – especially in light of new responsibilities likely to be taken on as part of the National Competition Programme.

[9] Act of AMCU of 25 June 2012 No 399-p "The Procedure of Exemption from the Responsibility" (Official Journal of Ukraine 2012, No. 73, item 206).

[10] As it is stated in para 5 Art.6 of Law of Ukraine "On Protection of Economic Competition".

[11] Available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/102633.pdf.

announced the completion of the negotiations on the content of the Association Agreement (hereafter: AA). Officially, the AA was initialized on 30 March 2012. Afterwards, Ukrainian legislation (including its rules on competition) was continuously being amended in order to ensure future implementation of the provisions of the AA. The Association Agenda of 2009[12] (as revised in 2013[13]) is a special bilateral document which stipulates the necessary steps on future harmonization of Ukrainian legislation with EU law and covers nearly all legal spheres.

The political part of the AA specifies in its preamble that the adaptation of the Agreement contributes to the gradual economic integration and deepening of political association between the parties. The preamble stresses the leading role of a mechanism for law approximation that is necessary to create a comprehensive and deep free trade area between Ukraine and the European Union. It is noteworthy that the term "harmonization" is not used widely in the text of the AA. Used instead are the notions such as: "adaptation", "legal convergence", "recognition of international standards", "transposition" and so on. However, the vast majority of researchers use the term "harmonization" as an umbrella term in this context[14].

Comparing the current AA with Ukraine with analogue acts signed by the EU with other countries, it can be said that this is a "fourth generation agreement". It is the first of a new generation of association agreements between the EU and countries of the Eastern Partnership that covers a deep and comprehensive free trade area (DCFTA). Considering further on the "deep" and "comprehensive" character of the FTA, it can be concluded that the EU-Ukraine DCFTA is the first of a new generation of FTAs concluded by the EU which will, once in force, gradually and partially integrate the economy of Ukraine into the EU Internal Market. Its integration into the Internal

[12] Available at http://eeas.europa.eu/ukraine/docs/2010_eu_ukraine_association_agenda_en.pdf.

[13] The present version of the EU-Ukraine AA was endorsed by the EU-Ukraine Cooperation Council, Luxembourg, 24.06.2013, (available at http://eeas.europa.eu/ukraine/docs/eu_ukr_ass_agenda_24jun2013.pdf).

[14] For example, V. Muravyov, "Legal approximation: evidence from Ukraine" (2007) Law 2007/21 in M. Cremona, G. Meloni (eds) *The European Neighborhood Policy: A framework for Modernization*, *EUI Working Papers* 129136 (available at http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Cremona/TheEuropeanNeighbourhoodPolicy/PaperMuravyov.pdf); C. Hillion, "A new framework for the relation between the Union and its East-European Neighbours" (2007) Law 2007/21 [in:] M. Cremona, G. Meloni (eds) *The European Neighborhood Policy: A framework for Modernization*, *EUI Working Papers* p. 147154 (available at http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Cremona/TheEuropeanNeighbourhoodPolicy/PaperHillion.pdf); R. Petrov, P. Elsuwege, "Article 8 TEU: Towards a New Generation of Agreements with the Neighboring Countries of the European Union?" (2011) 36 *European Law Review* 688-703.

Market will take place, however, only under the condition that Ukraine approximates its legislation to the EU *acquis communautaire*.

On the other hand, the "deep" character of the DCFTA refers also to Ukraine's commitment to approximate its legislation to the *acquis communautaire* in order to achieve its economic integration with the EU Internal Market. The DCFTA contains numerous legislative approximation clauses according to which Ukraine must approximate its domestic legislation or standards to the EU *acquis*. Title IV of the Association Agreement[15] shows that the EU-Ukraine AA not only covers traditional FTA areas, such as market access for goods, but also includes public procurement, IPRs, competition, energy, etc.

2.1. Substantial aspects of the "competition clause" in the Association Agreement

The AA focuses on the main principles of an undertaking's conduct on the market that can impede, restrict or distort competition (including conduct prohibited under Article 101 (1) TFEU, abuse of a dominant position and certain concentrations that result in market dominance or a substantial restriction of competition in the market in the territory of either Party). In truth, the above mentioned provisions have already been implemented by Ukrainian legislation.

Article 1 of the AA states that the purpose of the association is "to establish conditions for enhanced economic and trade relations leading towards Ukraine's gradual integration in the EU Internal Market […] and to support Ukrainian efforts to complete the transition into a functioning market economy also through the progressive approximation of its legislation to that of the Union". Basic principles of undistorted competition in a market economy are among key principles of a deep and comprehensive free trade agreement established in accordance with the AA's Section IV ("Trade").

Competition issues (the so called "competition clause") are included in a separate Chapter 10 of the AA (Articles 253–267 AA) that consists two sections: antitrust and mergers; and state aid. Incidentally, this division is almost identical to European law. Attached to the Association Agreement is special Annex 23 which contains a glossary of basic definitions relating to competition matters. Included in particular are terms such as "public undertakings", "exclusive rights", "services of general economic interest (SGEI)", "state monopoly of commercial character", "important project in

[15] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (OJ [2014] L 161).

the common European interest or in the common interest of the Parties" and so on. As noted in Annex 23, this glossary is not legally binding and is used exclusively for the interpretation of the provisions of this very Association Agreement.

The AA identifies the key practices and economic transactions that could potentially adversely affect the functioning of markets and undermine the benefits of trade liberalization established between the parties. These anti-competitive practices include: a) agreements and concerted practices between undertakings, which have the purpose or effect of impeding, restricting, distorting or substantially lessening competition in the territory of either Party; b) the abuse by one or more undertakings of a dominant position in the territory of either Party; c) concentrations between undertakings, which result in monopolization or a substantial restriction of competition in the market in the territory of either Party[16].

Generally, Ukrainian legislation encompasses the fundamental principles of fair competition and prohibits the foregoing acts that are clearly enshrined in Article 42 para 3 of the Constitution of Ukraine which ensures the protection of competition in entrepreneurial activity. Types and limits of monopolies are also determined by the law. In other words, the substantial matter of Article 254 AA is reflected in current Ukrainian legislation and regulations issued by the AMCU.

In particular, Article 254 AA refers to the concepts of "anticompetitive concerted actions", which are understood as concerted actions that have led or may lead to the prevention, elimination or restriction of competition. As such, it is reflected by Article 6 of the Law on the Protection of Economic Competition. Article 254 AA speaks also of "abuse of a dominant position in the market", which refers to the acts or omissions of an entity that holds a monopolistic (dominant) position[17] in the market that have led or may lead to the prevention, elimination or restriction of competition or infringement of interests of other undertakings or consumers, which would be impossible conditions of substantial competition in the market. The national equivalent can be found in Article 13 of the Law on the Protection of Economic Competition. Finally, the AA refers to the notion of "control of concentration", which is defined in Article 22 of the Ukrainian Law.

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[16] Art. 254 AA.

[17] It is worth noting that Ukrainian legislation puts emphasis on the abuse of a "monopolistic" position instead of a "dominant" position as in EU Competition Law. This derives from Art. 13 of the Law on the Protection of Economic Competition. Unlike the EU, Ukrainian legislation follows a strict legislative line concerning a "monopolistic" position ("As monopoly (dominant) position shall be deemed a position of an undertaking, whose part on the commodity market exceeds 35 percent, unless it proves, that it experiences a considerable competition")

It is noted also that in determining the importance of the implementation of the guidelines set out in Article 254, parties to the AA must apply them in a "non-discriminatory transparent manner, respecting the principles of procedural fairness and the right to protection"[18].

The AA emphasizes however also the existence of some gaps in the harmonization process and clearly defines the requirements that must be incorporated into Ukrainian law and the terms of their performance.

A special provision of the AA is devoted to the substantial aspects of the approximation of Ukraine legislation to European competition law and the timing of its implementation into the national legal system[19]. Conventionally, these substantial requirements can be grouped according to the areas to which they relate, that is, procedural aspects of competition law enforcement, the legal regime on concerted actions, control of concentrations, the activity of state monopolies and state aid.

1. In the area of improving the *procedural aspects* of competition law enforcement, it is important to implement the principle of transparency and proper decision-making process by the AMCU and Ukrainian courts in cases concerning concerted actions and concentrations. For that reason, existing national legislation must be supplemented so as to impose upon the AMCU an obligation to publish its decisions in cases of an infringement of national competition rules as well as concentration control cases within three years from the date of the entry into force of AA[20].

The current Article 48 of the Law on the Protection of Economic Competition does not oblige the AMCU to officially publish its competition law decisions. Neither does such obligation exist in the Ukrainian Law on the AMCU[21]. Instead, this commitment derives from Article 256 para 1 of the Association Agreement, which clearly states the rule to be implemented into the Ukrainian legal system – that is – Article 30 Regulation No 1/2003 of 16 December 2002[22].

There is also a strict obligation for the AMCU to adopt and publish a document explaining the principles to be used in the setting of any pecuniary sanctions imposed for infringements of competition law. A similar document must be published explaining the principles used by the Ukrainian competition authority in the assessment of horizontal mergers.

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[18] Art. 255 AA.

[19] Art. 256 AA.

[20] para 1, 3 Art. 256 AA.

[21] Law of Ukraine "On Antimonopoly Committee of Ukraine" of 26.11.1993 No 3659-XII (Verhovna Rada Bulletin 1993 No 50, item 472).

[22] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ [2003] L 1/1).

2. A number of requirements exist on the approximation of Ukrainian legislation to EU law with respect to the mandatory implementation of *rules concerning exemptions from prohibited anticompetitive conduct for vertical agreements*. The current text of Article 10 of the Law on the Protection of Economic Competition only contains general requirements for exemptions for prohibited concerned practices[23]. At the same time, a detailed procedure for the granting of prior authorization for concerted actions is specified in a special act on the Procedure Applicable to Submissions of Applications for Authorization for Concerted Practices of Economic Entities[24] of 2002 (Procedure for Concerted Practices). As such, a block exemption system does not exist in the Ukraine at this moment. Current legislation provides for exemptions only on an individual basis by way of AMCU decisions, despite the fact that it is common practice in the EU to provide so-called "block exemptions" for certain categories of anti-competitive agreements.

