LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition

Bruce Kilpatrick
Pierre Kobel
Pranvera Këllezi *Editors*

Compatibility of Transactional Resolutions of Antitrust Proceedings with Due Process and Fundamental Rights & Online Exhaustion of IP Rights

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Preface

The International League of Competition Law (LIDC) carries out a leading work every year in studying two topical questions selected among the fields of antitrust law, intellectual property or unfair competition. On each question, the key themes in the major jurisdictions are reflected in a series of national reports, whilst an international report identifies common features and trends from the national reports and draws conclusions on potential solutions or ideas to be explored in the future. The works of the LIDC have been a well of practical guidance for generations of lawyers, whether or not they are members of the LIDC, and for regulatory authorities.

Parts of the studies, international reports and recommendations were made available on the Web and disseminated to a selected audience. However, the LIDC has also decided to publish the entire reports for the benefit of the legal practitioners, academics and authorities active in the field of antitrust, intellectual property and unfair competition. LIDC is therefore making full use of this unique opportunity to contribute in the development of these fascinating fields of law.

This publication provides unparalleled comparative analysis of two “hot topics” in the field of antitrust and unfair competition laws.

The first part of the book examines the consistency and compatibility of transactional resolutions of antitrust proceedings (such as settlement procedures, leniency programmes and commitments) with due process and the fundamental rights of the parties. This is a particularly important topic, given the widespread adoption of these procedures by antitrust authorities worldwide. The papers consider how the leniency, settlement and commitment procedures have developed across a range of jurisdictions and consider the extent to which checks and balances have been applied in those national procedures in order to safeguard the fundamental rights of the parties. A detailed international report, prepared by Pranvera Këllezi, identifies general trends and highlights differences and the most interesting features of national regulations.

The second part of the book gathers contributions from various jurisdictions on the unfair competition question of the online exhaustion of IP rights. As commerce moves increasingly online, the reports consider the extent to which exhaustion and similar concepts have adapted to these rapid changes. The comprehensive and insightful international report, prepared by Vincenzo Franceschelli from the

University Studi di Milano-Bicocca in Milan, brings together these reflections by comparing various national positions.

The editors would like to thank all the authors for their contributions and their patient collaboration during the editing of this book. They would like to express their sincere gratitude to the Members of the Bureau, of the Council and of the Scientific Committee for their kind support and encouragement during the preparation of this book.

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Abbreviations

AUD	Australian dollar
Berne Convention	The Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, as amended
BGBl.	Bundesgesetzblatt (Germany)
BGH	Bundesgerichtshof (Germany)
BGN	Bulgarian lev
B2B	Business to business
B2C	Business to consumers
bn	Billion
BRL	Brazilian real (reais)
c./ca.	Circa
cf.	Compare
CFI	Court of First Instance of the ECJ (before 1 December 2009)
CFREU	The Charter of Fundamental Rights of the European Union, OJ 2010 C 83, p. 389
CHF	Swiss franc
CJEU	Court of Justice of the European Union (after 1 December 2009)
CMLR	Common Market Law Review
CR_n	Concentration Ratio measuring the percentage market share held by *n* largest undertakings
De minimis Notice	Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis), OJ 2001 C 368, p. 13
Directive 97/7	Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 L 144, p. 19
Directive 2000/31	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), OJ 2000 L 178, p. 1.

Directive 2011/7	Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, OJ 2011 L 48, p. 1
DKK	Danish krone
DM	Deutsche mark
e.g. or eg	For example
EC	European Community
ECHR	Council of Europe, European Convention on Human Rights of 4 November 1950
ECJ	European Court of Justice (before 1 December 2009)
ECR	European Court Reports
EU	European Union
ff	And following
GBP	Pound sterling (UK)
GC	General Court of the CJEU (after 1 December 2009)
GDP	Gross domestic product
Guidelines on the effect on trade concept	Commission Notice—Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 2004 C 101, p. 81
ha	Hectare
HADOPI	Haute Autorité pour la diffusion des œuvres et la protection des droits sur Internet, France
HRK	Croatian kuna (*hrvatska kuna*)
HMT	Hypothetical monopolist test
HUF	Hungarian forint (*Magyar forint*)
i.e.	Id est (that is)
Id./Idem	The same as previously mentioned
IP	Intellectual property
m	Million
m^2	Square metre
min	Minutes
MFN	Most Favoured Nation
NAAT-rule	The non-appreciable affectation of trade rule
Notice on the relevant market	Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C 372, p. 5
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
p./pp.	Page(s)
para/paras	Paragraph(s)
Paris Convention	Paris Convention for the protection of industrial property of 20 March 1883
pt	Point
kg	Kilogram
R&D	Research and development

Regulation 1/2003	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 2003 L 1, p. 1
Regulation 139/2004	Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004 L 24, p. 1
Regulation 330/2010	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 L 102, p. 1
Rome Convention	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done at Rome on October 26, 1961
RON	Romanian leu
SEK	Swedish krona
SMEs	Small and medium-size enterprises
SMP	Significant market power
Software Directive	Directive 2009/24 of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ 2009 L 111, p. 16
SSNIP	Small but Significant and Non-transitory Increase in Price
TEC	Treaty establishing the European Community
TFEU	Treaty on the Functioning of the European Union
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 199.
UAH	Ukrainian hryvnia
UK	United Kingdom
US/USA	United States of America
v	Versus
WCT/WIPO Copyright Treaty	World Intellectual Property Organization Copyright Treaty, 199.

Part I

Due Process in Antitrust Transactional Mechanisms

1 International Report

Pranvera Këllezi

1.1 Introduction

Transactional resolutions are becoming an increasingly important part of antitrust proceedings. Contributions from 16 jurisdictions[1] confirm such a trend.

To embrace all jurisdictions represented in the LIDC, under this contribution the transactional resolution of antitrust proceedings encompasses any resolution of competition law (i.e., antitrust) proceedings through bargaining or negotiation that results in a mutually agreed outcome between competition authorities or other governmental bodies and the companies, or else in an outcome influenced by these negotiations. We mention as examples settlements, plea bargains, commitments, undertakings, amicable agreements, leniencies, consent orders, decrees, judgments, remedies, and all other forms of negotiated solutions.[2]

A transactional resolution of antitrust proceedings brings many benefits to competition authorities and companies under investigation in public interest, as well as private companies. Due process, as part of the rule of law, ensures that public interest is maximised in antitrust proceedings while safeguarding individual

[1] The following national groups submitted a contribution on this topic: **Australia** (B. Jedličková, J. Clarke, and S. Bhojani), **Austria** (G. Fussenegger), **Belgium** (J. Auwerx), **Brazil** (J. C. M. Berardo and B. B. Becker), **Czech Republic** (J. Kindl and M. Petr), **France** (D. Bosco), **Germany** (E. Bueren), **Hungary** (A. Keller), **Italy** (A. Camusso), **Japan** (I. Hayashi, report not published), **Poland** (A. Stawicki, B. Turno, T. Feliszewski, K. Kanton, and K. Karasiewicz), **Serbia** (D. Ognjenovic), **Spain** (J. Suderow and A. A. Garzaro), **Sweden** (H. Andersson), **Switzerland** (D. Emch, D. Neuenschwander, and A. Burkhard), the **United States of America** (E. E. Varanini).

[2] Settlements of private actions are outside the scope of this study.

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rights and freedoms which underlie the market economy and our democracy. Starting with the investigation of sensitive points that can lead to an imbalanced result, this contribution aims to derive and propose recommendations on how transactional resolutions can achieve an optimal balance in terms of market intervention while safeguarding public interest on the one hand and protecting individual rights and freedoms on the other. At the end, the success of transactional resolution mechanisms will depend on procedural fairness and on the extent to which the rights of the parties involved will be safeguarded.[3]

Our study encompasses transactional resolutions pertaining to all fields of competition law: agreements, abuse of dominant positions, or merger control. Although undertakings and competition authorities have always exchanged views while complying and applying competition laws in any field, the negotiation of remedies in merger control is one of the domains where both parties have benefited from the full potential of such discussions.[4] We include, therefore, merger remedies to permit comparison with other fields.

Under the influence of the competition law of the European Union, many European jurisdictions currently use the term ‘settlement’ for agreement on a fine reduction in the field of cartels and the term ‘commitments’ for any agreed-upon solutions outside the domain of horizontal cartels, that is, abuse of a dominant position and other potentially restrictive agreements. In this contribution, we will use the term ‘settle’ or ‘settlement’ as the resolution of an antitrust investigation in the framework of an antitrust proceeding before a competition authority, with or without court involvement. In this sense, the term ‘transactional resolution’ better encompasses all kinds of agreements reached with competition authorities, thus avoiding appeals or litigation in court.

The main focus of this study is on due process and fairness. Our objective will be to identify weaknesses and shortcomings and suggest measures or safeguards to improve fairness of the transactional resolution mechanism. Accordingly, this report is less about the comparison of mechanisms and transactional resolutions in various jurisdictions. The national contributions in this book provide excellent information and analysis for further reflection on this subject.

After discussing the role and benefits of transactional resolution mechanisms (Sect. 1.2), we will review the informal and formal processes of transactional resolutions in the abuse of dominant position and agreements (Sect. 1.3). We will briefly present the main findings in merger control (Sect. 1.4) before drawing conclusions regarding how over- and under-intervention can be dealt in transactional resolution mechanisms (Sect. 1.5). We will conclude with some recommendations in the final section.

[3] See M. Israel, United Kingdom, Sect. 16.1.

[4] In some countries, negotiated merger remedies have preceded settlements in the field of agreements and abuse of dominant positions; see A. Camusso, Italy, Sect. 10.1.2.

1.2 Role and Benefits of Transactional Resolutions

Transactional resolution mechanisms have become central to antitrust proceedings.[5] The success of transactional resolutions is driven by the fact that all parties benefit therefrom, in what can be explained by a balance of public and private interests.

Competition law enforcement benefits from quick termination of the infringement and damages to the economy,[6] adequate allocation of resources, reduction of the length of antitrust proceedings,[7] better cooperation of the companies under investigation,[8] and higher acceptance of state intervention by the companies under investigation.[9] In the case of leniency programmes, the cooperation of the marketplace is a substitute for time-consuming and costly investigative mechanisms.[10] In certain jurisdictions, transactional resolutions have long been considered ‘a very effective means for social peace’ and for facilitating adherence from the public.[11]

Beyond case resolutions, discussion with companies under investigation improves authorities’ understanding about markets and industries; the positive externalities of this understanding will spill over into other cases and improve market intervention overall.[12] It is submitted that transactional resolutions reduce costs and delays that result from requirements related to the burden and standard of proof[13]; however, it is precisely this shifting of the burden of proof to companies and the reduction of the level of proof resulting therefrom that weaken guarantees for companies, giving rise to issues of fairness.

National reports largely admit that transactional resolutions help with optimal competition law enforcement and therefore serve public interest by ensuring both restoration and correction of an anticompetitive situation,[14] as well as detection and

[5] In some jurisdictions, the majority of proceedings are resolved following a transactional mechanism. In Germany, in the period between 2007 and 2011, around 80 % of proceedings were resolved through settlements (E. Bueren, Germany, Sect. 8.2.4). In Austria, all cartel cases since 2012 have been concluded by settlements (G. Fussenegger, Austria, Sect. 3.1). In France, around 30 % of all decisions are resolved through commitment (D. Bosco, France, Sect. 7.2.2). See, however, D. Ognjenovic, Serbia, Sect. 12.1.1, where transactional resolutions are not used often.

[6] See G. Fussenegger, Austria, Sect. 3.1; J. Suderow and A. A. Garzaro, Spain, Sect. 13.1.2.