The Ukrainian law does not have a Block Exemption System by way of general BER (Regulations No 330/2010[25]) for vertical agreements. Certain

[23] *Article 10 of Law of Ukraine "On Protection of Economic Competition". Concerted Actions which may be Authorized*

1. The concerted actions, provided for by Article 6 of this law, may be authorized by the appropriate bodies of the Antimonopoly Committee of Ukraine, if their participants prove, that these actions promote: the improvement production, procurement or sale of goods; technical, technological and economic development; the development of small and medium enterprises; the optimization of export or import of goods; the development and application of the uniform specifications or standards for goods; the rationalization of production.
2. The concerted actions, provided for in paragraph one of this Article, may not be authorized by the bodies of the Antimonopoly Committee of Ukraine, if the competition is significantly restricted on the whole market or in its significant part.
3. The Cabinet of Ministers of Ukraine may authorize concerted actions, which have not been authorized by the Antimonopoly Committee of Ukraine pursuant to paragraph two of this Article, if participants of concerted actions prove that the positive effect for public interests prevails over adverse consequences of competition restriction.
4. The authorization provided for in paragraph three of this Article may not be given if: participants of concerted actions apply restrictions which are not required for the implementation of the concerted actions; the restriction of competition constitutes a threat to the system of market economy.
5. It shall be prohibited to take concerted actions, provided for in this Article, until authorization has been granted by bodies of the Antimonopoly Committee of Ukraine or the Cabinet of Ministers of Ukraine.

[24] Act of AMCU of 12 February 2002 No 26-p "Regulation on the procedure for applying to the Antimonopoly Committee of Ukraine for granting permission for concerted actions of undertakings (Regulation on concerted actions)" (Official Journal of Ukraine 2002 No. 11, item 253).

[25] Commission Regulation 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 (OJ [2010] L102/1).

types of horizontal agreements are subject to typical requirements for concerted actions of economic entities on the specialization of production, compliance with which makes these concerted actions permissible without the authorization of the Antimonopoly Committee of Ukraine. Article 256 para 3 of the Association Agreement provides a direct link to specific EU Regulations which must be implemented into the Ukrainian legal system within three years of the entry into force of the AA.

The Association Agreement also focuses on the strict necessity to fill the gap currently existing in Ukrainian legislation with respect to the lack of a block exemption system for agreements on technology transfer, which is provided in Regulation 772/2004[26] of 27 April 2004. Full implementation of such system must occur within three years after the entry into force of the AA.

3. The Association Agreement contains additional requirements for the improvement of existing national laws on *concentrations*. Thus, Article 256 para 2 AA lists specific articles of Regulation 139/2004[27] of 20 January 2004, that is, Article 1 and Article 5 (1) and (2), to be implemented into Ukrainian legislation within three years of the entry into force of the AA.

It should be noted that the practice of the AMCU under Articles 22 and 23 of the Law on the Protection of Economic Competition is significantly different from the practice of the European Commission with respect to concentration control.

According to Article 24 of the Law on the Protection of Economic Competition, a concentration is permissible only if prior clearance (authorization) of the transaction is obtained from the AMCU. Clearance is obligatory in cases stipulated in the law: if the total value of the assets or the total product sales of the participants in the concentration (with relations of control being taken into account) in the last financial year, including those abroad, exceed the sum equivalent to 12 mln EUR, while the assets (total assets) or the sales (total sales) of products, including those abroad, of at least two participants in the concentration (with relations of control being taken into account) exceed the sum equivalent to 1 mln EUR, and the assets (total assets) or the sales (total sales) of products in Ukraine only of at least one participant of the concentration (with relations of control being taken into account) exceed the sum equivalent to 1 mln EUR[28]. Clearance is also necessary if the share of the market of products of any undertaking concerned

[26] Commission Regulation (EC) No. 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (OJ [2004] L 123).

[27] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation) (OJ [2004] L 24).

[28] Art. 24 of Law of Ukraine "On Protection of Economic Competition".

in the concentration (taking into account the relationship of control) is more than 35% in the relevant market.

Requirements of the AA can completely change the financial and economic indicators of the concentration subject to mandatory "authorization" by the Ukrainian competition authority.

Looking at the EU concentration control system, the analysis of the relevant market share held by the participants in the concentration is not determinative for the EU practice. By contrast, the financial indicators used in Ukrainian competition law are different and cause an increased number of requests to the AMCU for permission to implement a concentration by medium sized entities. It can be assumed that harmonization of concentration control rules is primarily aimed at reducing the number of applications by entities requesting permission to concentrate so as to enable the Ukrainian competition authority to focus on those transactions which can actually significantly change the structure of the market in the long run.

Additionally, a formalistic approach is applied in Ukraine when assessing concentrations – less economic analysis of merger activities is undertaken than in the EU.

The Association Agreement refers to the necessity to improve the calculation mechanism of financial indicators in the national concentration control system. In Ukraine, the procedure for calculating concentration parameters, a procedure contained in an annex to the Regulation on Concentrations[29], is characterized by a detailed performance analysis and needs to be improved in accordance with Article 5 of Regulation 139/2004.

4. The Association Agreement contains also particular requirements for activities of *state monopolies* in line with the basic principles of competition law. Article 258 AA placed the Ukraine under an obligation to adjust the activities of its state monopolies of a commercial character within a period of five years from the entry into force of this Agreement. The adjustment must ensure that no discriminatory measures exist regarding the conditions under which goods are procured and marketed between natural and legal persons of the Parties. Under the enforcement practice of the AA, the priority of competition law should be clearly stated – as opposed to the current situation where the norms of the Law on Natural Monopolies[30] are seen as *lex specialis* in this context, which give a special position to those undertakings.

[29] Act of the Antimonopoly Committee of Ukraine of 19 February 2002 No 33-p «On Approval of the Procedure of applying the Antimonopoly Committee of Ukraine for prior authorization for Concentration of Undertakings (Regulation on concentration) (Official Journal of Ukraine 2002 No. 13, item. 225).

[30] The Law of Ukraine of 20 April 2000 No 1682-III "On Natural Monopolies" (Verhovna Rada Bulletin 2000 No. 3, item 238).

2.2. Improvement of competition law enforcement

All the above notwithstanding, the main practical gap between Ukraine and the EU lies in the lack of fairness and transparency in the competition law enforcement process. As a result, the text of the Association Agreement contains a whole range of competition rules, unlike other spheres of economic cooperation that are covered in detailed harmonization schemes which supplement the AA in a number of annexes.

The main difficulties lie in the process of effective enforcement of substantive competition rules in a transparent, timely and non-discriminatory manner, respecting the principles of procedural fairness and rights of defence. The main gaps are seen here in the failure to officially publish AMCU decisions and in the lack of a precise official act on calculating fines. As a result of these faults, enforcement practice lacks legal certainty. With the aim to improve transparency, Article 256 AA contains a detailed implementation scheme of specific provisions which must be incorporated into domestic competition legislation within three years of the entry into force of the Association Agreement.

As a result, current Ukrainian laws should be amended in a number of areas. Improving the decision-making process of the Ukrainian competition authority – the AMCU – is of fundamental importance. The obligation to introduce a national block exemption system for certain categories of vertical agreements and concerted practices (in accordance with Regulation 330/2010) as well as for certain technology transfer agreements (Regulation 772/2004) is the key gap that needs to be filled in Ukrainian legislation. The financial criteria applicable to the domestic concentration control system should also be changed (in convergence with the criteria under Regulation 139/2004).

2.3. State aid regulation in Ukraine: gaps and tendencies

The legislation of state aid remains the most vulnerable area. It should be noted that the issue of state aid harmonization arose in both bilateral documents preceding the Association Agreement between the EU and Ukraine: the Action Plan of 2005 as well as the Association Agenda of 2009 (as revised in 2013).

Unsurprisingly, the Association Agreement pays special attention to state aid, which remains unregulated in Ukraine. Article 262 AA states that “any aid granted by Ukraine or the Member States of the European Union through state resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with

the proper functioning of this Agreement insofar as it may affect trade between the Parties". Article 262 AA imposes upon Ukraine the strict obligation to adopt a special act on the system of monitoring and control of state aid schemes under Article 107 TFEU with all implementing regulations in the state aid area.

Following this analogy, the Association Agreement contains conditions under which state aid can be compatible and can be recognized as valid. Such is the treatment of state aid granted in order to provide consumers with socially important goods, on condition that such assistance is not discriminatory in relation to the place of origin of these goods; and aid given to victims of man-made emergencies and natural disasters. The above two types of state aid are considered acceptable according to Article 262 para 2 AA. The second category of exceptions allows the following types of state measures: aid meant to promote economic and social development of geographic regions in which the standard of living is low and the unemployment rate high; implementation of national programmes or solving social and economic problems of a national character; aid meant to facilitate the development of certain types of business activities or undertakings that carry out activities in certain economic areas, provided the latter does not conflict with other applicable international agreements; aid given for the maintenance and preservation of national cultural heritage whose influence on competition is negligible (para 3 Article 262 AA). In line with EU practice, the second group of exemptions is different from the first in so far as for their admissibility it is necessary not only to submit a relevant notification, but to receive an approval of the European Commission, which has exclusive authority to decide on the issue.

The Association Agreement emphasises also the necessity to introduce rules on *de minimis* state aid which does not, *a priori*, make a significant impact on trade between the Parties. Article 263 AA states that any aid below the threshold of EUR 200.000 per undertaking over three years does not need to be notified.

It is worth stressing that the state aid rules contained in the Association Agreement are to be applied in light of the interpretation criteria arising from the application of Articles 106, 107 and 93 TFEU. This includes the relevant jurisprudence of the Court of Justice of the European Union as well as relevant European secondary legislation, communications, guidelines and other administrative acts.

The Association Agreement's provisions on state aid should be implemented within five years from its entry into force. Incidentally, a draft Law on State Aid to Undertakings[31] was prepared by a group of Ukrainian and European

[31] Draft Law of Ukraine "On state aid to the undertakings" (available at http://www.amc.gov.ua/amku/control/main/uk/publish/article/95306).

experts. It was transferred to the national legislative body (Verhovna Rada) in April 2013, but it is very difficult to predict its future destiny.

The Draft Law on State Aid[32] fully reflects the requirements contained in the Association Agreement. If ultimately adopted, Article 267 AA will be fully implemented. It is expected that if the Verkhovna Rada of Ukraine approves the Draft Law, its entry into force will take place three years after its official publication, as stated in its final provisions. This term coincides with the requirements contained in the Association Agreement.

According to the Draft Law on State Aid, the Ukrainian competition authority – the AMCU – will become the body competent to receive notifications of new state aid to its beneficiaries; examine the misuse of state aid and monitor the lawfulness of granted state aid; evaluate the admissibility of state aid with respect to competition; collect and analyse information on measures to support businesses given from state or local resources, etc. (Article 8 of the Draft Law on State Aid).

The Draft Law on State Aid regulates the monitoring of state aid, the procedural aspects of notifications to the AMCU for the determination of a misuse of state aid and the procedure for its recovery.

It should be stressed with respect to the provisions of the Association Agreement (Article 267 para 3(a)) that in the first five years after the entry into force of the AA, any public aid granted by Ukraine shall be assessed taking into account the fact that the country shall be regarded as an area where the standard of living is abnormally low or where there is serious unemployment (under Article 107(3)(a) TFEU).

3. Conclusions

The paper analyzes certain areas of the approximation of Ukrainian competition law to that of the EU in accordance with the requirements of the Association Agreement. It can be concluded on this basis that the main weakness of the Ukrainian legal system is the lack of proper enforcement levels and the need to improve the transparency of decision-making procedures, including the publication of decisions issued by the national competition authority – the Antimonopoly Committee of Ukraine.

Due to the effective enforcement and implementation of prospective amendments to the competition law of Ukraine the mechanism of cooperation & coordination should be settled between national authorities. Notwithstanding

[32] Ibid.

that there is no provision in the AA concerning coordination within the International Competition Authority, Art. 259 AA stressed on the necessity of co-operation and co-ordination between their respective competition authorities to further enhance effective competition law enforcement. These forms of cooperation include the exchange of information between relevant national authorities of Ukraine, the European Union and its individual Member States. In addition, the AA focuses on the fact that such cooperation shall not prevent the authorities from taking independent decisions[33].

Consulting is the main instrument of an effective harmonization process and fostering mutual understanding of the parties in competition law enforcement – its implementation is foreseen in Article 260 AA. A process of consultation will be used during the interpretation or application of competition rules. However, this rule does not represent a firm commitment but merely the expression of the intention of the parties to provide each other with non-confidential information in order to improve the consultation process.

In particular, it should be noted that the scope of the feature according to the Association Agreement is that none of the parties to the Agreement may not resort to dispute settlement procedures of the questions referred to the field of competition[34]. The only obligation on the terms of harmonization of Ukrainian legislation in accordance with Article 256 AA may be subject to dispute settlement procedures. This means that the provisions of the Association Agreement are determined as mandatory principles of free competition in the market in terms of free trade. Prohibition of anticompetitive practices in the form of concerted actions or agreements, abuse of dominance, and the principle of concentration control *are the basic elements of the implementation of free trade*.

State aid may distort competition by giving an advantage to certain companies or industries. Since state aid is considered a separate branch of EU law and subject to strict controls, the Association Agreement pays special attention to the question of state aid.

Harmonization is a process of convergence towards the principles of another legal system. Attention is thus paid not only to the substantive content of the rules to be assimilated, but to the complex nature of its practical application also. In this respect, the Court of Justice of the European Union is of crucial importance as it interprets and explains the features of the implementation of European Union law.

To implement these commitments, Ukraine has to, within three years of the entry into force of the Association Agreement, adapt its legislation in this area with that of the EU. It must also improve its current institutional

[33] Para 2 Art. 259 AA.

[34] Art. 261 AA.

framework under the principle of fair practice & state litigation. On the other hand, with the aim to adopt fair rules on state aid (which would be a novelty for Ukrainian legislation), a control and monitoring system of state aid should be created, including the provision of relevant statistical information.

Current practice shows that there is no direct effect of EU norms in the national competition system of the Ukraine; there are also no judgments of EU Courts (or even Commission decisions) on the extraterritorial application of EU Competition norms in the Ukraine. But due to the intensification of the trade liberalization process, Ukrainian undertakings should be bound by EU "competition clauses" in accordance with the "effect on trade" & "effect on the internal market" rules.

In general, we can observe the system of implemented norms but with the inefficient system of its enforcement. This problem has the ground of formalistic approach to protect the activity on the market instead of social welfare-oriented system of competition. The special clause in the enforcement process should be stressed as a necessity of reorientation of the object of competition law as a whole mechanism of better consumer protection.

Challenges in Combating Cartels, 14 Years After the Enactment of Indonesian Competition Law

by

Sih Yuliana Wahyuningtyas*

CONTENTS

Abstract

Fourteen years after the enactment of Indonesian Competition Law, the public has had the chance to witness the enforcement practice of the Commission for the Supervision of Business Activities (the Kppu), the competition supervisory authority of Indonesia. Being recognized as an aggressive competition agency, the enforcement of Indonesian Competition Law seems to largely rely on the

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discretion of the Kppu. However, a review needs to take place not only of how the competition authority accomplishes its tasks, but also how the enforcement process is outlined in the provisions of the Law itself. Around 72% of the cases dealt with by the Kppu concern bid-rigging, 14% cover other types of cartel practices, further types of anticompetitive conduct account for the rest. Despite being criticized as having excessive authority covering the function to investigate, prosecute, and make rulings, the Kppu faces problems in battling cartel practices because major legal flaws exist, for instance concerning collecting evidences. The discussion will be limited to the combat with cartels. Competition law enforcement through the Kppu is administrative in nature albeit with some criminal law influences (evidence). Although it is possible to enforce the law by means of criminal injunctions and private claims, they have rarely been used so far, mainly because Indonesian Competition Law lacks clarity. Problems with existing procedures are rooted in the Kppu's inability to obtain sufficient evidences. Two propositions are made how to deal with these difficulties – using indirect evidence and implementing a leniency programme, both based on existing Indonesian Competition Law or by amending the Law and inserting new provisions which would explicitly allow the use of both indirect evidence and a leniency programme.

Résumé

Quatorze ans après la promulgation de la Loi indonésienne sur la concurrence, le public a eu la chance d'assister à la pratique de l'application accomplie par la Commission pour la Supervision des activités commerciales (la KPPU), l'autorité de surveillance de la concurrence de l'Indonésie. Reconnu comme une autorité de la concurrence agressive, l'application de la Loi indonésienne de la concurrence semble se référer largement à la discrétion de la KPPU. Toutefois, un examen doit avoir lieu non seulement sur la façon dont l'autorité de la concurrence accomplit ses tâches, mais aussi la façon dont le processus d'application est décrite dans les dispositions de la Loi elle-même. Environ 72% des affaires traitées par la KPPU concernent des offres collusoires, 14% d'autres types de pratiques de cartel et encore d'autres types de comportement anticoncurrentiel compte pour le reste. En dépit d'être critiqué comme ayant autorité excessive couvrant des enquêtes, des poursuites, et des jugements sur les affaires de droit de la concurrence, la KPPU fait face aux problèmes rélatifs à la lutte contre les pratiques de cartel, car les grandes failles juridiques existent, par exemple en ce qui concerne la collecte des preuves. La discussion sera limitée à la lutte contre les cartels. L'application de la loi de la concurrence par la KPPU est de nature administrative mais avec quelques influences provenant du droit pénal (preuves). Bien qu'il soit possible d'appliquer la loi au moyen d'injonctions pénales et des demandes privées, ils ont été rarement utilisées jusqu'à présent, à cause de manque de clarté par rapport au droit indonésien de la concurrence. Les problèmes avec des procédures existantes sont enracinés dans l'incapacité de la KPPU d'obtenir des preuves suffisantes. Deux propositions ont été faites sur la manière permettant de résoudre ces difficultés

- en utilisant des preuves indirectes et en mettant en œuvre un programme de clémence, tous les deux basés sur la Loi indonésienne actuelle sur la concurrence ou en modifiant la Loi et introduisant des nouvelles dispositions qui permettraient explicitement l'utilisation des deux preuves indirectes et un programme de clémence.

Classifications and keywords: Competition law; law enforcement; Indonesia; cartels

1. Introduction

Indonesian Competition Law entered into force in 2000, a year after it was signed and published as a response to both internal and external pressures[1]. To answer the necessity to reform the national economy, two laws were enacted in 1999: Law No. 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Competition (hereafter, Indonesian Competition Law) and Law No. 8 of 1999 concerning Consumer Protection. This paper deals exclusively with Indonesian Competition Law.

Whilst the need for a competition law regime has been recognized in Indonesia as early as the 1980s, the political situation of the country did not make it possible for the enactment of national competition law earlier[2]. The opportunity emerged when a domestic monetary crisis called for reforms, in particular in economic and legal fields. Rent seekers and unfair business practices were deemed responsible for the crisis. As a result, the reformation agenda in the legal field emphasized the establishment of a set of rules that would create a level playing field where fairness to compete would be protected[3]. In doing so, the Model Law on Restrictive Business Practices issued by UNCTAD (Rev 5)[4] was used as a model, aside from looking at other jurisdictions, for instance US Antitrust rules, the German Act against Restraints in Competition, and the Japanese Antimonopoly Act.

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[1] M. Pangestu, H. Aswicahyono, T. Anas, "The Evolution of Competition Policy in Indonesia" (2002) 21 Review of Industrial Organization 213.

[2] D.J. Rachbini, *Cartel and Merger Control, OECD Global Forum on Competition*, CCNM/GF/COMP/WD(2002)6, 6 February 2002, available at http://www.olis.oecd.org/olis/2002doc.nsf/3dce6d82b533cf6ec125685d005300b4/ce581da03ad9f490c1256b580052d300/$FILE/JT00120421.PDF, p. 3.

[3] See the background of the introduction of Indonesian competition law in S.Y. Wahyuningtyas, *Unilateral Restraints in the Retail Business: A Comparative Study on Competition Law in Germany and Indonesia*, Munich Series on European and International Competition Law, Vol. 27, Bern Stämpfli Publisher 2011, pp. 86 ff.

[4] United Nations Conference on Trade and Development, *Continued Work on the Elaboration of A Model Law or Laws on Restrictive Business Practices*, TD/B/RBP/81/Rev.5, 20 February 1998.

Among the anticompetitive conducts prohibited by Indonesian Competition Law, cartel practices have become prominent. They have mostly taken the form of bid rigging, which very often involved corruption by public officials. Indonesian Competition Law carried therefore in its early years the additional expectation of helping eradicate corruption in the country. After the enactment of Law No. 30 of 2002 concerning the Corruption Eradication Commission, the border between combating anticompetitive conduct and combating corruption became clearer. While the Anticorruption Commission (*Komisi Pemberantasan Korupsi – Kpk*) deals with corruption cases involving state officials, the Commission for the Supervision of Business Activities (*Komisi Pengawas Persaingan Usaha* – Kppu) deals with anticompetitive conduct of private business actors, in this regard bid rigging[5].

2. Cartel Prohibition in Indonesian Competition Law

The prohibition of anticompetitive conduct encompassed by Indonesian Competition Law is divided into three groups each set in a separate chapter. Chapter III (Article 4–16) deals with prohibited agreements, Chapter IV (Article 17–24) covers prohibited activities, and Chapter V (Article 25–29) prohibits the abuse of a dominant position. The last chapter also includes provisions on merger control.

The provisions of Indonesian Competition Law do not specifically define the term "cartel". However, the term "cartel" is used as the heading of the prohibition of production and distribution cartels in Article 11[6]. The use of the term "cartel" in the heading is not entirely correct because the term is essentially broader than the specific type of cartel actually prohibited in Article 11. Considering the content of the prohibited agreements provided for in Articles 4–16, all agreements should fall under the term "cartel". Moreover, this term should also cover prohibited conspiracies covered by Articles 22–24, which in the structure of Indonesian Competition Law are instead listed under the prohibition of certain activities.

[5] United Nations Conference on Trade and Development, *Volunteer Peer Review on Competition Policy: Indonesia*, New York-Geneva United Nations 2009, 1-36, p. 4.