[7] Transactional resolution of antitrust proceedings has not, however, reduced the length of proceedings in Belgium (J. Auwerx, Belgium, Sect. 4.4). In other countries such as Brazil, transactional resolutions have considerably reduced the length of the proceedings (see J. C. M. Berardo and B. B. Becker, Brazil, Sect. 5.1).

[8] See, for instance, J. C. M. Berardo and B. B. Becker, Brazil, Sect. 5.1; E. E. Varanini, United States of America, Sect. 17.3.

[9] See D. Emch et al., Switzerland, Sect. 15.1.

[10] See J. Kindl and M. Petr, Czech Republic, Sect. 6.1.

[11] See A. Camusso, Italy, Sect. 10.1.1.

[12] See A. Camusso, Italy, Sect. 10.5.

[13] See A. Camusso, Italy, Sect. 10.1.3.

[14] B. Jedličková et al., Australia, Sects. 2.2.3 and 2.2.4; see also E. Bueren, Germany, Sect. 8.2.8.

prevention of infringements. The flexibility of transactional resolution mechanisms is superior in many aspects to bare injunctions since transactional resolution mechanisms enable the testing of more innovative remedies compared to injunctions and orders,[15] as well as a fine balancing of pro- and anticompetitive effects,[16] avoiding an all-or-nothing approach. Transactional resolution mechanisms as a balancing act may achieve more in the development of competition law and pave the way for better enforcement policies.

Companies under investigation benefit from lower fines,[17] less reputational damage,[18] and overall cost reductions. In cases of commitment decisions where no liability is found, companies avoid acknowledgment of infringement by reducing in this way the risk of follow-on actions for damages. Besides, negotiations allow companies to actively participate in market intervention, accordingly establishing their own acceptable conduct in the market.[19]

Transactional resolution mechanisms can have downsides as well. One of the criticisms is based on the decreased legal certainty for companies and the lack of precedential findings. An increased unpredictability of competition law may result from an unbalanced intervention through transactional resolutions compared to injunctions[20]: if the majority of proceedings are resolved through transactional resolutions, which are often published in a form that does not describe all the facts and or include the complete reasoning, companies cannot rely on a clear decision-making practice. The transactional resolutions also run the risk that benign conduct is left unqualified through commitments; in certain circumstances, non-infringement decisions may provide more beneficial for the market in the long run.[21]

Not all contributors to this study share this criticism. Transactional resolutions have a great potential for guiding other market players[22] or serving as soft law, setting governmental expectations over time.[23] It is submitted that benefits related to the flexibility and innovative nature of remedies may well outweigh the costs of a loss of legal certainty or lack of precedential strength.[24]

An argument linked to the unpredictability of transactional resolutions is that the procedure is not transparent, and its opacity affects the rule of law.[25] Increased

[15] B. Jedličková et al., Australia, Sects. 2.2.3 and 2.2.4; E. E. Varanini, United States of America, Sect. 17.3.

[16] E. E. Varanini, United States of America, Sect. 17.3.

[17] A. Keller, Hungary, Sect. 9.1; A. Stawicki et al., Poland, Sect. 11.1.

[18] A. Camusso, Italy, Sect. 10.2.1.2; A. Keller, Hungary, Sect. 9.1.

[19] A. Camusso, Italy, Sect. 10.2.1.2.

[20] See, for instance, M. Israel, United Kingdom, Sect. 16.4.3.

[21] See M. Israel, United Kingdom, Sect. 16.4.3.

[22] See A. Keller, Hungary, Sect. 9.1; A. Camusso, Italy, Sect. 10.5.

[23] See E. E. Varanini, United States of America, Sect. 17.3.

[24] See E. E. Varanini, United States of America, Sect. 17.3.

[25] See E. Bueren, Germany, Sect. 8.2.8.

transparency would be achieved not only by allowing third parties and the market to comment but also by publishing full reasons for choosing a commitment or settlement procedure and the content and measures thereof.

Reduction of punishment and of the deterrent effect of competition laws is another potential negative effect associated with the transactional resolution of antitrust proceedings.[26] The greater the proportion of transactional resolutions compared to injunctions is, the greater the risk that the deterrent effect of competition law will be reduced. The weakening of the deterrent effect would in turn lessen the attractiveness of transactional resolutions.[27] However, it is our conclusion that such negative effects have not been observed, and, if any, they are outweighed by the overall positive benefits associated with transactional resolutions.[28]

The view that agreements with respect to fines are also considered to contradict the exclusive power of the state to sanction infringements[29] and that settlements constitute deviations from the "public interest" and from the "rule of law" is becoming less common,[30] demonstrating greater acceptance of transactional mechanisms.

Another debate is the undermining of restorative justice in that transactional resolutions make private damage actions more difficult or impossible. In the Unites States, the argument is even made that prosecution should be preferred to settlements where those settlements do not include admission of facts.[31] Another view is that by facilitating admission of infringement to competition law, settlements could also contribute to facilitating civil claims.[32] The practice of the German Competition Authority to ensure indemnification of victims of competition law infringements is an innovative approach dealing with the drawbacks of transactional resolutions with regard to private actions for damages.[33] In other jurisdictions, such as in Belgium, the new Code of Economic Law takes into account companies' commitment to compensate victims of infringements when determining the amount of the fine.[34] On the other hand, in jurisdictions where private actions are rare, transaction resolutions would not hinder private actions regarding damages claims.[35]

Transactional resolutions outside horizontal cartels do not have punishment as the principal aim. Restorative justice is achieved through measures that correct

[26] See M. Israel, United Kingdom, Sects. 16.4.2 and 16.4.3; E. Bueren, Germany, Sect. 8.2.8.

[27] See J. Auwerx, Belgium, Sect. 4.4.

[28] See, for instance, B. Jedličková et al., Australia, Sect. 2.7.

[29] See, for instance, G. Fussenegger, Austria, Sect. 3.2.2.1, A. Camusso, Italy, Sect. 10.1.1.

[30] See J. C. M. Berardo and B. B. Becker, Brazil, Sect. 5.1.

[31] See E. E. Varanini, United States of America, Sect. 17.3.

[32] See J. C. M. Berardo and B. B. Becker, Brazil, Sect. 5.1.

[33] See E. Bueren, Germany, Sect. 8.4.2.6.

[34] See J. Auwerx, Belgium, Sect. 4.2.1.1.

[35] A. Keller, Hungary, Sect. 9.5.

anticompetitive effects while ensuring more cooperation from companies and better prevention of future infringements. Transactional resolutions play a significant role in involving undertakings in the resolution of the anticompetitive effects of their proper conduct in the market. As such, transactional resolutions are a means to solve the unpredictable nature of competition law and the impossibility for the legislator to clearly define what anticompetitive conduct is. Inclusion of obligations to compensate victims of competition law infringements in transactional resolutions is another way of strengthening the restorative component of competition law.

Concern has been expressed in relation to the regulatory nature of remedies and transactional resolutions that cause competition authorities to act beyond the scope of their remit.[36] Competition law intervention is by its nature case specific and limited in time, and transactional resolutions act as a means of enforcing conduct obligations over long periods, instead of clear-cut prohibitions or non-intervention. Accordingly, it is submitted that regulatory remedies should not be considered suitable mechanisms to address market failure requiring long-term regulation.

1.3 Transactional Resolution of Agreements and Abuse of Dominance

1.3.1 Overview of Transactional Mechanisms

In the EU, national competition laws are heavily influenced by EU competition law. Generally, besides leniency programmes, two types of procedures exist: settlements of infringements involving the finding of an infringement and fine discounts, and commitments (undertakings) made binding through a decision declaring that there are no grounds for action (no infringement is found). The scope of transactional resolutions varies, however, from those resolutions in EU law, and the procedural rights of the parties comply with national legislation. While settlements in EU competition law are possible only in cartel proceedings, settlement procedures in Belgium,[37] France,[38] and the Czech Republic[39] are possible in other cases of restrictive agreements, as well as in abuse-of-dominance cases. In Sweden, settlements do not aim at a fine reduction since the legislator did not want a system that would compel companies to admit guilt.[40] Similar mechanisms exist in other jurisdiction influenced by EU competition law, where commitments and leniency are part of the competition law enforcement.[41]

[36] See A. Camusso, Italy, Sect. 10.5.

[37] See J. Auwerx, Belgium, Sect. 4.2.1.1.

[38] See D. Bosco, France, Sect. 7.2.3.1.

[39] J. Kindl and M. Petr, Czech Republic, Sect. 6.2.1.

[40] See H. Andersson, Sweden, Sect. 14.2.3.

[41] D. Ognjenovic, Serbia, Sect. 12.2.

In Australia, the difference regarding a finding of liability is determined by the prerogative of the judiciary to make an infringement finding: the competition authority has competence in negotiating undertakings not resulting in a finding of liability, and the court has competence in approving fine reduction in cases of decisions involving a finding of liability.[42]

Leniency programmes are effective tools for discovering cartels and are increasingly used by companies. A factor and precondition of their success is the transparency and legal certainty of the regulatory framework for prospective applicants. In Germany, the recent legal reform aiming at improving legal security for applicants has resulted in an increase in leniency applicants.[43] Consequently, the enhancement of companies' collaboration depends significantly on the legal certainty and transparency of the regulatory framework and its application in practice. This lesson applies to all other transactional resolutions; accordingly, increasing the *legal certainty* and *transparency* of the transactional process will enhance the benefits of such mechanisms for all parties involved.

Outside Europe, leniency programmes exist in Australia, Brazil, and the United States. In Brazil, leniency applications are applicable to horizontal cartels and require admission of infringement of competition law, whereas settlements in unilateral conduct cases may or may not include acknowledgment of liability.[44] Instead of a fine, the companies applying for leniency may be required to pay a contribution. Fine discounts are also available for companies that do not benefit from immunity or leniency. In the United States, for instance, settlement with defendants not benefiting from immunity/leniency (plea bargains) results in reduced fines or dismissal of some of the charges.[45]

In Switzerland, the same procedure on amicable settlements is open to cartel participants or companies subject to investigation on transactional resolutions and abuse-of-dominance positions. The decision approving the agreement cannot leave open the question of the infringement of competition law; amicable agreements are therefore possible in cases of infringement. A leniency programme applies for horizontal and vertical agreements subject to fines.[46]

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[42] B. Jedličková et al., Australia, Sect. 2.2: when submitting undertakings, companies acknowledge simply the *potential* risk of breaching competition law.

[43] See E. Bueren, Germany, Sect. 8.2.4.

[44] J. C. M. Berardo and B. B. Becker, Brazil, Sect. 5.2.1.

[45] E. E. Varanini, United States of America, Sect. 17.5: plea bargains are "negotiated agreement [s] between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, [usually] a more lenient sentence or a dismissal of other charges."

[46] See D. Emch et al., Switzerland, Sect. 15.2.1. Only hardcore horizontal and vertical cartels and abuse of dominant positions are subject to fines in Switzerland; agreements restricting competition by their effect are subject to sanctions in case of non-compliance with an existing prohibition decision.

1.3.2 Discretion of Competition Authorities and/or Judges During Proceedings

Competition authorities enjoy broad discretionary powers in conducting antitrust proceedings, including the possibility to conclude an amicable agreement with the parties under investigation. The discretion of competition authorities is applicable not only during investigations but also in the limited review conducted *de facto* or *de jure* by courts.[47]

Generally, the discretion of authorities is greater in cases of transactional resolutions outside leniency programmes. In order to offer sufficient incentives to potential leniency applicants, leniency programmes include clear criteria that circumscribe the discretion of authorities; accordingly, competition authorities have less discretion to reject leniency applications than settlement or commitment submissions.

Apart from the discussion of the right to appeal and the waiver of the right to appeal that we will discuss below, the limited control of settlements by judicial branches shows a certain deference of the judicial branch to the government's power to settle. The very existence of discretionary powers of government bodies[48] is found in the separation, or balance, of executive, legislative, and judicial powers. In the United States, judges cannot dictate policy to federal agencies.[49] Also, courts are reluctant to discuss and circumvent the use (or misuse) of powers by competition authorities. Such deference may put undue pressure on companies under investigation resulting from the use of discretionary power, incompatible with fairness and due process.

Given the waiver of the right to appeal, the limited possibility to appeal, and the deference shown by the judicial branch to the executive branch of government in the case of transactional resolutions, there is a greater interest in ensuring fairness and due process from the start of investigation until the conclusion of transactional resolutions.

Discretion has an impact on the conduct of proceedings and the rights of the parties. Discretion also impacts the predictability of the process and the legal security of the parties. One mechanism for increasing predictability and reducing the negative impact of the authorities' discretion is the communication of the essential steps of the transactional mechanism in guidelines and other soft law instruments bound to the authorities themselves. Several authors see the use of soft law as a necessary tool for increasing the fairness of the transactional resolution process and a way to reduce the drawbacks of the discretion of authorities in this matter.[50] If the prerequisites for entering into discussion and for concluding

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[47] See, for instance, D. Emch et al., Switzerland, Sect. 15.2.2.

[48] In Europe, known as independent administrative authorities.

[49] E. E. Varanini, United States of America, Sect. 17.2.

[50] See, for instance, G. Fussenegger, Austria, Sect. 3.2; see also the guidelines in Spain, J. Suderow and A. A. Garzaro, Sects. 13.2.4 and 13.2.5.

transactional resolutions are made transparent and set out clearly in guidelines, parties engaging in discussions with authorities will be fully aware of consequences. Also, guidelines may provide crucial information on how the different procedures apply: for instance, whether settlements in cases of hardcore cartels are used in conjunction with leniency application, at what stage of the investigation settlement or submission of undertakings are possible and what the maximum of reduction of fines would be in cases of cartels outside leniency.

In procedures involving admission of infringement, the discretion of authorities shall be reduced and confined to a minimum level aiming at ensuring flexibility. This is to grant companies greater legal certainty on whether, and under what conditions, they can successfully apply for leniency or a fine reduction (settlement). In general, the more the transactional resolutions encroach on the procedural rights and individual freedoms of the parties, the less discretion the authority shall have and the more transparent the process should be.

1.3.3 Fairness, Good Faith, Legitimate Expectations, and Good Administration

The principles of fairness, good faith, legitimate expectations, and good administration are central to many jurisdictions and are attached to the principle of procedural justice.

Good administration is a principle applicable in several jurisdictions.[51] Transactional resolutions as such contribute to good administration of the state by making the system more workable for individuals and companies, and they are considered to represent a step forward in the good administration of antitrust enforcement.[52]

The national reports do not reveal any trend showing that these principles are not respected by authorities. In particular, it appears that legal measures in this sense would be ineffective and risk increasing bureaucracy[53] and would not affect the incentive of authorities and parties to respect these principles. On the other hand, conduct benchmarks are difficult to incorporate in regulations, hence the existence of the above-mentioned principles and the use of two other principles to guide or control authorities, companies, and judges: proportionality and equal treatment.

However, the extraordinary set of sanctions as well as the risk of prohibition of merger transactions, coupled with the necessary discretion authorities enjoy, grant significant leverage to authorities, which can be misused by particular officials. Misbehaviour is difficult to report, particularly in niche markets such as legal services on competition law, and therefore the fact that the national reports do not mention misbehaviour does not mean that it does not exist.

[51] See Article 41 of the EU Charter of Fundamental Rights, right to good administration.

[52] See A. Camusso, Italy, Sect. 10.1.2.

[53] See J. C. M. Berardo and B. B. Becker, Brazil, Sect. 5.3.

Within the discretion of the law recognised by competition authorities, there are several ways for authorities to increase pressure on companies. These include the threat of higher fines,[54] a lower reduction of fines, and conduct requests that exceed what is necessary to cure anticompetitive effects. In merger control, where time is of essence, delays in authorisation or delays in evaluation of remedies submitted by parties increase the pressure on companies, as well as their incentive to submit remedies that go beyond what is necessary to remedy the competitive concerns, or remedies that are unnecessary because the risk identified is remote or insignificant. As explained, benchmarks in this matter are the principles of proportionality and equal treatment. However, the subjective assessments inherent in such an exercise are not apt to identify and clearly define threat or pressure that would exceed the level the legislator intended to grant to authorities and would be qualified as admissible.

Not all such principles can serve as grounds for appeal. Furthermore, the right to appeal plays a limited role in transactional resolutions. Principles of fairness and due process will not be effectively tested in appeals. Accordingly, the grounds for setting aside or reversing a decision are irrelevant. In addition, due to the deference of judges and the difficulty of the task in this matter, the right to appeal is not suitable to offset the power of authorities.

Consequently, it is crucial to respect such principles with respect to transactional resolution *at the investigation level*, as conformity with such principles fosters acceptance of competition law by the business community and contributes to achieving optimal enforcement in the public interest.

1.3.4 Fundamental and Procedural Rights of the Parties

In general, the fundamental and procedural rights of the parties are specifically provided in a text of law, and their scope is generally construed and defined by the judiciary. Fundamental rights are of crucial importance in competition proceedings due to the threat of fines. The proceedings are considered to be of a criminal nature, and therefore similar safeguards and guarantees to criminal procedures are provided to companies under antitrust investigations. In merger control, the fines play a minor role, and therefore the parties' rights are guaranteed by procedural guarantees only.

Another distinction is relevant—that between legal entities and individuals. In Germany, for instance, the rights closely linked to human personality, such as the right to remain silent, were denied to legal entities.[55] Similarly, in Australia, the right against self-incrimination applies to individuals, not to corporations.[56] Other

[54] See discussion of E. Bueren, Germany, Sect. 8.4.2.6; see also J. Suderow and A. A. Garzaro, Spain, Sect. 13.4.

[55] See E. Bueren, Germany, section "Rights of Defence and Procedural Rights".

[56] B. Jedličková et al., Australia, Sect. 2.5.6.

jurisdictions have not adopted such a distinction; consequently, companies enjoy the same rights as individuals.

We will present below a few considerations regarding the right against self-incrimination and the right to be heard, essential in antitrust proceedings. Other rights will be discussed further while discussing the process of transactional resolutions.

The right against self-incrimination and the presumption of innocence are expressly provided for in the fundamental laws (constitutions) of several countries.[57] On that basis, these essential guarantees apply to administrative criminal proceedings as well as cartel proceedings.[58] The right against self-incrimination and the presumption of innocence are based on Article 6 of the CEDH. In some jurisdictions, the right against self-incrimination applies to criminal antitrust offences only and not to administrative proceedings.[59]

The obligation to provide information does not affect the right against self-incrimination as long as the request concerns only factual elements and the questions are not formulated in such a way as to trigger a response resulting in an admission of guilt.[60] In general, there is no duty to actively provide documents or facts proving infringement of competition laws by parties submitting a settlement request.

The right against self-incrimination is particularly relevant for submissions entailing admission of infringement. In transactional resolution mechanisms, such submissions are considered to be voluntary, implying therefore a waiver of such right.[61] However, submissions of companies are not genuinely 'voluntary' when they are filed in response to a threat of sanctions or other constraints. The greater such threat, depending on the importance of the sanctions and the potential hindrance on business conduct, the less 'voluntary' the cooperation of companies and infringement admissions thereof[62]; indeed, in certain circumstances the threat of sanctions, together with the risks related to time and investigation costs, makes such cooperation *involuntary*. This also applies to leniency applications. In a system involving extremely high fines such as competition law, the risk in terms of enforcement lies not only in the admission of actual infringement but also in the admission of infringement that never happened or in the filing of leniency as a precautionary measure, overloading the enforcement authorities and increasing enforcement costs.

[57] Art. 90(2) of the Austrian Constitutional Law.

[58] With regard to the principle of presumption of innocence: Austria (5 Ob 154/07v).

[59] In Serbia, abuse of dominant position is a criminal offence provided for in the criminal code.

[60] See decision of the Austrian Cartel Supreme Court of 11 October 2006, 16Ok7/06, G. Fussenegger, Austria, Sect. 3.3.1. J. Kindl and M. Petr, Czech Republic, Sect. 6.3.1.

[61] See, for instance, J. Suderow and A. A. Garzaro, Spain, Sect. 13.3.3 (leniency applications).

[62] See the discussion in Germany concerning leniency applicants, E. Bueren, section "Rights of Defence and Procedural Rights".

A distinction should be drawn, however, between immunity or leniency applications on the one hand and settlement submissions regarding a fine reduction on the other. Immunity and leniency applications aim at the denunciation and discovery of cartels that would have continued to cause damage to the economy without such a procedure. Leniency and immunity programmes apply in general before any procedure is opened against the applicants; the likelihood of fines and therefore the threat thereof are somehow more abstract than in actual cartel investigations. As such, leniency is a detection and information mechanism, which implies the waiver of the right against self-incrimination. As a result of such voluntary disclosure and incrimination, other rights such as the right to know the case against them or the presumption of innocence would have the same relevance for applicants of immunity and leniency programmes; in practice, such rights are waived by leniency applicants. The same applies to subsequent settlement submissions by the same leniency applicants.

By contrast, settlements regarding fine discounts reward further cooperation of companies being investigated. The right against self-incrimination, presumption of innocence, and the right to know the case against them are relevant for companies that have not applied previously for leniency or immunity programmes. Companies are not compelled to actively submit documents or information evidencing their own acts or actions of other companies. In cases where settlements involving admission of infringements are entered only in later stages of the investigation, i.e. after the authority has produced all evidence and parties have had the right to review such evidence, the right against self-incrimination is not compromised since the parties accept the settlement after having reviewed the existing evidence.[63]

In order to preserve the right against self-incrimination and other rights of defence, authorities should not consider the lack of active cooperation of companies under investigation as an aggravating factor.[64] On the other hand, granting of benefits under the discretion of authorities, such as a fine reduction, against companies' cooperation would be permissible.[65]

Other procedural circumstances affect the right against self-incrimination. In Belgium, a company's settlement statement shall contain 'acceptance of infringement identified' in the communication of objections sent by the competition authority, which may affect the right against self-incrimination to a greater extent, since the company is not free to draft its statement according to its own understanding of the facts and of the infringement.[66]

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[63] See J. Kindl and M. Petr, Czech Republic, Sect. 6.3.1.

[64] See the discussion in Germany regarding leniency applications, E. Bueren, Germany, Sect. 8.2.1.

[65] See also in Germany, this is not covered by the prohibition of granting advantages not envisaged by statute; see E. Bueren, Germany, Sect. 8.2.3.2. See A. Camusso, Italy, Sect. 10.2.3.4, for whom the more companies benefit from the cooperation, the less relevant the right against self-incrimination becomes.

[66] J. Auwerx, Belgium, Sect. 4.2.1.1.

In cases of commitments that do not result in acknowledgment of guilt, there is no pressure or incentive on companies to accept liability for infringing on competition law. Consequently, the presumption of innocence and the right against self-incrimination are safeguarded. Yet this is true provided the voluntary undertakings are not considered to imply any (implicit) recognition of wrongdoing.

The right to be heard comprises several components, such as the right of parties to know the case against them, the right to have access to files and the right to comment on objections raised against them, and/or the opportunity to be heard in person.