[6] Art. 11 of Indonesian Competition Law reads: "Undertakings are prohibited from making any agreements with their competitors with the intention to influence the price by determining the production and/or the marketing of goods and/or services that can result in monopolistic practices and/or unfair business competition." See unofficial English translation in K. Hansen, et.al., *Undang-undang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat*, Revised edition, Jakarta Katalis 2002.

The definition of the term "cartel" can be found in Kppu Regulation[7] No. 4 of 2010 concerning the Guidelines on Article 11 of Indonesian Competition Law as: "a cooperation of a number of competing undertakings to coordinate their activities in order to control the volume of production and the prices of goods and or services to gain a profit above reasonable profit"[8].

Based on the wordings of the aforementioned Kppu Regulation, the Guidelines cover a broader scope than the prohibition of Article 11 of the Law itself. While Article 11 prohibits "any agreements", the Guidelines prohibit any "cooperation … to coordinate". The term "agreement" refers to all kind of meeting of the minds between actors, which means that it does not have to be written and it could take any form of meeting of minds. However, in some cases, it is not easy to determine whether such meeting of minds has taken place[9]. For example, it is problematic to prove the occurrence of a meeting of minds in concerted practices and distinguish the events for instance from an act of following a market trend. Another difficulty is to conclude whether or not there is a meeting of minds when members of association follow the decision of the association. Sometimes they do it because it is the obligation as members to follow any decision of the association without the members having actually been willing to agree on it[10]. The application of Article 11 to concerted practices and decisions of associations based on the above argument have not been challenged in practice[11]. It seems, nevertheless, that the Kppu intends to clarify the enforcement of that provision by providing such a broad

[7] Kppu Regulation has a similar function to an act of soft law, provides guidelines and interpretation of certain provisions of Indonesian Competition Law and binds Kppu only internally. Thus, it does not have a binding character for courts, for example.

[8] Kppu Regulation No. 4 of 2010, p. 8.

[9] Indonesian Civil Code requires a consensus as one of the elements of an agreement (Art. 1320). A consensus is understood as a meeting of minds or wills between parties. There is no valid consensus according to the Indonesian Civil Code Article, when such willingness to agree is given due to oversight, coercion, or fraud (Art. 1321).

[10] Compare to Art. 101 TFEU where cartel covers "…all agreements between undertakings, decisions by associations of undertakings and concerted practices…". See also the distinction between agreements between undertakings and decisions by associations of undertakings in EJ. Mestmäcker, H. Schweitzer, *Europäisches Wettbewerbsrecht*, München, C.H. Beck 2004, § 9 Margin No. 10, p. 244, and the distinction between agreements between undertakings and concerted practices in K.W. Lange, *Europäisches und Deutsches Kartellrecht*, Frankfurt am Main Recht und Wirtschaft 2006, p. 62; EJ. Mestmäcker, H. Schweitzer, *Europäisches*…, op. cit., § 9 Margin No. 18, p. 248.

[11] However, there are already some cases concerning an abuse of association for cartel practices, for instance the case of *Electricity Association* (DPP AKLI, an association of Indonesian electricity and mechanical contractors), KPPU Decision No. 53/KPPU-L/2008, concerning an infringement against the prohibition of market allocation in Article 9 of Indonesian Competition Law.

definition of the term "cartel" in order to avoid doubts on the scope of the prohibition.

The Guidelines explain further that the term "cartel" in general covers any agreement or collusion or conspiracy by undertakings. More specifically, according to the Guidelines, the term includes price fixing, market allocation, bid rigging, consumer allocation[12], and other types of cartels[13]. Thus, the Kppu also believes that Indonesian Competition Law recognizes not only cartels prohibited in Article 11, but also other types of cartels, despite the Law using the term "cartel" only for the prohibition contained in Article 11.

This broad interpretation finds confirmation in another Regulation published a year later – Kppu Regulation No. 4 of 2011 concerning Guidelines on Article 5 of Indonesian Competition Law that prohibits price fixing. The latter Guidelines on Price Fixing explain that not only is price fixing (Article 5 of Indonesian Competition Law) a form of cartels but so is the prohibited agreement to control production and distribution in order to influence product prices[14].

Cartel prohibitions in Indonesian Competition Law can be seen in the catalog below.

As shown in the catalog below, most cartel practices are not prohibited *per se* in Indonesia. This includes the prohibition contained in Article 11. However, price fixing is *per se* illegal, as it is considered a hard core cartel, not unlike in other jurisdictions[15]. For a rule of reason analysis, the Guidelines list six elements to examine the illegality of an alleged cartel:

a. the occurrence of signs of the reduction of production or price increase;
b. the nature of the respective cartel, whether it is a naked or ancillary cartel;
c. the level of market power controlled by the cartel[16];
d. the efficiency level that might be resulted from practicing cartel;

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[12] Price fixing, market allocation, bid rigging, and consumer allocation are considered as primary types of cartels according to the Guidelines.

[13] Kppu Regulation No. 4 of 2010, p. 12.

[14] Ibidem, p. 9.

[15] Compare to the practice in the US Sherman Antitrust Act in E.G. Disner, *Antitrust: Questions, Answers, Law and Commentary*, Pennsylvania, American Law Institute/American Bar Association 2006, pp. 27–47; M.A. Utton, *Cartels and Economic Collusion: The Persistence of Corporate Conspiracies*, Cheltenham Edward Elgar 2011, p. 78; in the EU in D. McFadden, *Some Thoughts on Criminalizing Cartels*, Paper presented at the European Competition Day Budapest May 2011, available at http://www.tca.ie/images/uploaded/documents/2011-05-30%20Some%20 Thoughts%20on%20Criminalising%20Cartels.pdf, pp. 7 ff.; International Competition Network, *Defining Hard Core Cartel Conduct*, ICN 4th Annual Conference, Bonn June 2005, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf, p. 10.

[16] Compare to the application of the rule of reason in the U.S. Sherman Antitrust Act in E.G. Disner, *Antitrust…*, op. cit., p. 45. Consideration of market power is in line with the concept of the "*de minimis* rule" that excludes transactions involving businesses below a certain level of profit or market share which are not able to significantly affect the market. See F.J. Sacker,

e. the occurrence of reasonable necessity[17]; and
f. the balancing test to measure if the benefit from practicing cartel can justify the resulting loss[18].

Table 1.
Catalog of Cartel Prohibitions according to Indonesian Competition Law

Type of Cartel	Provision	Approach
Price fixing	5	Per se illegal
Price discrimination	6	
Conspiracy to obstruct production and/distribution of competitors' products	24	
Oligopoly		Rule of reason
Selling below market price	7	
Resale price maintenance	8	
Market allocation	9	
Boycott	10	
Production cartel and distribution cartel	11	
Trust	12	
Oligopsony	13	
Vertical integration	14	
Closed dealings	15	
Anticompetitive agreements with foreign parties	16	
Market control with other undertakings	19	
Bid rigging	22	
Conspiracy to get confidential information of competitors	23	

The Kppu provides also guidelines on how to show the existence of a cartel. There are two main indicators applied by the Indonesian competition authority in this context. The first reflects certain structural factors that can be used as early indicators for the existence of a cartel:

a. Market concentration level
b. Company scale

A. Lohse [in:] K. Hansen, et. al., *Undang-undang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat*, Revised edition, Jakarta Katalis, 2002, Art. 11, Margin No. 16, p. 214.

[17] Compare to the concept of "legitimate business purposes" and "whether a lesser restraint could accomplish the same business purposes" for the application of the rule of reason in the U.S. Sherman Antitrust Act in E.G. Disner, *Antitrust…,* op. cit.

[18] Kppu Regulation No. 4 of 2010, pp. 24–25.

c. Homogeneity of products
d. Multi market contact
e. Stock and capacity of products
f. Linkages of ownership
g. Level of entry barriers
h. Demand characters: regularity, elasticity, and change
i. Buyer power[19]

The second indicator reflects behavioral factors including:

a. Transparency and information exchange
b. Price regulation and contracts[20]

In this regard, it is also important to note that the Kppu has been aware of the danger of the misuse of associations for cartel practices[21]. Associations have been regarded as an important part of running the national economy. In many areas, associations are useful for practical reasons for instance, as they assist small undertakings. They can support their members in improving better packaging of their products in order to avoid the risk of transport damage and provide help in moving the products, bearing in mind Indonesia's peculiar geographical conditions and infrastructure problems. Associations can thus be very helpful for some naturally complex products such as cement.

3. Commission for the Supervision of Business Competition (Kppu)

The Indonesian Commission for the Supervision of Business Activities, the Kppu, was established according to Indonesian Competition Law Article 30 as an independent body[22] authorized to supervise the implementation of Indonesian Competition Law[23]. This independence means that the Indonesian competition authority shall not be under the influences of the Government or any other party including big undertakings or any organization in the society that possesses power over economic or political matters. Such independence also means that the Kppu is not subject to the opinions of the Parliament on the matters being dealt with by the competition authority. Its independence remains, despite the fact that the Kppu is obliged by the Law to regularly

[19] Ibidem, pp. 20–22.
[20] Ibidem, pp. 22–23.
[21] Forum Group Discussion on Trade Association organized by Kppu, Jakarta, 27 June 2012.
[22] Indonesian Competition Law, Art. 30(2).
[23] Ibidem, Art. 30(1).

submit a report to the Parliament[24] and is liable to the President[25]. In this context, the Kppu is considered to be a state auxiliary organ[26]. This issue will be discussed further in the next sub chapter.

Implementing Article 34 of Indonesian Competition Law, the Kppu was established by way of the Presidential Decree No. 75 of 1999 which was later amended with the Presidential Decree No. 80 of 2008. The latter changed the parts of the original act dealing with the costs of the exercise of the tasks and plans of the competition authority, fostering state civil servants in the Kppu's Secretariat, and the remuneration of that Secretariat.

The Indonesian competition authority consists of seven Commissioners appointed and dismissed by the President upon the approval by the Parliament (*Dewan Perwakilan Rakyat – DPR*). The Commissioners are appointed for a 5 years term of office, which can be extended for an additional term. The newest Commissioners were appointed in December 2012 for the term of office 2012–2015[27].

4. Competition Law Enforcement Procedures

4.1. Administrative Enforcement of Competition Law

The existence of a state auxiliary organ under the executive authority, such as the Kppu, is permitted in the Indonesian state system in order to improve the performance of the executive power in a particular field. The role of this organ becomes prominent for at least two reasons: *first*, transition to democracy[28] introduces certain concepts[29]

[24] A.F. Lubis, N.N. Sirait (eds), *HPU antara Teks dan Konteks*, Jakarta Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH 2009, p. 312.

[25] Indonesian Competition Law Art. 30(3).

[26] A.F. Lubis, N.N. Sirait (eds), *HPU…*, loc. cit.

[27] New Commissioners of Indonesian Competition Commission, available at http://eng.kppu.go.id/new-commissioners-of-indonesian-competition-commission/.

[28] J. Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, Jakarta Konpress 2006, p. 24; I. Mexsasai, *Dinamika Hukum Tata Negara Indonesia*, Bandung Refika Aditama 2011, pp. 152–156.