In transactional resolution mechanisms, the right to be heard in person is generally respected since discussions give sufficient opportunity to the parties to present and defend their case in front of competition authorities. In order to increase efficiency, the right to be heard in person is replaced by the opportunity to give comments at several stages of the procedure, in particular comments to the quasi-final draft decision that would record and make binding the agreement and undertakings of the parties. The right to be heard would be impaired if the parties were incentivised to submit undertakings or commitments, to admit facts or any infringement of the law before having had a reasonable opportunity, and within a reasonable deadline, to study the theory and objections of the authority, as well as to have access and review the main evidence used by authorities against them.

At early stages of the transactional discussions, the most important aspects of the right to be heard are (1) the right to know the case against the companies; (2) the right to have access to and see the main evidence, even access to the full file; and (3) the opportunity to have a clear perspective on the essential components of the transaction and their amount.

Transactional resolutions are conceived from the competition authorities' standpoint as a means to reduce costs and speed up the procedure by drafting shorter statements of objections and using fewer resources to arrange access to files for companies under investigation. While such a position is comprehensible, it is precisely the hurdles created for companies at this stage that may encroach on the right to be heard and may produce unnecessary pressure to accept objections based on insufficient evidence or unclear effects on the market and to submit commitments that go beyond what is necessary to restore effective competition.

As a matter of principle, cost efficiencies should not be achieved on the back of parties' rights of defence. Only when the parties' rights are considered to be sufficiently fulfilled in an actual case should the cost efficiencies take priority over the rights of defence. Accordingly, total or partial waiver of defence rights should not be made a prerequisite to the benefits granted to companies in the framework of transactional resolution mechanisms.

The section below will discuss fairness all along the process of transactional resolution since different issues arise at different stages of the process.

1.3.5 Fairness, Due Process, and the Transactional Resolution Process

1.3.5.1 Informal Investigations That Do Not Result in Binding Decisions

Many antitrust investigations are resolved informally, following a discussion with competition authorities during an initial phase where procedural rights are not formally available or respected. Companies voluntarily undertake the adaptation of their conduct against closure of investigation without any adoption of a formal decision or a finding of infringement. The main advantage for companies is that they avoid the time and expense in connection with a formal investigation,[67] and the same applies for authorities. In principle, such quick resolution of cases should be used in relation to conducts having limited effect on competition.[68]

In this preliminary phase, companies in general do not have access to files and do not receive any written form of objections. Only discussions occur between parties and competition authorities. In contrast, authorities have large investigative powers, backed by sanctions in cases of non-cooperation to provide information.[69] The risk in this initial phase is that authorities may be willing to open investigations on the basis of complaints filed by competitors or customers without investigating further the reality of the anticompetitive effects, thus shifting the burden on companies under investigation and increasing the later incentives to offer something in order to stop investigations.

The rights of defence may be more at stake at this stage than during a formal investigation.[70] However, companies under investigation may wait for the formal opening of the procedure, where they will have more rights than during the initial and informal investigation phase, should they not be comfortable with the lack of information about the case or the impossibility of having access to key documents.

Such undertakings are not binding on the companies submitting them; accordingly, there is no sanction for non-compliance outside the opening of a formal investigation. In the United Kingdom, these are called 'voluntary assurances'.[71] In Switzerland, such undertakings create an obligation on the companies to act in good faith; however, they are not approved, or made binding, by a decision of the Swiss Competition Commission.[72] Given the fact that companies agree to adapt their behaviour, that no binding decision is taken against them, that no infringement is found, and that such closure of procedures is not subject to publicity, such an informal procedure does not encroach on the fundamental rights of companies.

The main risk lies in over- or under-intervention and the lack of transparency of this kind of informal intervention. The risk of over-intervention may be solved by a

[67] See M. Israel, United Kingdom, Sect. 16.2.

[68] See J. Kindl and M. Petr, Czech Republic, Sect. 6.2.1.4.

[69] See in Italy, A. Camusso, Sect. 10.2.3.1.

[70] See A Camusso, Italy, Sect. 10.2.3.1.

[71] M. Israel, United Kingdom, 16.2.1; D. Emch et al., Switzerland, Sect. 15.2.1.1.

[72] D. Emch et al., Switzerland, Sect. 15.2.1.1.

regular review of undertakings. In the United Kingdom, for instance, the OFT released a company form of voluntary assurances one year after they were offered by the company, on the ground that the evidence was insufficient to lead to a finding of infringement.[73] Under-intervention may also be adjusted by the possibility for authorities to open a formal investigation at any time if the assurances given by companies prove to be inadequate or insufficient. Ultimately, the main drawback of such intervention is insufficient transparency and publicity around the case, which sends mixed messages to market participants: was there a potential infringement, should other companies adopt the same conduct, what exactly was offered to companies under investigation, or how can third parties benefit from or enforce such commitments? Given that no sanctions are adopted, such informal intervention is not suitable for conduct that has caused significant damage to the economy or that has a clear detrimental effect on competition.

1.3.6 Formal Investigations

1.3.6.1 Communication of the Case Against the Company

In general, the parties have the right to be informed about the investigation. Such information is usually provided at an early stage of the procedure and does not include sufficient information on all allegations that the competition authority may wish to raise. This communication is not a sufficient basis on which the companies may submit commitments or simply show readiness to enter into a settlement with authorities.

As explained above in this report, the main achievement of transactional resolutions is to free up resources of competition authorities by downsizing formal exchanges, such as written procedures and the preparation of written documents, which in turn is believed to increase efficiency. Yet less written procedure entails ill-defined concerns related to competition infringements, making burdensome the defence of companies and arduous their task of finding remedies to cure vague competition concerns or their decision to acknowledge (or not) infringement of competition law. For instance, the preliminary assessment in the case of commitments may well be very superficial, and companies may offer commitments for an alleged infringement that does not exist or is not proven.[74] In other words, the burden is shifted onto companies and, on the whole, this does not reduce society's cost related to the enforcement of competition law.

Not all jurisdictions have an information mechanism comparable to the statement of objections in EU competition law, i.e. a written communication where the Commission states in detail the objections raised against the company under investigation and where such objections are the result of thorough investigative work.

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[73] See M. Israel, United Kingdom, Sect. 16.2.1 (case *Robert Wiseman Dairies*).

[74] See D. Bosco, France.

In some jurisdictions, the form and the content of such communication are not clearly set.[75] In Switzerland, the objections of the Secretariat of the Competition Authority are presented in a draft decision that is sent to the parties for comments; however, such a draft decision is usually drafted after the parties have negotiated an agreement with the authority.

In Belgium, the College of Competition Prosecutors (the investigative body of the competition authority) communicates its intention to proceed to a settlement (fine discount) in writing. After such discussions, if the competition authority believes that a settlement is possible for fine reduction, it invites the companies to submit a settlement statement by a fixed deadline.[76] The communication of objections is therefore an essential element of the procedure since a company's settlement statement shall contain 'acceptance of infringement identified' in the communication of objections. Even though prior communication safeguards the right of the company to know the case against it, the fact that the company should accept the facts and infringement as described in the communication is believed to affect the right against self-incrimination.[77] The level of the fine (minimum and maximum) will be set in draft decision by the investigative body only after discussion and after the issuance of the settlement statement by the company.[78] Therefore, neither the level of the fine nor the fine reduction is predictable for companies. Moreover, the College of Competition Prosecutors is free to modify the proposed minimum and maximum until the submission of the draft decision to the president of the authority.

In Germany, the competition authority should disclose orally or in writing the essential elements of the infringement and the upper limit of the fine. Objections do not have to be set in writing before the discussions start.[79] The competition authority drafts a settlement declaration and sets a deadline for companies to admit objections and facts included in the settlement declaration, as well as to admit the upper limit of the fine.[80]

Doubtful also is the practice of granting greater benefits if companies settle before receiving any statement of objections compared to the situation where parties receive one. This is the case in the United Kingdom, for instance, where settlement discounts are capped at 10 % post-statement of objections but may go up to 20 % before the issuance of a statement of objections.[81] While this is linked to a certain degree to time and cost savings, as well as the stage of reaching a settlement, the fact that the fine reduction depends simply on the issuance of a document that is

[75] See, for example, Austria, Sect. 3.3.2; A. Stawicki et al., Poland, Sect. 11.2.2.2.

[76] J. Auwerx, Belgium, Sect. 4.2.1.1.

[77] J. Auwerx, Belgium, Sect. 4.2.2.1.

[78] J. Auwerx, Belgium, Sects. 4.2.2.1 et seq.

[79] E. Bueren, Germany, Sect. 8.2.8.

[80] See E. Bueren, Germany, Sect. 8.2.6.2.

[81] M. Israel, United Kingdom, Sect. 16.2.3.

essential to safeguard fundamental rights of companies is questionable. This rewards waiver of the rights and not only time and cost savings.

Even in cases where companies are not found to have infringed on competition law, such as in cases of commitments, companies have the right to know the concerns of competition authorities. In EU jurisdictions, companies are informed of the competition concerns via a preliminary assessment, which is shorter and more superficial than the statement of objections,[82] upon which companies may submit commitments that remove these concerns. In France, for instance, companies may submit commitments after the reception of the preliminary assessment but before any statement of objection is issued,[83] a limitation that intends to clearly distinguish between commitment procedure and regular proceedings. In the United Kingdom, the authority sends a summary of competition concerns after a company shares its readiness to offer commitments.[84] In Belgium, companies may submit undertakings once the Competition College (decision-making body) has made clear that it intends to take a prohibition decision, which implies that the Competition College has sufficient proof of an infringement[85]; however, parties may submit commitments even before this, once they have sufficient information on the objections raised against them. In Italy, a resolution of the case through commitments is possible after the issuance of a statement of objections issued to companies.[86] The statement of objections summarises the main findings and a prima facie assessment of infringement. After informal discussion on the willingness to resolve the case by undertakings, the competition authority and the company under investigation start formal commitment discussions. In Serbia, commitments must be offered before the drafting of the statement of objections.[87]

It is our conclusion that parties should always receive a summary of the concerns and objections in writing, with sufficient details on the facts and alleged infringement and a description of anticompetitive effects, accompanied with essential evidence. If authorities do not issue a statement of objections in general, verbal discussions with authorities in the early stages of investigation or transactional discussions shall be at least recorded and handed over to companies and their counsels so that they have sufficient information to enable them to choose between litigation or settlement. In our view, such a summary of concerns is an essential element to ensure due process.

1.3.6.2 Predictability and Clarity of Objections

Less formal safeguards regarding communication of objections decrease predictability for companies. The practice of increasing the amount of the potential

[82] See D. Bosco, France.

[83] See D. Bosco, France.

[84] M. Israel, United Kingdom, Sect. 16.2.2.

[85] J. Auwerx, Belgium, Sect. 4.2.1.2.

[86] A. Camusso, Italy, Sect. 10.2.1.1.

[87] D. Ognjenovic, Serbia, Sect. 12.2.1.

sanctions[88] or extending the scope of initial objections to infringements without sufficient evidence increases the pressure on companies under investigation to accept a settlement with authorities. The threat of a high fine to obtain modification of the conduct of the company under investigation also constitutes an undue pressure on companies. In other words, competition authorities may be tempted to extend their scope objections in order to improve their 'negotiation position' regarding companies under investigation.

It is difficult to assess to what extent such negotiation techniques are used by competition authorities; however, concerns are raised about the use of such actions in antitrust transactional resolutions.[89] In this regard, the policy followed by the competition authority should be clear and predictable up front for companies under investigation. In particular, the choice between sanctions and commitment decisions should be made at the beginning of the investigation, as soon as the authority has sufficient evidence and elements to determine the harm to the economy and the need to sanction the company. The authority should not use the threat of high sanctions to induce companies to submit excessive undertakings. This is particularly the case for abuses of dominance.

As a matter of principle, the power lies with the competition authorities, and therefore there is no need for them to act as private actors during negotiations; every use of such negotiation techniques is contrary to the principles of fairness and due process.

Safeguards in this respect include the following:

1. The authority shall decide as soon as possible whether to enter into discussion with companies. Outside cartel cases, if a fine is envisaged, the threat of such a fine should not be used in order to obtain extensive commitments or undertakings by the companies under investigation without findings of any infringement;
2. The basic amount of the sanction shall be set up front, not after the expression of willingness of the companies under investigation to settle;
3. The basic amount of the fine, as well as the level of the reduction, shall be communicated to companies before their settlement statement containing acknowledgment of the infringement;
4. Objections shall be raised only on the basis of sufficient evidence and only after a careful analysis and assessment of the likelihood of finding an infringement[90]; and

[88] See E. Bueren, Germany, Sect. 8.2.6.4, reporting that cooperation allegedly has influenced the trend by increasing the basic amount of the fine and not by reducing the actual level of fine paid by companies.

[89] See G. Fussenegger, Austria, Sect. 3.2.2.

[90] See G. Fussenegger, Austria, Sect. 3.2.2; see also Article 29 of the Swiss Competition Act: "If the Secretariat *considers that a restraint of competition is unlawful*, it may propose an amicable settlement to the undertakings involved concerning ways to eliminate the restraint" (emphasis added).

5. The companies under investigation shall have the option to withdraw their submission and their willingness to settle or submit undertakings without having to bear any negative consequence.

1.3.6.3 Access to Evidentiary Documents and to Files

Access to files is crucial in transactional resolution mechanisms. Due to the streamlined procedure, with fewer written documents and more superficial objections, access to main documents is also a necessary safeguard and a way to overcome difficulties[91] deriving from the lack of clarity due to the form and stage of the transmission of objections.

In several jurisdictions, companies under investigation have access to evidence used to support objections after beginning the discussion of settlements but before the submission of settlement statements.[92] In Germany, for instance, the guidelines state that the parties are able to access the *main evidence* at an earlier stage of the procedure compared to the standard one.[93]

Access to the full file is not granted to companies before they submit settlement statements,[94] or it is expected that the parties waive their right to have access to the full file.[95] In certain jurisdictions, however, such as in Italy, access to the file, like any other right of defence, cannot be validly waived.[96] In Switzerland, parties have access to the full file once a formal investigation is initiated. The investigative body of the competition authority informs companies under investigation about the documents included on the file so that they can review them and possibly comment on their content.[97] In Sweden, parties have broad access to files at any time, and therefore waiver of such rights cannot be a precondition to entering a transactional resolution.[98] In Serbia, parties have access to files once a formal investigation has started.[99] In the United States, companies do not have access to documents before the filing of the case to courts; due process is safeguarded by ensuring access to documents and public hearings once the civil or criminal litigation before the courts has commenced. It is submitted by the national reporter that in American-style systems, defendants and third parties should not have a formal right to access investigative files while the case is still under investigation.[100]

The main obstacle to accessing files of the procedure is confidentiality and business secrets—handling confidentiality and requests to keep a portion of the

[91] See D. Bosco, France.

[92] This is the case, for instance, in Belgium and in Germany.

[93] E. Bueren, Germany, Sect. 8.2.6.2 regarding settlements.

[94] In Belgium, it is not clear whether the parties will have access to full file.

[95] E. Bueren, Germany, Sect. 8.2.6.2 regarding settlements.

[96] A. Camusso, Italy, Sect. 10.2.3.1, Article 24 of the Italian Constitution.

[97] D. Emch et al., Switzerland, Sect. 15.2.4.5.

[98] H. Andersson, Sweden, Sect. 14.2.4.3.

[99] D. Ognjenovic, Serbia, Sect. 12.2.1.

[100] E. E. Varanini, United States of America, Sect. 17.11.

documents and submissions secret is what costs time and resources from the standpoint of authorities.[101]

It is our conclusion that companies entering a transactional process shall have sufficient access to essential evidence used by competition authorities. Access to the entire file may be used in transactional resolutions to counterbalance the reduced formality during the communication of objections, the lack of formal oral hearings on the case, and the streamlined procedure in general. At an initial stage, companies may be granted access to essential evidentiary documents, and if necessary access to the entire file, in order to assess exculpatory and disculpatory evidence. Reasons of cost and efficiency are not in our view sufficient justification for authorities to restrict such rights to access the entire file. Waiver to the right to have access to essential evidence or to files shall not be a prerequisite for entering a transactional resolution. A company subject to investigation and ready to start discussions in view of a transaction has sufficient interest in using this right efficiently, and not requesting documents with abusive intentions.

1.3.6.4 Form and Status of Parties' Submissions

A general trend has emerged regarding who submits the first draft: in the majority of jurisdictions, the parties take the initiative to request a transactional resolution of the investigation and submit the first draft. This possibility for parties to take the initiative and submit the draft settlement respects to a greater extent their rights by ensuring that they are not forced to commit, conduct, or admit facts or infringements beyond what is necessary and beyond what can be expected from them to mitigate anticompetitive effects.

This is particularly the case for commitments or undertakings: in Belgium, the initiative to submit undertakings always comes from companies under investigation, and these companies also submit the first draft undertakings or draft commitments.[102] Such a draft is further modified by companies following discussions with the competition authority.

In other jurisdictions, there is no specific rule; the companies or the authority may take the initiative and even draft the text of settlements.[103]

1.3.6.5 Form and Status of Admission of Facts and Infringement

In substance, admission of facts and/or infringement is a precondition in case of settlements. In France, the company entering into a settlement for the reduction of a fine shall state clearly and unconditionally that it does not deny the facts or the qualification as an infringement on competition law given to them by the investigative body of the authority, neither the liability nor other elements such as the duration of infringement or the anticompetitive effects.[104] In Belgium, the

[101] See, for instance, A. Camusso, Italy, Sect. 10.2.3.3.

[102] J. Auwerx, Belgium, Sect. 4.2.1.2.

[103] See G. Fussenegger, Austria, Sect. 3.2.2; D. Emch et al., Switzerland.

[104] D. Bosco, France.

settlement statement must contain the company's acknowledgment of its involvement and its responsibility for the infringement and its acceptance of the proposed range of sanctions proposed by the investigative body to the decision-making body (the Competition College).[105]

In Australia, parties are generally required to admit that they have engaged in an infringement of the competition law; however, only the courts can make a finding of infringement, and therefore transactional procedures are not perceived as requiring waiver of the right against self-incrimination.[106] Leniency applications are an exception to this, in that the admission of guilt is a precondition to the granting of immunity.

In cases of undertakings or commitments, acknowledgment of infringement is not a precondition. The facts presented in decisions that make binding undertakings or commitments are, however, acknowledged or confirmed by undertakings, either expressly or implicitly, by not challenging them.

In certain jurisdictions, there are no formal minutes about the content of the discussions with officials. While this may protect companies under investigation against the improper use of their oral statements during discussions, a written procedure gives more legal certainty regarding the promises and requirements of competition authorities. In Germany, the institution of formal minutes about settlement agreement, the settlement proposal, and its acceptance or rejection shall be mentioned in the file to enable control by judges and parties.[107]

1.3.6.6 Deadlines and Timing for Submissions

Competition authorities usually fix a deadline for the parties to submit a settlement proposal, which is fixed in the regulations or at the discretion of authorities.[108] For commitments, it is also common to set deadlines. For settlements in cartel cases, the requirement for an early submission may encroach on the parties' right to know the case against them. The same issue comes up in cases of commitments or merger remedies, even though in this latter case deadlines are shorter due to the strict deadlines of merger control.

In the Czech Republic, parties must submit commitments within 15 days from the reception of the statement of objections.[109] In France, the issue of temporal pressure has been resolved by providing to companies in the law a minimum deadline of one month for submitting commitments; obviously, companies may submit their undertakings earlier.[110] In Italy, parties can offer commitments within 3 months from the reception of the statement of objections.[111] This 3-month

[105] J. Auwerx, Belgium, Sect. 4.2.1.1.

[106] B. Jedličková et al., Australia, Sect. 2.5.6.

[107] E. Bueren, Germany, Sect. 8.2.8.

[108] See J. Auwerx, Belgium, Sect. 4.2.1.1.

[109] J. Kindl and M. Petr, Czech Republic, Sect. 6.2.1.2.

[110] D. Bosco, France, Sect. 7.2.2.3.

[111] A. Camusso, Italy, Sect. 10.2.1.1.

deadline is not considered mandatory but rather a suggested deadline that can be prolonged—absolute deadlines are considered inappropriate in cases of negotiations since they would put unnecessary pressure on both authorities and companies.[112]

The timing of submissions is also important, particularly when benefits for companies under investigation decrease with the lapse of time. The fact that the companies shall submit commitments or apply for settlements at a very early stage of the antitrust investigation runs the risk of adversely affecting their right of defence.[113] Certain limitations are justified, such as the obligation to submit commitments after the reception of the preliminary assessment but before any drafting of a statement of objections[114] (which entails a greater workload for authorities)—the companies had the opportunity to assess the objections raised against them on the basis of the preliminary assessment, and therefore their rights are safeguarded.

Measures to mitigate the above-mentioned risks in cases of the submission of settlement statements involving acknowledgment of an infringement at an early stage of the investigation may include

1. granting access to the key documents and key evidence within a reasonable deadline to companies under investigation;
2. describing the main objections in writing and identifying the main evidence supporting the alleged infringement that the authority intends to object to such companies;
3. setting a reasonable deadline for consulting key documents and evidence;
4. setting a reasonable deadline to allow parties to review and examine the objections of the authority and to prepare their settlement submissions; and
5. setting clear procedural rules in guidelines or regulations, including a minimum deadline to allow companies to examine the evidence held by authorities, draft their settlement statement, and make an informed decision regarding the admission of the infringement and of the charges raised against them.

1.3.6.7 Burden and Standard of Proof

In general, while according to the law it is clear that the burden of proof lies always on the authorities, it is not clear to what degree of proof the infringement should be evidenced before starting a transactional discussion with companies under investigation. This is also a consequence of the pragmatic function of settlements—as

[112] A. Camusso, Italy, Sect. 10.2.3.7.

[113] A. Stawicki et al., Poland, Sect. 11.1.

[114] See the case of France. By contrast, in the EU, companies are allowed to offer commitments at any stage of the procedure, even after having received a statement of objections.

stated by an American court: ‘Trials are primarily about the truth. Consent decrees [settlements with court orders] are primarily about pragmatism.’[115]

At the investigation stage, the more advanced is the investigation, the more evidence is gathered from the authority, either by proving an infringement or by disqualifying the conduct. Accordingly, at an early stage of the conduct, the authority does not have sufficient evidence proving an infringement and, in most cases, neither do companies under investigation have a clear view on what the authorities have as evidence or on whether their own conduct would infringe on competition law. An internal investigation is often necessary to discover evidence regarding anticompetitive conduct.

The issue of the level of evidence becomes delicate, particularly in transactional resolutions involving an admission of facts or infringements at early stages of the investigation. There is a conflict between the time and resources that authorities and companies aim to save, and situations where there is not sufficient evidence of an infringement or where the question of whether the conduct in question infringes competition law are controversial. The information asymmetry in favour of authorities is cured by granting file access to companies under investigation and by forcing authorities to describe the case against companies. Similar to leniency, transactional resolutions provide an opportunity for authorities to use their discretion in order to incentivise companies to disclose valuable information and adopt collaborative behaviours.

However, saving time and resources is the very reason why a transactional discussion shall not commence at first place if there is little or no evidence of an infringement or if the conduct under investigation is not likely to restrict competition. The investigation principle (*maxime inquisitoire*) shall compel authorities to investigate both incriminating and exonerating facts concerning the conduct of a company.