[29] A new concept is for instance the concept of democracy in the economic filed that assure free competition in order to guarantee equal opportunity for people to take part in the economic process. The term "free" competition is not always welcome in Indonesia and thus, is replaced by the term "fair" competition. Free competition is often associated with head to head competition that only allows big players to take over the power in the market and does not allow small players to actively take part in economic life. The concept of fair competition

and functions[30] that had not been recognized earlier in an authoritarian system. Even when such concepts and functions had in fact been recognized before, the government must still deal with the skepticism of the society[31] seeing as the public is not certain that the government is sufficiently reliable to implement such concepts and to carry out such functions. In other words, the government has to regain the trust of the society that it will perform better in the reformation era than was the case before. This can be done by creating a new organ under the executive power that will be specifically responsible for the implementation of a particular concept and function[32].

Second, in order to attain social welfare by means of implementing the law, the executive power needs support and reinforcement from a particular body established under its power with a specific task to back up the executive power in a certain field. This means that such body shall consist of experts in the respective field.

The Kppu is an administrative body. The logical implication of such realization is that its authority is also of an administrative character. This realization can be seen, for example in the sanctions that can be imposed by the Kppu on undertakings for violations of Indonesian Competition Law. Although penal sanctions and private injunctions are possible according to the Law, the Kppu is not authorized to impose them. The Kppu is only authorized to impose administrative sanctions as well as to issue guidelines and other acts concerning the implementation of Indonesian Competition Law. It is also allowed to further regulate the exercise of its powers and tasks[33].

The authority of the Kppu to issue Kppu regulations is justified by the function attached to an administrative body to make legal interpretation (*droit function*). Legal acts of an administrative body can be categorized into those to create and those to implement regulations. Furthermore, an Indonesian administrative law expert, Prajudi Admosudirdjo, makes a distinction between administrative discretion (*Beschiking*), planning, concrete norms, and pseudo legislation (*Pseudowetgeving*)[34]. This concept can be traced back to the idea

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contrasts the concept of centralistic economy that submits all power in the market to the hand of the state, including the function to fixing prices in the market.

[30] A new function being introduced is that of competition law to ensure that fair competition will be able to take place in the market, which will ultimately result in efficiency and consumer welfare. This function is not recognized in an authoritarian system.

[31] See S. Sumawinata, *Politik Ekonomi Kerakyatan*, Jakarta Gramedia Pustaka Utama 2004, p. 16.

[32] See A.F. Lubis, N.N. Sirait (eds), *HPU…*, op. cit., pp. 135–136.

[33] Presidential Decree No. 75 of 1999 as amended with President Regulation No. 80 of 2008 Art. 10.

[34] V. Situmorang, *Dasar-dasar Hukum Administrasi Negara*, Jakarta Bina Aksara 1989, pp. 101–103.

that in order to attain state welfare, the government has the power to take the initiative to solve the problems of its citizen. The right of the government to take such steps also includes the discretion to take necessarily measures to carry out its tasks[35]. This concept is also recognized in the Indonesian administrative law system.

The implementation of the abovementioned concept can be observed in the Kppu's authority to create guidelines for the implementation of certain provisions of Indonesian Competition Law. However, if the interpretation of the said legal provisions provided for by the Kppu in the Guidelines is in fact too broad, it may result in legal uncertainty[36]. This point finds its relevance in current discussions concerning how far the Kppu is authorized to define the substance of its guidelines. This issue is important, mainly because the Indonesian competition authority carries a heavy burden of responsibility to implement the Law which contains weaknesses in its provisions that make it difficult for it to be implemented. This consideration will be discussed in more detail below. In this sense, guidelines on how to interpret and implement specific provisions of the Law are very helpful.

In its function to enforce Indonesian Competition Law, the Kppu is authorized by the Law to investigate and to take decisions on whether an undertaking has violated Indonesian Competition Law. The authority can do so either on the basis of a report from the public or taking the action on its own initiative. In this regard, it is important to point out that despite its administrative character, the decision rendered by the Kppu are not decisions of an administrative body subject to Law No. 5 of 1986 concerning the Administrative Court as amended by Law No. 9 of 2004. This means that a decision of the Kppu on a competition law matter cannot be challenged before the administrative court. This view is supported by Supreme Court Regulation No. 3 of 2005 concerning Remedies Procedures for Kppu Decisions[37].

Instead, an objection[38] against a decision of the Kppu concerning a given competition law case can be submitted to a district court the jurisdiction of

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[35] J. Ginting, "Perwujudan Fungsi Hukum Adminsitrasi Negara dalam Negara dengan Prinsip Welfare State" (2010) 2(1) *Jurnal Moral dan Adil* 13; V. Situmorang, *Dasar-dasar…*, op. cit., pp. 96–97.

[36] See M. Lukman quoted by S.S. Panjaitan, "Makna dan Peranan Freies Ermessen dalam Hukum Administrasi Negara" [in:] S.F. Marbun (et. al.), *Dimensi-dimensi Pemikiran Hukum Administrasi Negara*, Yogyakarta UII Press 2001, p. 117.

[37] Supreme Court Regulation No. 3 of 2005 concerning Remedies Procedures for Kppu Decisions Art. 3.

[38] The term "objection" *(keberatan)* is used in this paper instead of "appeal" *(banding)*, because in Indonesian law both have a different meaning and Indonesian Competition Law specifically uses the term "objection", although substantially it means lodging an appeal (in which case it is also possible to translate the word "*keberatan*" as an appeal in general).

which covers the legal seat of the alleged offender[39]. Furthermore, in the objection case before the district court, the competition authority acts as a party (defendant) against the undertaking (plaintiff). This means that the position before the court of the Kppu is equal to that of the undertaking that lodged the objection[40]. Interestingly, private law procedures apply instead of administrative procedures for objection cases before district courts in competition matter[41]. Accordingly, competition law cases are treated as private law cases before the appeal court. In the last instance, a cassation can be lodged before the Supreme Court and treated as special civil suit.

According to the Annual Report of the Kppu in 2012, objections were lodged against 86 Kppu decisions to the district court and 58 cassations were lodged to the Supreme Court. The competition authority won 56% of its cases in the district court and 76% in the Supreme Court. For this performance, the Kppu is recognized as an aggressive competition law enforcement agency[42]. The statistics are shown below[43].

Table 2.
Objection cases in the District Court

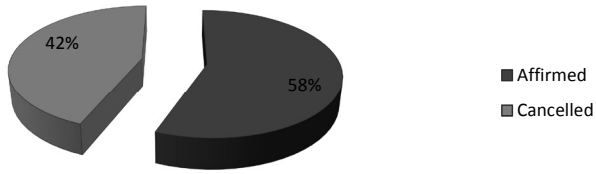
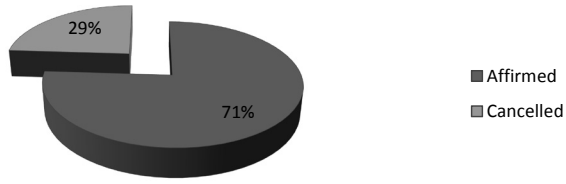


Table 3.
Appeal Cases in the Supreme Court



The use of the term is further regulated in the Supreme Court Regulation No. 2 of 2005 *(Peraturan Mahkamah Agung No. 2 Tahun 2003).* The term "objection" in this paper is thus to be distinguished from the generally speaking of the term used in court proceedings, where an attorney objects to a statement being made.

39 Ibidem, Art. 2(1).

40 Ibidem, Art. 2(3).

41 Ibidem, Art. 8.

42 United Nations Conference on Trade and Development, op. cit., p. 7.

43 Kppu, *Laporan Kinerja Kppu 2012*, p. 11.

To supervise the enforcement of Indonesian Competition Law, the task of the Kppu is first of all to assess three issues: agreements, activities that potentially result in monopolistic practices and/or unfair competition, and dominant position. Merger issues are included in the assessment of dominance because mergers are seen from the perspective of the possibility to create dominance in the market and its abuses[44].

In dealing with competition law cases, the Kppu is authorized to take necessary measures[45] as shown in the table below.

Table 4.
Scope of authority of the Kppu according to Article 36 of Indonesian Competition Law

Action	Object
Receiving reports from the public or undertakings, making assessments, investigation and/or inquiry	Allegations of monopolistic practices and/or unfair competition
Drawing conclusion	The result from its investigation/inquiry on an allegation of monopolistic practices and/or unfair competition
Summoning	– Undertakings being suspected of violating Indonesian Competition Law – Witness, expert witness, and every person who might have knowledge of the alleged violation
Asking for assistance from police officer*	To present the suspect(s), witness, expert witness, and every person who might have knowledge of the alleged violation, if they do not voluntarily come after being summoned by the Kppu
Requesting information from government agencies	Matters related to the investigation and/or inquiry on undertakings being suspected of having violated the Law
Obtaining evidences, making an evaluation and/or assessment	Letters, documents, or other evidences for the purpose of an investigation and/or inspection
Taking a decision or resolution	The existence of damages on the part of other undertakings or the public
Notice to undertakings	Decision on the case
Impose penalties	Administrative penalties (according to Article 47 Indonesian Competition Law)

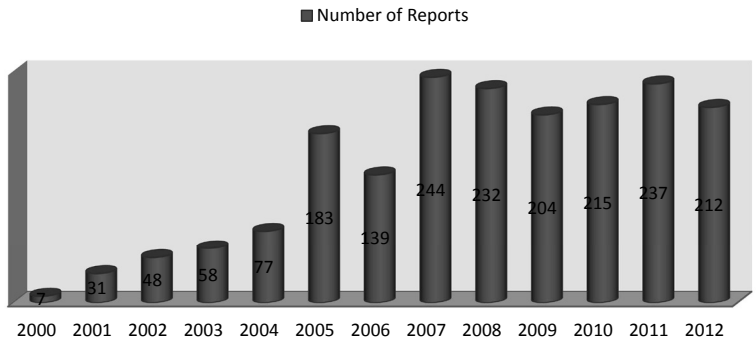
* The term used in the provision is "investigator" referring to Law No. 8 of 1981 concerning Procedural Criminal Law, according to which an investigator can be a police officer or a public servant, assigned by law to conduct an investigation.

[44] Indonesian Competition Law, Art. 35.

[45] Ibidem, Art. 36; also B. Nadapdap, *Hukum Acara Persaingan Usaha*, Jakarta Jala Permata Aksara 2009, p. 17.

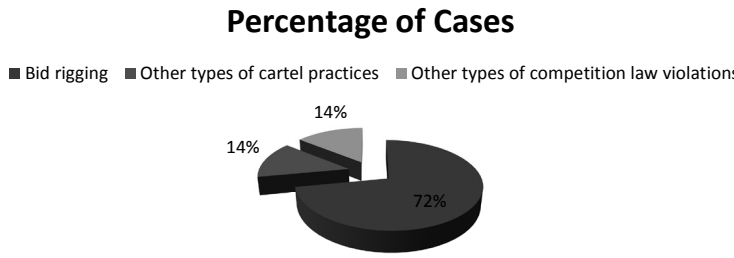
Between 2000 and 2012, the Kppu has received 1887 reports on possible violations of Indonesian Competition Law.