Moreover, even where companies admit having infringed on competition law, such admission shall be backed by sufficient evidence.[116] This is also a lesson to be learned from criminal law on bid rigging proceedings, where the agreement with the prosecutor, which involves a confession, does not exempt the court from the duty to collect evidence around all facts relevant to the decision.[117] Even though in practice the courts seem to reduce their control to the level of plausibility of confessions compared to the main evidence submitted to them, it is important that the investigation authorities as well as judges verify whether the admission of facts, infringement, and, if necessary, guilt are supported by sufficient evidence.

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[115] See E. E. Varanini, United States of America, Sect. 17.3, citing a court judgment in *U.S. (SEC) v. Citigroup Global Markets (Citigroup Global Markets II)*, 752 F.3d 285, 295 (2nd Cir. 2014).

[116] See, for instance, the requirement regarding settlements in Germany, where admission should be backed by sufficient other evidence, inspired by criminal procedural principal (E. Bueren, Germany, Sect. 8.2.5).

[117] E. Bueren, Germany, Sect. 8.3.

Obviously, the rule above and the measures do not apply to leniency applications since leniency application should submit full evidence of infringement of competition law even before opening any investigation.

Some authorities resolve this issue by setting high standards up front. In the United Kingdom, the authority will consider settlement of a case provided the evidential standard for issuing a statement of objections is met.[118] Also, two-tier systems involving court approval result in better safeguards with respect to the burden and standard of proof since authorities should defend their case and the necessity of undertakings or settlements before the court,[119] which maintains the power to simply reject any intervention if the case is not backed by sufficient evidence.

1.3.6.8 Discretion of Authorities in Pursuing Discussions Concerning Undertakings and Settlements

Competition authorities have broad discretion to start, continue, or cease the settlement procedure. This is a direct consequence of the fact that companies under investigation do not have a right to a negotiated outcome. Besides, parties do not have a right to appeal the decision of the authority to continue or cease the settlement procedure. The same discretion is present in cases of commitment procedures that do not involve a finding of infringement.

Such discretion is necessary; however, the lack of efficient control by appeals gives leverage to authorities that should be counterbalanced by other mechanisms, such as clear rules on the prerequisites for starting a transactional resolution process or on the use of documents after a discussion fails.

1.3.6.9 Withdrawal of Settlement Submissions and Admission of Guilt

The use of information and statements of companies submitted in the settlement procedure after such procedure is unsuccessful, be it because the companies have withdrawn their statement or the authority decides not to pursue with a transactional resolution mechanism, runs the risk of encroaching on the presumption of innocence and the right of parties to a partial and objective authority.

Generally, competition authorities do not make use of settlement submissions or undertakings in the event the authority itself decides to discontinue or the company withdraws from the discussion.[120] Such a principle is set out in guidelines or is simply followed in practice.

[118] M. Israel, United Kingdom, Sect. 16.2.3.

[119] See, for instance, B. Jedličková et al., Australia, Sect. 2.2.3, where there is a perception that transactional resolutions do not alter the burden and standard of proof.

[120] See, for instance, J. C. M. Berardo and B. B. Becker, Brazil, Sect. 5.2.5.1; M. Israel, United Kingdom, Sect. 16.2.3, p. 414.

In certain countries, authorities can use settlement statements where the parties have acknowledged infringement on competition law even if the settlement procedure is not successful.[121]

In leniency and settlement cases, where the companies include in their submission an admission of the facts or of the infringement, the prohibition of the use of statements, correspondence, and documents is crucial for companies. In addition to clear rules, some authorities have put in place firewalls within the authorities to impede the flow of information from the unit receiving and handling leniency applications to the other units of competition authorities. In Brazil, for instance, the submissions are accessible to other units only from the moment the authority decides to accept the leniency application or a settlement agreement.[122] Such structural separation is advisable with regard to all transactional mechanisms that are abandoned while companies have made submissions or oral statements before officials; in such cases, a different group of officials or a different composition of the decision-making body shall continue the case and make the final decision without being influenced by statements already made by the companies under investigations. This would also be sufficient, but necessary, to safeguard the right to an impartial judge.

We conclude that all discussions in the framework of a transactional resolution of the case should be clearly distinguished as such and should be done on a 'without prejudice' basis, in particular in cases of admission of liability. In cases of a failure of transactional discussions, companies shall be allowed to withdraw their submissions without bearing any consequences, meaning that authorities shall not make use of such submissions, or of the information contained therein, against the company. In addition, competition authorities shall create sufficient safeguards such as separation of teams and units dealing with the case if negotiations fail.

1.3.6.10 Withdrawal of Undertakings

In several jurisdictions, undertakings pertaining to the modification of future behaviour can be withdrawn without consequences for the companies that submitted them.[123] In countries such as Italy, there is no automatic protection of parties' submissions in case of withdrawal or failure to reach an agreement, which gives significant leverage to authorities.[124]

Furthermore, even though statements may be protected by submission on a 'without prejudice' basis, publicity and publication of undertakings or commitments in order to allow the market to provide comments are an obstacle

[121] For instance, Belgium, Serbia, and Hungary. This was the case in Germany; however, it seems that currently it is considered that admission of infringement may not be used (e.g., as evidence) if such statement is withdrawn, this for both criminal and administrative procedures (E. Bueren, Germany, Sect. 8.2.5, footnote 59).

[122] See J. C. M. Berardo and B. B. Becker, Brazil, Sect. 5.2.5.1. Other measures are taken on a case-by-case basis.

[123] See, for instance, France.

[124] See A. Camusso, Italy, Sect. 10.2.3.4.

to the withdrawal of commitments. Some aspects of undertakings can, however, remain confidential.

Another risk lies in the fact that the undertakings submitted to the competition authorities are made binding by authorities, even if the companies did not agree to their amendments or wish to withdraw them. This is the case in Austria.[125] In Switzerland, the Competition Commission may also issue a decision approving, and therefore making binding, an amicable agreement concluded between its Secretariat (the investigative body) and the company under investigation and may impose sanctions even though the company submitted its undertakings on the condition that no fine would be imposed on it.[126] Such a decision was not considered to breach the principle of legitimate expectations; however, the insecurity resulting from it makes companies circumspect when discussing and submitting undertakings to the competition authority. In addition, according to a controversial decision of the Federal Administrative Court, the fact that a company enters into an agreement with the competition authority is considered as an implicit admission of infringement, even though companies state clearly that their submissions do not involve any admission of guilt.[127]

In several jurisdictions, the law provides for the confidentiality of correspondence and documents exchanged between the companies under investigation and competition authorities in the framework of settlement procedures.[128] Confidentiality protects companies under investigation against disclosure to third parties and the use of such documents in follow-on private litigation. There is no uniform solution in this regard.

Accordingly, parties shall be granted the right to withdraw their undertakings or commitments, and such withdrawal must preclude authorities from using the company's submissions. Submission of undertakings by companies in the framework of a transactional resolution mechanism shall not imply admission of any wrongdoing. Such submission shall be kept confidential to the greatest extent possible, except for essential information necessary to market test commitments or undertakings.

1.3.6.11 Right to Appeal

A distinction should be drawn between the waiver of the appeal as a precondition for discussion and concluding a settlement and/or granting benefits (such as a fine reduction) on the one hand and the fact that *de facto* parties have no interest in lodging appeals after having reached a transactional resolution on the other. A waiver of the right to appeal or limited access to justice not only unduly limit parties' right to a fair trial but also could offer negative incentive to officials to not

[125] See G. Fussenegger, Austria, Sect. 3.2.3.

[126] ATF 139 I 72, *Publigroupe*.

[127] D. Emch et al., Switzerland, Sect. 15.2.4.3.

[128] On the importance of confidentiality, see E. E. Varanini, United States of America, Sect. 17.4.

behave in good faith or to not respect due process during transactional discussions or to request remedies beyond what is necessary to remove competition concerns.

In several jurisdictions, companies submitting a settlement statement, commitments, or a leniency application have no right to appeal the settlement decision.[129] Such absolute exclusion is excessive and inadequate since parties may have an interest in lodging an appeal on procedural grounds or on other grounds such as disagreement about the correct interpretation of the commitments, additional injunctions that did not form part of the agreement, or the fact that the company was induced to propose commitments by force or deceit.[130] In addition, while such a solution may be acceptable in cases where companies have the right to review the draft decision before the decision is made and agree in all respects with it, this position encroaches on the right to trial if the companies under investigation do not have the opportunity to review and assent to the draft final decision.

In some jurisdictions, parties maintain to a certain extent their right to appeal. In France, for instance, a company cannot challenge the parts of the settlement agreement that it has not denied; however, the company maintains its right to challenge the criteria for the calculation of the fine, including the importance of the damage to the economy, the assessment of its individual situation, its ability to pay, and recidivism.[131] In Australia, undertakings are also subject to judicial review.[132] In Serbia, both leniency decisions and commitments are subject to judicial review.[133] In other jurisdictions, the scope of the right to appeal in cases of commitments is disputed.[134]

Other drawbacks may limit companies' right to appeal. In the United Kingdom, for instance, if settlement discussions fail, the authority cannot make use of settlement submissions,[135] whereas in cases of appeal of settlement decisions it is possible to use admission of infringement in the appeal and any other document, information, or witness evidence provided by it.[136]

Interestingly, in Italy, not only the commitment decisions are subject to appeal but also the decision of the authority to reject commitments offered by parties.[137] In Italy, commitment decisions are reviewed under the proportionality test, which allows the court to assess the merits of the case and evaluate whether the suggested commitments were suitable to resolve competition concerns.[138] The review, however, focuses on the consistency of the reasoning, which highlights

[129] For instance, in Belgium (see Sects. 4.2.1 and 4.2.2.7).

[130] E. Bueren, Germany, Sect. 8.4.2.5.

[131] D. Bosco, France, Sect. 7.1.3.

[132] B. Jedličková et al., Australia, Sect. 5.2.1.2.

[133] D. Ognjenovic, Serbia, Sect. 12.3.5.

[134] See in Germany, E. Bueren, Sect. 8.4.2.5.

[135] M. Israel, United Kingdom, Sect. 16.2.3.

[136] M. Israel, United Kingdom, Sect. 16.2.3.

[137] A. Camusso, Italy, Sect. 10.2.3.7.

[138] A. Camusso, Italy, Sect. 10.2.3.7.

that commitments are primarily there to properly resolve competition concerns and not to quickly terminate investigations.[139]

The waiver of the right to appeal is a precondition in a number of jurisdictions, particularly in cases of commitment mechanisms not involving either any admission of guilt or any finding of an infringement. In France and Hungary, for instance, the waiver of the right to appeal is a precondition to enter into a settlement agreement regarding the reduction of fines.[140] The waiver of the right to appeal was considered admissible in Hungary on the ground that it was balanced by the right of the party to access the file prior to making the settlement submission and the right to withdraw the settlement submission.[141]

In some jurisdictions, the waiver of the right to appeal cannot be part of the settlement.[142] Under jurisdictions such as Brazil,[143] Italy,[144] or Poland,[145] the waiver of the right to trial is not valid. The same applies in Switzerland; however, the legitimate interest of the party having concluded an amicable agreement with authorities remains controversial.[146]

We conclude that the waiver of the right to appeal shall not be a precondition of any kind of transactional resolution of antitrust investigations and that the benefits of the transactional resolutions shall not be withdrawn in cases of a company appealing against the decision-making binding the transactional mechanism discussed with the competition authority.

1.3.6.12 Transparency and Publicity of Transactional Resolutions

Decisions or judgments that do not include the grounds and the reasoning behind the conclusion of transactional resolutions bear the risk of reducing the predictability of competition law enforcement. In some jurisdictions, there is no constant practice regarding publication of commitment decisions, and some commitment decisions are not published at all.[147] No information is given to the public on why the procedure was closed, on what grounds commitments were accepted, or why they were considered to resolve competition law concerns. Such lack of publicity creates an area of opaque and ambiguous intervention; the public cannot assess whether its interest in efficient competition is preserved, nor can other companies draw any conclusions or benefit from any indications based on how they could modify their behaviour to comply with competition law.

[139] Ibidem.

[140] D. Bosco, France, Sect. 7.1.3, A. Keller, Hungary, Sect. 9.2.5.

[141] A. Keller, Hungary, Sect. 9.2.5.

[142] See Germany regarding settlement procedures, E. Bueren, Germany, Sect. 8.2.5.

[143] See J. C. M. Berardo and B. B. Becker, Brazil, Sect. 5.2.5.6.

[144] See A. Camusso, Italy, Sects. 10.2.3.1 and 10.2.3.3.

[145] A. Stawicki et al., Poland, Sect. 11.2.2.5.

[146] D. Emch et al., Switzerland, Sect. 15.2.4.7.

[147] See G. Fussenegger, Austria, Sect. 3.2.3.

1.3.7 Two-Tier Systems: Approval of Transactional Resolutions by a Body Not Involved in Negotiations

Some jurisdictions function in a two-tier system where investigation and negotiation of settlements are separate from the decision-making process. In the United States, Australia, Austria, and Sweden, the process involves the executive as well as the judiciary. France, Belgium, and Switzerland have somehow separated investigation from decision-making; however, these functions remain within the same administrative authority.

The United States has a two-tier system in which settlements and plea bargainings are negotiated by government authorities but approved by courts. Courts are not bound to follow the recommendations of the government and can also reject the case entirely.[148] The investigation and enforcement of competition law in the United States is accomplished by the Federal Trade Commission (the FTC) and the Department of Justice (the DoJ); however, most of the cases resolved through settlements must be submitted for approval by the courts.[149] In general, the courts provide great deference to the executive branch for legal and practical reasons, meaning that the court will not second-guess the remedies and solutions found by the government within its discretionary powers.[150] For instance, the review of civil antitrust settlements entered into by the DoJ under the Tunney Act is conducted under the narrow test of public interest: the judge will check whether the terms of the order are clear or ambiguous, if the method used to enforce the terms is inadequate, and if third parties will be positively injured.[151] The court may reject a proposed settlement only if it will result in adverse antitrust consequences. Due process concerns are resolved by requiring from the government a submission of justifications for the settlement, by conducting hearings, and by granting third parties the opportunity to comment and intervene in the procedure.[152] Civil antitrust settlements brought by federal states are assessed under a fairness and reasonableness standard, similar to that of settlements outside of the antitrust context: the courts examine the basic legality of the settlement, the clarity of the court order (settlement), the ability of the settlement to resolve allegations in the complaint, and whether there is any evidence of collusion or corruption surrounding the settlement.[153] Concerns of due process are resolved through the conduct of public hearings. In certain states, courts do not conduct any hearing of the interested party, and the proposed order may enter the same day, meaning that there is no

[148] See E. E. Varanini, United States of America, Sect. 17.2.

[149] Not all settlements are subject to court review. The FTC may conduct civil antitrust settlements (consent decrees), which do not require an approval from the Court (see E. E. Varanini, United States of America, Sect. 17.7).

[150] E. E. Varanini, United States of America, Sect. 17.2.

[151] E. E. Varanini, United States of America, Sect. 17.6.

[152] E. E. Varanini, United States of America, Sect. 17.6.

[153] E. E. Varanini, United States of America, Sect. 17.8.

scrutiny of the proposed orders. According to the national reports, such abbreviated settlement processes may create a problem hindering justification of how the settlement fits with the authority that government enforcers have to enter into such settlements.[154] The lack of hearing raises concerns about due process since it is the public hearing and the opportunity of the public to comment that force the executive branch to set clear goals and clearly justify its actions.[155]

In Austria, decisions about fines are made by the Cartel Court. The Cartel Court is bound by the highest level of fine requested by the Competition Authority. Companies under investigation merely acknowledge the request filed by the Competition Authority. Companies are therefore confronted with uncertainty regarding the time, cost, and outcome of the case.[156] It is unclear, however, to what extent the Cartel Court reviews the facts and the qualification of facts investigated by the Competition Authority.[157] In addition, only the Cartel Court can impose a fine, making it impossible for the investigative bodies to threaten an exaggerated fine in case the parties withdraw from negotiations,[158] although the risk of requesting a higher fine threshold from the Cartel Court still subsists.

In Australia, only courts can make a finding of infringement and impose penalties of a punitive nature. The punitive character of infringement and penalties results in the obligation to subject such procedures to a fair trial, thus the necessity for the courts to determine and approve such transactions.[159] Reduction of penalties is negotiated by the competition authority, which prepares with the parties a joint submission to the court. The court is not bound by the joint submission but generally follows the agreement.[160] The test the court applies is whether the penalty falls within a range that the court itself would fix, even though the court would not substitute its assessment of the penalty with the figure submitted by competition authority.[161] Sufficient discretion is therefore provided to the transaction agreement between competition authorities and companies. In contrast, undertakings/ commitments are not of a punitive character and therefore can be made by the administrative authority alone. The competition authority may accept undertakings from companies and then enforce them in courts if such undertakings are not followed by the companies having offered them.[162] The two-tier system in

[154] E. E. Varanini, United States of America, Sect. 17.8.

[155] See, in general, E. E. Varanini, United States of America, Sect. 17.2.

[156] In Austria, the Cartel Court may freely reject the request of the authority for a settlement. Under general procedural rules, statements of the company on facts and the acknowledgment of the infringement are subject to the free appraisal of the evidence by the Cartel Court, which results in uncertainty for companies under investigation.

[157] G. Fussenegger, Austria, Sect. 3.2.2.3.

[158] G. Fussenegger, Austria, Sect. 3.4.5.

[159] B. Jedličková et al., Australia, Sect. 2.5.1.

[160] B. Jedličková et al., Australia, Sect. 2.1.2.

[161] B. Jedličková et al., Australia, Sect. 2.1.2.

[162] B. Jedličková et al., Australia, Sects. 2.2.1 and 2.2.3.

Australia is considered to respect the right to an impartial judge since decisions on the reduction of penalty are decided by a judge who has not been involved in the case.[163]

Sweden has a similar system to that of Australia, in that the competition authority has competence to order a company to terminate an infringement or accept commitments, but only courts can impose fines.[164] Accordingly, settlements are adopted only when the circumstances of the case are clear, and the fact that only a judge may impose a sanction regarding voluntary undertakings or leniency cases makes the system less vulnerable with respect to due process.[165]

In France, in the case of commitments, the preliminary assessment is issued by the investigative body of the authority, and the commitments are discussed by this authority and the companies. The decision-making body is, however, aware of the commitments submitted and the discussions taking place between the officials and the company under investigation and may make comments.[166] The involvement of the decision-making body in the investigative phase was not found to be contrary to the right to an impartial judge under Article 6 (1) of ECHR. After the market test, the parties are invited to a hearing before the decision-making body of the authority, which can request amendments to commitments. In France, commitments submitted to the investigative and decision-making body may be withdrawn and the authority excludes these documents from the file.[167] However, the two-tier system in France may result in a lack of predictability regarding the fine reductions; indeed, the fine reduction is discussed between the company and the investigative body, but the agreed reduction of the fine is not binding on the decision-making body.[168]

A similar system exists in Switzerland, where amicable settlements are negotiated by the investigative body but are approved and made binding by decision of the Competition Commission.[169] The agreement covers the level of the fine for past conduct and lays out future conduct that companies are obliged to follow, but the legal qualification is not negotiable. The Swiss Competition Commission can either reject or accept the agreement or suggest necessary changes. Although the Competition Commission usually follows the agreement concluded between its Secretariat and the company under investigation, in at least one case the Competition Commission went beyond what was agreed by the company, imposing a fine in addition to the approval of commitments for the future.[170] This raises the issue of the respect of the principle of legitimate expectations and that of good faith in negotiations.

[163] B. Jedličková et al., Australia, Sect. 2.5.2.

[164] H. Andersson, Sweden, Sect. 14.1.

[165] H. Andersson, Sweden, Sect. 14.2.2.

[166] D. Bosco, France.

[167] D. Bosco, France.

[168] D. Bosco, France, Sect. 7.2.3.7.

[169] D. Emch et al., Switzerland, Sect. 15.2.3.

[170] ATF 139 I 72, *Publigroupe*.

1.3.8 Rights of Third Parties

The rights of third parties are largely defined by procedural rules. Such rights are much more limited for various reasons.

A difference is to be drawn between the rights of complainants or other market participants affected by the conduct subject to investigation (such as competitors or customers), the rights of other companies subject to investigation, and the possibility for other market participants to comment.

At early phases of investigations, third parties do not have formal rights to intervene or access files and certainly do not have more rights than defendants. Such restrictions are admissible to preserve the confidentiality of investigations. In cases of leniency or immunity applications, the rights of third parties are even more limited and justified by the secrecy of the investigations, which applies also to the leniency applicants themselves. In other jurisdictions, third parties are granted broad access to files,[171] with the exception of confidential information.

Restrictions on the rights of other companies subject to the same investigations are more delicate. Transactional resolutions may create incentives for companies to accept facts that charge other companies at the same time, or in cases of leniencies even risk creating the opportunity to exaggerate the liability of other competitors in cartels while minimising their own. Such risks can be minimised by granting conditional access to other defendants in the file and granting them the opportunity to comment and provide discharging evidence. For leniency applications, specific restrictions apply to the rights of third parties to view documents.[172] Scholars in countries like Italy with a long-standing practice of whistleblowing suggest that evidence provided by one party to a cartel should not be treated in the same way as evidence gathered *ex officio* by authorities,[173] in order to circumvent such risks.

In Italy, the statement of objections preceding commitments is published, and third parties with interest may comment on it.[174] Such third parties may be individuals, companies, or consumer associations. In Australia, all submissions are published and made public subject to confidentiality and business secrets, and third parties have the opportunity to comment. Public hearings are also conducted.[175]

In a number of jurisdictions, third parties do not have a right to appeal the decision-making binding the undertakings submitted by companies or settlements.[176] Compelling public interests such as the discovery of harmful cartels supersede the interests of third parties to intervene or appeal. In the United States, for instance, amnesty processes are not reviewed by courts, granting to the

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[171] H. Andersson, Sweden, Sect. 14.2.4.3.

[172] See, for instance, A. Camusso, Italy, 10.2.2.1.

[173] See A. Camusso, Italy, Sect. 10.2.2.1.

[174] A. Camusso, Italy, Sect. 10.2.2.1.

[175] B. Jedličková et al., Australia, Sect. 2.5.7.

[176] See, for instance, United States of America, Sweden, Switzerland, and Serbia.

government discretion to grant immunity without control by third parties.[177] In other jurisdictions, such as Italy,[178] third parties may appeal against commitment decisions.

1.4 Merger Control

The vast majority of remedies raising competition concerns are cleared subject to conditions or obligations attached to the decision authorising the transaction. The most commonly used types of merger remedies are divestments or sale of an ongoing business, sales of shareholdings, IP licensing, or account, structural, or legal separation. In jurisdiction where no suspension period is imposed, such remedies are negotiated in a less formal procedure.[179]

The initiative for proposing remedies is up to the companies. Given the strict deadlines on the authorities, the submission of remedies is also subject to strict deadlines, which is in the interest of the companies that have filed a notification.