Table 5.
Number of reports to the Kppu on alleged violation of Indonesian Competition Law[46]



157 cases being dealt with by the Kppu in this period of time have been bid-rigging cases – they amount to around 72% of the totally 218 cases[47]. 30 out of those 218 (almost 14% cases) concern cartel practices other than bid rigging[48].

Table 6.
Bid-Rigging and other types of cartel cases dealt with by the Kppu between 2000–2013[49]



[46] KPPU, *Laporan Kinerja Kppu 2012*, p. 5.

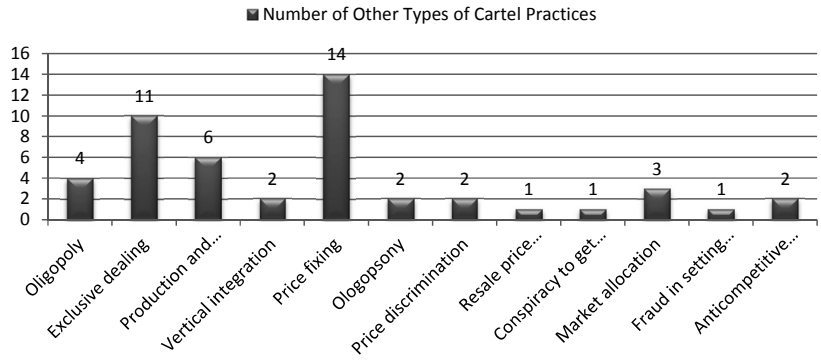
[47] E. Syahril, *Tanpa „Bintang Penghargaan' KPPU Selamatkan Uang Negara*, Majalah Kompetisi, KPPU 27th Edition 2011, 1-36, p. 19.

[48] Five cases dealt until April 2006 with other types of cartels. See the list in S. Pompe, et.al. (ed.), *Ikhtisar Ketentuan Persaingan Usaha,* Jakarta The Indonesia Netherlands National Legal Reform Program (NLRP) 2010, pp. 47–48; KPPU, *Buku Penjelasan Katalog Putusan KPPU Periode 2000–2009*, 2009; the list of Kppu Decisions available at http://www.kppu.go.id/id/putusan/.

[49] The list of Kppu Decisions available at http://www.kppu.go.id/id/putusan.

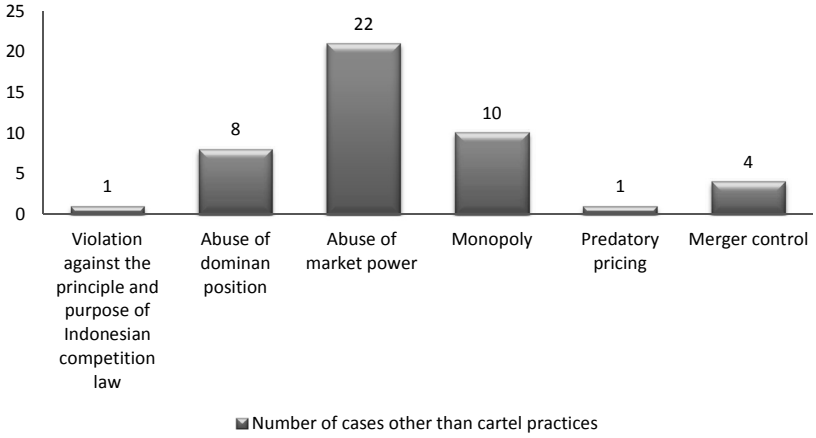
Other types of cartel practices are shown in the list below.

Table 7.
Cartel cases other than bid-rigging dealt with by the Kppu between 2000-2013[50]



Other types of competition law violations are listed as follow:

Table 8.
Types of cases other than cartel practices dealt with by the Kppu between 2000–2013[51]



[50] Ibidem.
[51] Ibidem.

4.2. Criminal and Private Enforcement

As described above, competition law enforcement by the Kppu follows an administrative procedure. In principle, violations of Indonesian Competition Law are regarded as administrative infringements. As such, operating/participating in a prohibited cartel is also considered an administrative violation, unlike in the US Antitrust Law where the Sherman Act sees the involvement in a cartel as a felony[52]. One of the consequences of using an administrative enforcement system for competition law violations in Indonesia is that the sanctions being imposed by the Kppu are also of an administrative character.

However, Indonesian Competition Law also provides for provisions which can be considered as entry points for possible criminal enforcement, although they have not yet been implemented in practice. It remains debatable, if criminal injunctions used in conjunction with administrative enforcement will not prove too burdensome for undertakings.

The first entry point is two provisions concerning criminal sanctions in Article 48[53] and 49[54] of the Law. However, the Kppu does not have the competence to impose criminal sanctions. Thus, filing a criminal case for a violation of Indonesian Competition Law shall be done according to Criminal Law Procedures. In this case, criminal charges shall be filed by public prosecutors before a district court. However, it is not clear from the above provisions whether the case shall be treated as an "offense complaint case" that requires a complaint from the injured party for the prosecution (like in

[52] R.A. Posner, "An Economic Theory of Criminal Law" (1985) 85 *Columbia Law Review* 1215.

[53] Art. 48 of the Law reads: "(1) Violations against the provisions in Article 4, Articles 9–14, Articles 16–19, Article 25, Article 27 and Article 28 of this law are subject to a criminal fine in the amount of at least IDR 25,000,000,000 [around 1,600,000 EUR] and in the amount of IDR 100,000,000,000 [around 6,400,000 EUR] at the most, or imprisonment for a maximum period of 6 months. (2) Violations against the provisions under Article 5–8, Article 15, Articles 20–24, and Article 26 of this law are subject to a criminal fine in the amount of at least IDR 5,000,000,000 [around 320,000 EUR] and in the amount of IDR 25,000,000,000 [around 1,600,000 EUR] at the most, or imprisonment for a maximum period of 5 months. (3) Violations against the provisions under Article 41 of this law are subject to a criminal fine in the amount of at least IDR 1,000,000,000 [around 64,000 EUR] and in the amount of IDR 5,000,000,000 [around 320,000 EUR] at the most, or imprisonment for a maximum period of 3 months".

[54] Art. 49 reads: "With reference to the provisions under Article 10 of the Criminal Code concerning a crime as referred to under Article 48 of the Law, additional criminal punishment might be added in the form of: a. revocation of a business permit; or b. prohibition for the undertakings who were proven to have violated this law to hold a position as a director or commissioner at least within a period of 2 (two) years and at the longest within a period of 5 (five) years; or c. termination of certain activities or actions that cause damage to other parties".

the cases of intellectual property violations), or as a "normal criminal case", for which police officers can start an investigation on their own initiatives.

The second entry point is filing a competition law case as a criminal case when, during the administrative proceedings before the Kppu, an undertaking fails to comply with the obligations to provide evidence, commits an obstruction of justice, or fails to carry out the decision of the competition authority, when the decision has become final and binding[55].

In practice, the criminal procedures have never been applied yet. Indonesian Competition Law does not clearly regulate the procedure to be used in such cases and this can result in uncertain implementation. In addition, criminal law enforcement bodies are not yet familiar with competition law violations in Indonesia. Enforcement through the Kppu, in the form of administrative enforcement, remains therefore more preferable in practice than criminal law enforcement.

Private enforcement is not mentioned in Indonesian Competition Law. However, there is no prohibition for filing a civil suit for damages according to the Indonesian Civil Code. The claim is possible on the ground of a wrongful act provided under Article 1365 of the Indonesian Civil Code, which reads: "[a] party who commits a wrongful act which causes damage to another party shall be obliged to compensate therefore."

The application of private enforcement remains debatable until today[56]. In practice, there is a reluctance to apply the procedure. However, a number

[55] Art. 41 of the Law reads: "(1) Undertakings and/or other parties being investigated shall be obligated to submit evidence required for the investigation and/or examination. (2) Undertakings are prohibited from refusing to be investigated, refusing to provide information required for the investigation and/or examination, or from hampering an investigation and/or examination process. (3) If there is any violation to the provision under Paragraphs (2) of this article, the [Kppu] shall assign investigators to conduct investigation pursuant to the applicable laws.

The sanction imposed for not carrying out a final decision of the Kppu is provided for in Article 44 of the Law: (1) Within a period of 30 (thirty) days counted from the date the undertakings receive notification of the [Kppu] decision as referred to under Article 43, Paragraph (4) above, the undertakings shall be obligated to carry out that decision and deliver the implementation report to the [Kppu]. (2) Undertakings may submit an objection to the District Court within a maximum period of 14 (fourteen) days upon receiving notification of the [Kppu] decision. (3) Undertakings who do not submit an objection within a period as referred to under Paragraph (2) of this article shall be regarded as to have accepted [Kppu] decision. (4) If provisions as referred to under Paragraph (1) and Paragraph (2) of this article are not carried out by the undertakings, the [Kppu] shall hand over the said decision to the investigators for investigation pursuant to existing law".

[56] It is completely different from how private damages are vastly used as part of law enforcement against cartels in the US. This practice is supported by § 4 of the Clayton Act that provides for treble damages and attorney fees to the successful plaintiff. See H. Hovenkamp, *Roundtable on the Quantification of Harm to Competition by National Courts and Competition*

of class actions have already been filed to Indonesian district courts to seek private compensation based on a Kppu decision declaring that a violation of Indonesian Competition Law had taken place. Such actions were filed in the case of *Temasek*[57] and *Astro*[58].

4.3. Administrative Procedures and Penalties

The Kppu can start an investigation on an alleged competition law violation either based on a report from the public or from another undertaking, or on its own initiative. The procedure is provided for in Article 38-46 of Indonesian Competition Law. The Kppu has published its Guidelines on this matter in Kppu Regulation No. 1 of 2010.

In both types of cases, those initiated by a report and the authority's own initiative, the Kppu has 30 days to carry out its investigation from the day it announces that it had started a preliminary investigation. If preliminary evidences of a competition law violation are discovered within this period of time, the Kppu shall release a decree stating that an extended investigation has been opened. From that moment on, the authority has further 60 days to decide whether a violation of Indonesian Competition Law occurred. The second phase can be extended by a maximum of another 30 days.

When the case is based on a report, the Kppu is obliged to keep the confidentiality of the informant's identity[59] unless the informant seeks compensation by way of the administrative procedure, which is made possible according to the Law[60].

During the investigation, the Kppu is obliged to summon the alleged undertaking(s) and authorized by the Law to call witnesses, expert witnesses, and other parties relevant to the case. However, the authority does not have the power to conduct searches in the premises or offices of the alleged undertaking(s) or to initiate wire-tapping in order to get evidence of the alleged violation. This makes it difficult for the Kppu to prove the existence of a suspected violation, especially in hard cases such as cartels.

Agencies, OECD Directorate for Financial and Enterprise Affairs Competition Committee, DAF/COMP/WD(2011)19, 7 October 2011, available at http://www.oecd.org/regreform/liberalisationandcompetitioninterventioninregulatedsectors/48849427.pdf, p. 2.

[57] Kppu Decision in *Temasek* case No. 07/KPPU-L/2007; Class action filed under registration No. 111/Pdt.G/2008/PN.Jkt.Pst.

[58] Kppu Decision in *Barclays Premier League Broadcasting Rights 2007–2010 (Astro* case*)* No. 03/KPPU-L/2008; Class action filed under registration No. 472/Pdt.G/2008/PN-Mdn; A.F. Lubis, N.N. Sirait (eds), *HPU…*, loc. cit., pp. 346–348.

[59] Indonesian Competition Law, Art. 38(2).

[60] Ibidem, Art. 38(2) and Art. 47(2) lit. f.

With regard to types of evidence, the procedure is similar to criminal procedure where the purpose of proof is to find and verify the material truth, as opposed to the purpose of proof in civil law procedure which is to find and verify the formal truth[61]. For this purpose, Indonesian Competition Law recognizes five types of evidence: witness statements, expert witness statements, letters and/or documents, indications[62], and statements by undertakings[63].

The authority must within 30 days of finishing its investigation arrives at a decision on whether a violation of Indonesian Competition Law had in fact taken place or not[64]. That decision shall be read out in the trial which is declared open to the public and must be notified to the alleged offenders[65]. In the absence of an objection, the addressee shall implement the decision within 30 days after they receive the notification[66].

Every legally binding decision of the Kppu requires a writ of execution from the Head of the district court[67], although it can also be voluntarily carried out by the undertaking concerned. This provision has become a contra argument against the opinion that the Kppu is a too powerful body due to the possession of several important functions given by the Law to investigate, prosecute, and make rulings. Such extensive authority has been criticized for the risk of being abused or used without control[68]. This critic is also countered by the fact that the Kppu is not powerful enough to collect evidence.

If the undertaking neither lodges an objection nor implements a final and binding verdict of the Kppu, the authority has two options to execute it. *First*, it can force execution based on a writ of execution provided by a district court whereby the execution is similar to that of a civil suit case. *Second*, it can file the case for criminal enforcement as discussed above[69].

Against the verdict of the Kppu, the convicted undertaking can file an objection to a district court within 14 days after it receives the notification of the decision[70]. The district court has 14 days after the objection is filed to investigate the case[71] – it has a maximum of 30 days to rule on the case after

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[61] A.F. Lubis, N.N. Sirait (eds), *HPU.*…, loc. cit., p. 365.

[62] Further explained under section 5.1 concerning the use of indirect evidence.

[63] Indonesian Competition Law, Article 42.

[64] Ibidem, Art. 43(3).

[65] Ibidem, Art. 43(4).

[66] Ibidem, Art. 44(1) jo (3).

[67] Ibidem, Art. 46(2).

[68] See Sukarmi, *Pelaksanaan Putusan Komisi Pengawas Persaingan Usaha,* Jurnal Persaingan Usaha KPPU, 7th Edition 2012, p. 16.

[69] A.F. Lubis, N.N. Sirait (eds), *HPU.*…, loc. cit., p. 342.

[70] Indonesian Competition Law, Article 44 par. (2).

[71] Ibidem, Art. 45(1).

it receives the objection[72]. A cassation can be filed against the decision of the district court to the Supreme Court within 14 days[73]. The Supreme Court shall decide on the cassation request within 30 days of receiving the application.

The penalties as provided for in Article 47 of the Law are administrative in their nature[74]. There are three types of penalties provided for in this provision: a cease and desist order (and in merger cases, cancellation of the merger or takeover); and or an order for payment of compensation; and or an imposition of a fine of a minimum amount of IDR 1,000,000,000 [around 64,000 EUR] and maximum IDR 25,000,000,000 [around 1,600,000 EUR].

Although the Kppu can impose any of these penalties, it is clear from their substance and purpose that it is not possible not to impose the cease and desist order, since any proven violation against Indonesian Competition Law must be halted. However, it is possible for the authority to impose the cease and desist order without imposing a compensation order or a fine.

Among the above three types of penalty, the order for the payment of a compensation seems to be misplaced here because, by nature, this type of payment should be regarded as a penalty in civil suit procedures. While a fine is paid to the state treasury, compensation is paid to the injured party. This is why the identity of the party which reports an alleged competition law violation to the Kppu in order to seek compensation is no longer confidential. It has to be proven if the damages being claimed have actually occurred. It must also be clear who is entitled to the compensation.

Since compensation in this provision is regarded as administrative in nature, it is possible that an undertaking might have to pay administrative compensation and an administrative fine as well as be subject to civil damages claims. This can overburden the undertaking. It must be said therefore that the order to pay compensation should be removed from the list of Indonesian administrative penalties and left to civil suit procedures.

Another shortcoming of the above regulation lies in the fact that the amount of fines provided for in the Law[75] is, in fact, too small for big companies – so much so, that large companies can regarded them as part of "operational" cost only. If the purpose of imposing fines is to remove the expected benefit from violating competition law, as long as the expected benefit remains larger than the expected cost (fine), such fine does not create a deterrent effect for the offender. The current amount of the Indonesian administrative fine is thus useful only to combat anticompetitive conducts by medium undertakings

[72] Ibidem, Art. 45(2).
[73] Ibidem, Art. 45(3).
[74] Ibidem, Art. 47(1).
[75] Ibidem, Art. 47(2) lit. g.

– it fails however to scare big players. Also here, the Kppu is essentially not powerful enough to enforce the Law in an effective manner.

5. Response to Challenges for Combating Cartels

To deal with current difficulties in proving the existence of cartels[76], the Kppu has considered the use of indirect evidence, which has in fact been already used in some cartel cases, as well as the implementation of a national leniency programme.

5.1. The Use of Indirect Evidence

The Kppu has used indirect evidence in cartel cases but not all Kppu decisions based on indirect evidence were later affirmed by the Supreme Court. Four cartel cases can be mentioned as examples here, namely 1) the crude palm oil cartel concerning the pricing of crude palm oil[77]; 2) the case of fuel surcharge price fixing in the domestic flight service industry[78]; 3) the case of bid rigging for drinking water network building in the Regency[79] of Lingga[80]; and 4) the case of price fixing and a cartel in the cement industry[81]. The Kppu decision rendered in the first case was annulled by the Supreme Court; the second and third decisions were affirmed; and in the fourth case, the Kppu verdict stated that the alleged violation was not evident.

The use of indirect evidence by the Kppu in dealing with cartel cases covers both communication and economic evidence. For instance, in the

[76] A.M.T. Anggraini, *Mekanisme Mendeteksi dan Mengungkap Kartel dalam Hukum Persaingan*, available at http://sekartrisakti.wordpress.com/2011/06/08/mekanisme-mendeteksi-dan-mengungkap-kartel-dalam-hukum-persaingan/, p. 16.

[77] See Kppu Decision *Crude Palm Oil Cartel* No. 24/KPPU-I/2009.

[78] See Kppu Decision *Fuel Surcharge Price Fixing in Domestic Flight Service Industry* No. 25/KPPU-I/2009.

[79] Regency *(Kabupaten)* is an administrative region having autonomy as a local government (according to Law No. 22 of 1999 concerning Local Government). The administrative territory of Indonesia is divided into 34 provinces *(provinsi,* similar to states in federal countries except that provinces have no power to self-govern their region to such a large extent like states; they are seen more as an extension of the central government), each of which covers a number of regencies. See D.S. Bratakusumah, D. Solihin, *Otonomi Penyelenggaraan Pemerintah Daerah,* Jakarta Gramedia Pustaka Utama 2001, p. 6.

[80] See Kppu Decision *Bid Rigging for Drinking Water Network Building in the Regency of Lingga* No. 12/KPPU-L/2009, Supreme Court Decision on Cassation No. 906 K/Pdt.Sus/2010.

[81] See KPPU Decision *Price Fixing and Cartel in Cement Industry* No. 01/KPPU-I/2010.

Crude Palm Oil case, the Kppu relied on the parallelism in conduct and facilitating practices by means of price indicators. In the case, communication evidence was referred to as "facts of meetings and/or communication between competitors" and further, Kppu held that such fact was already sufficient to become evidence without having to prove the content of the meetings and/or the communication[82]. Although in the case the Kppu found that the meeting and communication discussed important information for indicating a cartel, i.e. prices, production capacity, and production cost structure, such definition is too broad. It might include any type of meeting or communication that has nothing to do with cartel. There is no prohibition in Indonesian law for undertakings either to meet or to communicate with other undertakings, including with their competitors, and such activity is common in doing business, also it does not make sense to hinder undertakings from doing so. It is the content of such meeting and communication, which is decisive.

This approach for using indirect evidence formed the basis for a conviction for price fixing prohibited by Article 5 of the Law[83] and a distribution cartel prohibited by Article 11 of Indonesian Competition Law[84]. However, the use of indirect evidence in this specific case was rejected both by the district court and by the Supreme Court[85].

In the *Price Fixing and Cartel in the Cement Industry* case, the Kppu examined both communications, to identify the existence of concerted actions, and economic evidence, to detect price parallelism. However, the examination has ultimately led to negative results. In this case, the Kppu has neither proven the existence of an agreement to fix prices[86] nor to control cement distribution in order to affect prices by the Indonesian Cement Association (*Asosiasi Semen Indonesia – Asi*)[87].

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[82] KPPU Decision *Crude Palm Oil Cartel* No. 24/KPPU-I/2009, Legal Consideration on indirect evidence, Point 2.2.1., p. 57.

[83] KPPU Decision *Crude Palm Cartel* No. 24/KPPU-I/2009, Legal Consideration on price fixing allegation against Article 5 of Indonesian Competition Law, Point 7.2.4.-7.2.8, p. 64.

[84] Kppu Decision *Crude Palm Oil Cartel* No. 24/KPPU-I/2009, Legal Consideration on distribution cartel allegation against Article 11 of Indonesian Competition Law, Point 9.2.2-9.2.4., pp. 65–66.

[85] S.D. Mayestika, *20 Produsen Minyak Goreng Lolow Dakwaan KPPU*, Bisnis.com 11 December 2011, available at http://www.bisnis.com/articles/20-produsen-minyak-goreng-lolos-dakwaan-kppu.

[86] Kppu Decision *Price Fixing and Cartel in Cement Industry* No. 01/KPPU-I/2010, Legal Consideration on price fixing allegation against Article 5 of Indonesian Competition Law, Point 8.b.2(e), p. 421.

[87] Kppu Decision *Price Fixing and Cartel in Cement Industr,* No. 01/KPPU-I/2010, Legal Consideration on distribution cartel allegation against Article 11 of Indonesian Competition Law, Point 9.b.2(e), p. 422.

The problem with the use of indirect evidence lies in the lack of a provision that allows the use of such evidence in Indonesian Competition Law. As explained in the previous part of this paper, Indonesian Competition Law names only five types of admissible evidence: witness statements, expert witness statements, letters and/or documents, indications, and undertakings' statements[88]. The Law does not define the term "indication". However, the types of evidences in the Law are similar to those recognized in the Procedural Criminal Law[89], in which an "indication" is defined as "any act, event, or circumstance that due to the aptness with each other or with a crime, indicates the occurrence of the crime and the actor"[90]. By analogy such definition can be used to interpret the meaning of "indication" in competition law cases as any act, event, or circumstance that due to the aptness with each other or with a competition law infringement, indicates the occurrence of the infringement and the actor.

Nothing in these provisions mentions indirect evidence. However, the Kppu argues that the notion of "indications" can be seen as covering indirect evidence also. An argument that goes against this reasoning is that applying such an extremely broad interpretation of this term will create legal uncertainty.

If one intends to use indirect evidence based on the current content of Indonesian Competition Law, a compromise can be proposed in this regard based on two points. As has been recognized in Indonesian legal practice, indications cannot be used as sole evidence – they must be supported by at least two other types of evidence. The Kppu shall abide by this principle. Arguing that doing otherwise is necessary because of existing difficulties in getting evidence is not sufficiently strong argument for the use of indirect evidence – in order to punish an alleged wrongdoer, the authority must prove beyond reasonable doubt that the company is actually guilty[91].

Another option would be to amend the current Law and insert indirect evidence into the catalog of evidence currently listed. This would be the preferred solution in order to ensure legal certainty. However, amending laws takes time and there is no guarantee that the purpose for amending the respective legal provisions will in fact be attained.

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[88] Indonesian Competition Law, Art. 42.

[89] Law No. 8 of 1981 concerning Procedural Criminal Law, Art.184(1).

[90] Ibidem, Art.188.

[91] William Blackstone states: "it is better that ten guilty persons escape, than that one innocent suffer" as quoted in M. Rizzolli, M.Saraceno, *Better that X Guilty Persons Escape than that One Innocent Suffer*, 16 June 2009, available at http://www.side-isle.it/4sided/assets/Rizzolli-Saraceno.pdf, p. 2.

5.2. The Possibility to Implement a Leniency Programme

In order to respond to the difficulties in proving cartels, typically characterized as anticompetitive conduct which is "continuative, collective, and hard to detect"[92], the Kppu considers introducing a national leniency programme. However there still are certain issues that must be resolved. First of all, there is a question whether it is possible to apply a leniency programme based on current Indonesian Competition Law.

The idea to implement a leniency programme to combat cartels in Indonesia is based on the following arguments:

First, to impose sanctions lies within the discretion of the Kppu, rather than being an obligation placed upon the Kppu. In the case of a violation of Law No. 5 of 1999, the authority has therefore discretion to consider whether it will impose a sanction onto the offender or not. This approach is possible on the basis of the wording of the Article 47 whereby: "[t]he Commission is authorized to impose …". Nevertheless, the Law does not mention what shall be the basis for not imposing sanctions.

Second, in terms of administrative sanctions provided for by Article 47 of Indonesian Competition Law, the penalties imposed can form a combination of the alternative sanctions available in the aforementioned catalog or any one of them. Article 47 provides three types of sanctions: the terminations of the infringement (cease and desist), order to pay compensation, and an administrative fine. The cease and desist order cannot, however, be omitted in any case simply because it is substantially required to stop the violation. There is therefore essentially at least one type of penalty according to Article 47 para (2) of the Law that will always be imposed for substantive reasons. However, as already explained, the wording of Indonesian Competition Law leaves the Kppu the discretion to not impose any compensation order or fine.

Third, a leniency programme is essentially a means to eliminate or reduce fines or other sanctions: administrative fines, criminal sanctions, or civil injunctions (like in the United States), but does not eliminate or reduce the sanction of terminating the infringing actions (cease and desist order). Therefore, the use of a leniency programme is not contradictory, does not deviate, and is not an exception to the power of the Kppu provided by the Law. The use of a leniency programme is thus possible without having to insert a specific provision into the legislation that explicitly regulates it.

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[92] See the rationale for implementing leniency programmes to uncover cartels in N. Zingales, "European and American Leniency Programmes: Two Models Towards Convergence?" (2008)5(1) *The Competition Law Review* 5-60, December 2008, available at http://www.clasf.org/CompLRev/Issues/Vol5Iss1Art1Zingales.pdf, p. 7.

A prominent function of leniency programmes used to combat cartels lies in its ability to destabilize cartels as explained by Bucirossi and Spagnolo[93]: "…leniency programs introduce and exploit a new form of deterrence which is completely different from that associated to all the other sanctions both pecuniary or non-pecuniary. In a nutshell: the latter aim at deterring an illegal conduct by modifying the 'participation constraint' of the potential offender, that is they increase the (expected) cost of behaving illegally; leniency programs, on the contrary, may prevent the formation of a cartel (or of any multi-agent crime) by modifying the 'incentive constraint' of the potential offender; that is, they increase the (opportunity) cost of sticking to the 'agreement' that keeps together the criminal team by tempting them with better conditions in case they betray their partners."

Furthermore, in order to implement a leniency programme, technical issues arise on how to do it best. The first option is by issuing guidelines on the implementation of Article 47 of the Law (giving technical guidance on the programme) to later implement them in standard operating procedures.

However, despite its practicality, this option is problematic. For instance, how to protect confidentiality of whistleblowers in the case of an objection or cassation, as well as, when the case is filed as a criminal or a civil case. These problems may arise because there will be institutions other than the Kppu that will be involved in such cases – institutions not bound by the Kppu Guidelines.

To address this problem, it is necessary to include a leniency programme into the national legal system, which in turn means that existing laws shall be amended. It is not sufficient to regulate leniency by legislation below the level of an act of parliament, because the programme needs to have binding power for institutions other than KPPU also, i.e. the courts, the attorney office, and the police department. With regard to the protection of confidentiality of whistleblowers in the case of a civil claim following administrative procedures, a lesson can be learned from the judgment in the *Pfleiderer*[94] case in Germany where leniency materials remained protected against disclosure. In the last instance of the EU judicial system, the Court of Justice ruled that it is up national courts to decide whether leniency materials are subject to disclosure in the case of damages actions[95]. Such concept has been adopted in the Proposal

[93] P. Buccirossi, G.Spagnolo, *Antitrust Sanction Policy in the Presence of Leniency Programs*, available at http://www.gianca.org/PapersHomepage/Buccirossi%20Spagnolo%20-%20Antitrust%20Sanction.pdf, p. 1.

[94] Case C-360/09 Pfleiderer v. Bundeskartellamt [2011] OJ C232/5.

[95] G. De Stefano, "Access of Damage Claimants to Evidence Arising out of EU Cartel Investigations: A Fast-evolving Scenario" (2011) 3 *Global Competition Litigation Review* 102.

for the EC Directive on Certain Rules Governing Actions for Damages under National Law for Infringements of Competition Law provisions of the Member States and of the European Union[96], as adopted by the European Parliament on 17 February 2014[97].

Another problem is that striking a delicate balance between the carrot and the stick will be hard to do when administrative fines are not severe enough to make leniency, or a fine amnesty, sufficiently interesting for large companies. That is so especially where business impact, not to mention the risk for the safety and well-being of the whistleblowers, is at stake[98]. Thus, without amending the amount of fines that the Kppu is able to impose, the implementation of a leniency programme will not be sufficiently effective.

The second option is implementing it by amending the current Indonesian Competition Law. This option provides a solution to the abovementioned difficulties. However, two problems occur in this regard. *First*, amending a law will require political will and actions on the part of both the government and the parliament. This will take time and political effort, the results of which are difficult to be estimated. *Second*, there is a risk that the current Law will become weakened further and the authority of the Kppu will lessen if there is no sufficient power and understanding of the importance of its work for the improvement of economic life in the country.

The discussion on the possible implementation of a leniency programme has taken place within the Kppu in 2012 but the question remains open – will it go further or will it stop there.

6. Conclusion

The procedures for competition law enforcement in Indonesia through the functions of the Indonesian competition authority – the Kppu – follow administrative procedures. They are however, in some parts, influenced by criminal law procedures, for instance with respect to evidence. Against the

[96] COM(2013) 404 final C7-0170/2013 – 2013/0185 (COD). The proposal has been adopted by the European Parliament Corrigendum on 10 September 2014.

[97] European Parliament Press Release, Antitrust: Commission welcomes Parliament vote to facilitate damages claims by victims of antitrust violations, 17 February 2014.

[98] Compare to criminal sanction imposed in the US in cartel cases in E.G. Disner, *Antitrust…*, op. cit., pp. 107 ff; G. Harrison, M. Bell, "Recent Enhancement in Antitrust Criminal Enforcement: Bigger Sticks and Sweeter Carrots" (2006) VI *Houston Business and Tax Law Journal* 208-240, available at http://www.hbtlj.org/v06p2/v06p2_harrisonbell.pdf, p. 211.

decisions rendered by the Kppu, an objection can be filed to the district court followed by a cassation to the Supreme Court in the last instance. In both instances, the Kppu is treated as a party of an equal standing to the opponent in the respective instance. The case in the district court is dealt with according to civil suit procedures; special civil suit procedures apply in front of the Supreme Court. Although the use of criminal enforcement and private injunctions is not excluded, reluctance persists to do so, mainly for lack of clarity in the provisions of Indonesian Competition Law.

Problems in dealing with cartel cases on the basis of existing procedures are rooted in the Indonesian competition authority's inability to obtain sufficient evidences. For example, the Kppu is not authorized to conduct searches in the alleged offender's premises or offices; there are also no provisions allowing the use of wiretapping. Moreover, the Kppu is not authorized to seize evidence directly or force alleged offenders to present themselves at the authority's office for an investigation. Rather, it must rely on the assistance of the police department for that purpose.

To improve existing procedures, two suggestions are proposed, namely to use indirect evidence and to implement a national leniency programme. This can be done either based on existing Indonesian Competition Law or by amending current legislation. In the latter case, new provisions have to be inserted into the Law to allow both the use of indirect evidence and a leniency programme. However, in order for the Law to be amended, political will and actions on the part of both the government and the parliament will be needed. In the meantime, the Kppu can issue guidelines and standard operating procedures to provide directions for its commissioners and staff to implement a leniency programme. For the use of indirect evidence, until the Law is amended, the Kppu should use indirect evidence only if supported by two other legally specified types of evidence. The authority should also not base its argumentation exclusively on indirect evidence covered by the meaning of the term "indications". Instead, the arguments shall be based on detailed technical and economic reasoning supporting both communication and economic evidence and their clear link to the alleged violation.

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