In certain jurisdictions, third parties have a right to comment during the formal investigation of mergers and after publication of the decision opening a formal procedure.[180]

Officials tend to be more open and constructive in the negotiations of merger remedies compared to transactional resolutions in other fields, although the procedural principles and rules are similar. It seems that the open process and the lack of threat of fines reduce the threats to fairness and due process compared to transactional resolutions of antitrust proceedings.

1.5 Impact on Transactional Outcome and on Market Intervention

Transactional resolutions involve a certain negotiation or bargaining with competition authorities, limiting to a certain extent the role and the right to appeal of companies under investigation and of third parties, accordingly bearing the risk of over-[181] and under-intervention.

The principles of proportionality and necessity are used in European jurisdictions to define appropriate solutions for resolving competition concerns while not going beyond what is necessary. In the case of commitments, for instance, their scope should be as close as possible to the injunctions.[182] The risk of over-

[177] E. E. Varanini, United States of America, Sect. 17.5.

[178] A. Camusso, Italy, Sect. 10.2.3.7.

[179] A. Camusso, Italy, Sect. 10.3.

[180] A. Camusso, Italy, Sect. 10.3.

[181] See A. Stawicki et al., Poland, Sect. 11.4, for examples of over-intervention.

[182] A. Camusso, Italy, Sect. 10.2.1.1.

intervention is taken into account in France, by stating that the authority does not make binding commitments that go beyond what is necessary to resolve competition concerns identified in the preliminary assessment.[183] Similarly, in the United Kingdom, the competition authority will accept commitments only in cases where competition concerns are readily identifiable.[184] In Australia, the competition authority will accept undertakings only if it has sufficient evidence to prove an infringement of competition law.[185] In case of remedies that go beyond what is necessary to remove competitive concerns, but that are nevertheless useful to implement the core commitments, authorities may simply acknowledge such measures without making them binding. This approach has the advantage of giving clear indications to the market regarding what measures are strictly necessary in order to comply with the law, avoiding the dissemination of the negative effects of overreaching undertakings or commitments.

Another means to limit over- or under-intervention of competition laws is transparency of the draft transactional resolutions and the opportunity of third parties to comment. Transparency gives the right incentive to authorities to be guided only by the public interest.

1.6 Conclusions

Transactional resolution mechanisms have become central to optimal antitrust enforcement. When public and private interests are balanced, all parties and society can benefit.

The principles of fairness and due process are vital to transactional resolution mechanisms. Conformity with such principles fosters the business community's acceptance of competition law and contributes to the realisation of optimal enforcement in the public interest.

Given the limited possibility of appeal, along with the deference shown by the judicial branch to the executive branch of government in the case of transactional resolutions, there is greater interest in ensuring fairness and due process from the beginning of the investigation until the conclusion of transactional resolutions.

Competition authorities enjoy broad discretion in the enforcement of competition law. Though such discretion is necessary, the lack of efficient control by appeal gives authorities leverage that should be counterbalanced by other mechanisms, such as clear rules regarding prerequisites for starting a transactional resolution process or concerning the use of documents after discussion fails.

Discretion impacts both the predictability of the process and the legal security of the parties. However, companies' collaboration depends significantly on the legal certainty and transparency of the regulatory framework and its implementation.

[183] D. Bosco, France.

[184] M. Israel, United Kingdom, Sect. 16.2.2.

[185] B. Jedličková et al., Australia, Sect. 2.2.1.

One mechanism for increasing predictability while preserving authorities' discretion is the communication of the essential steps of transactional mechanisms in guidelines and other soft law instruments.

In order to safeguard due process and fairness, waiving the company's rights (e.g., the right to access documents and the right to appeal) should not be a precondition for entering into or concluding transactional solutions. At the same time, benefits from transaction resolution mechanisms should not be withdrawn if companies enforce such rights.

Competition authorities should not increase pressure on companies during either investigations or transactional discussions as a means to compel companies to enter into such transactional resolution mechanisms. Entering into such mechanisms should remain voluntary. In that respect, the threat of sanctions, the increase of sanctions up front or the decrease of fine reductions in the absence of active cooperation, and delays in granting merger clearance should all be considered to be unfair conduct and contrary to due process.

Yet transactional resolutions should not result in the abandonment of charges or in very low sanctions for serious infringements since either would reduce the deterrent effect of competition law, preclude compensation to victims, and unduly incentivise, if not pressure, companies to renounce their fundamental rights.

Specific safeguards and rules may be adopted to ensure fairness and due process for companies under investigation:

1. Authorities should decide as soon as possible whether to enter into discussion with companies or follow through with the prosecution of the case;
2. Objections should be raised only on the basis of sufficient evidence and only after a careful analysis and assessment of the likelihood of discovering infringement;
3. Companies should always receive a written summary of the concerns and objections, with sufficient details about the facts and alleged infringement, as well as a description of the anticompetitive effect, accompanied with essential evidence. As an alternative, verbal discussions concerning the objections should be recorded and handed over to companies and their counsels;
4. Companies entering into a transactional process should have sufficient access to essential evidence used by competition authorities. Access to the entire file may be necessary in transactional resolutions in order to counterbalance the reduced formality during the communication of objections, the lack of formal oral hearings on the case, and the streamlined procedure in general;
5. Authorities should set a reasonable deadline by which key documents and evidence should be consulted;
6. In the case of fines, the basic amount of the sanction should be set up front and/or, in any case, before settlement submissions;
7. The basic amount of the fine and the level of the reduction should be communicated to companies before the submission of any settlement statement that contains an acknowledgment of the infringement;

8. Discussions in the framework of a transactional resolution of the case should be clearly distinguished as such and on a non-prejudicial basis, particularly in the case of admission of liability;
9. Companies under investigation should have the option to withdraw their submissions and retract their willingness to settle or their undertakings without having to bear any negative consequence; and
10. Authorities should not make use of such submission or of the information contained therein against the company. Competition authorities may, whenever possible, additionally create sufficient safeguards such as the separation of teams and units dealing with the case if negotiations fail.

Transactional resolutions may raise more issues regarding over- and under-intervention of competition law. However, such risks can be reduced by increasing both the transparency of drafted transactional resolutions and the opportunity for third parties to comment. Transparency gives appropriate incentives to authorities to be guided only by the public interest, which ensures a certain degree of control by the public.

Resolution of the International League of Competition Law
Consistency and compatibility of transactional resolutions of antitrust proceedings (such as settlement processes, leniencies, transactions, commitments, and amicable agreements) with the due process and fundamental rights of the parties

A. Whereas transactional resolutions of antitrust proceedings have become an important mechanism of antitrust enforcement;
B. Whereas transactional resolution mechanisms may contribute to preserving effective competition in the public interest while bringing benefits to both companies and competition authorities, and the public at large;
C. Whereas transactional resolution mechanisms are a means of ensuring cooperation and adherence of market participants and ensuring an effective enforcement of competition laws;
D. Whereas a balanced intervention through transactional resolution mechanisms maintains a sufficient degree of predictability and deterrent effect of competition laws;
E. Whereas in certain market circumstances, transactional resolution mechanisms may be superior to bare injunctions and fines by enabling more innovative remedies and allowing a fine balancing of anti- and pro-competitive effects;
F. Whereas the frequent use of transactional resolution mechanisms may result in abandonment of charges or low sanctions for serious infringements, reducing deterrent effect and hindering compensation to victims of such infringements, meanwhile unduly incentivising, if not compelling, companies to renounce their fundamental rights;
G. Whereas jurisdictions in which penalty settlements are approved by courts are generally perceived to show greater respect for impartiality and the right to a fair trial and set better incentives for authorities not to enter into inappropriate settlements provided that judicial review is exercised effectively;

H. Whereas negotiation and approval by a single administrative authority simplify the process and offer greater certainty to companies willing to enter into transactional resolutions. This also applies to when the transaction resolution is subject to judicial approval, but to a lesser extent;
I. Whereas the broad discretion of competition authorities in entering and concluding transactional resolution mechanisms should be balanced by procedural guarantees and communication of the essential steps of transactional mechanisms in guidelines and other soft law instruments;
J. Whereas the potential for transactional resolution mechanisms to contribute to an optimal enforcement of competition law depends also on procedural fairness and on the extent to which due process and the rights of all parties involved, including third parties, are safeguarded;
K. Whereas the interests of the public and the parties under investigation are considerably different in a settlement/commitment negotiation process when the enforcement agency's responsibility is essentially prospective, to avoid immediate and/or future losses of competition flowing from a proposed merger, acquisition, or joint venture that is under review by the agency;
L. Whereas in merger-type investigations, the whole process is instituted by the parties making a submission seeking approval, and the agency does not (and should not) normally start off with a presumption of infringement. Rather any antitrust concerns tend to arise during the course of merger review, and hence the agency may not have a clear view of what causes it to want to consider enforcement action or settlement until very late in the review process;
M. Whereas in a merger-type investigation and commitments and undertakings procedures, the principal purpose of competition policy is to protect the broad public interest in maintaining fair and efficient markets. Thus, it is important to provide some reasonable procedural opportunities for other potentially affected market participants (including especially customers and consumer representatives) to offer comments, evidence and objections;

The Ligue considers that it is important to participate in this debate and therefore recommends:

In general

1. That given the reduced likelihood or limited possibility of appeal, along with the deference shown by the judicial branch to competition authorities in relation to transactional decisions, there is greater interest in ensuring fairness and due process from the beginning of the investigation until the conclusion of transactional resolutions;
2. That waiving the company's rights (e.g., the right to access documents and the right to appeal) should not be a precondition for entering into or concluding transactional solutions and that benefits from transactional resolution mechanisms should not be withdrawn when companies invoke their rights. However, if the companies appeal on a basis that is inconsistent with the

grounds on which they were given such benefits, then those benefits should be liable to be withdrawn;

3. That entering into and concluding transactional resolution mechanisms should remain voluntary and that the threat of sanctions in the case of commitment procedures, the increase of sanctions up-front or the decrease of fine reductions in the absence of active cooperation, should all be considered to be unfair conduct and contrary to due process;
4. That competition concerns should be raised only on the basis of sufficient evidence and only after a careful analysis and assessment of the likelihood of making an adverse finding;
5. That, upon request, companies should receive a written summary of the competition authority's concerns accompanied with essential evidence, or, that verbal discussions concerning those concerns or objections should be recorded and handed over to companies;
6. That companies entering into a transactional process should have sufficient access to essential documents before concluding an agreement with competition authorities and that, in certain cases, access to the entire file may be necessary in order to counterbalance the reduced formality during the communication of objections and the streamlined procedure in general;
7. That companies should have a reasonable timeframe to consider key documents, evidence and objections and to prepare submissions;
8. That discussions in the framework of a transactional resolution of the case should be clearly distinguished as such and should be on a without prejudice basis, particularly in the case of admission of facts or liability;
9. That companies under investigation should have the option to withdraw their submissions and retract their willingness to settle or their undertakings without having to bear any negative inference;
10. In cases of penalty settlements
11. That, in transactional resolutions where admission of facts or liability for infringement of competition laws is a precondition, authorities should not make use of such submission or of the information and evidence contained in it against the company or draw any adverse inference if discussions are terminated. Where possible, competition authorities should additionally create sufficient safeguards such as the separation of teams and units dealing with the case if negotiations fail;
12. That in the case of settlements resulting in fine reduction, the basic amount of the sanction and the level of the discount should be communicated to the company up-front and, in any case, before settlement submissions acknowledging the infringement;
13. In cases of merger control
14. That when the competition agency receives a merger-type transaction for review, it should promptly issue a public notice and then allow third parties (including especially customers) to make responsive legal and factual submissions concerning the transaction;

15. That during an administrative review of a merger-type transaction, the competition agency should notify the parties under investigation as soon possible about its specific concerns that might cause it to reject the transaction as being inconsistent with competition law;
16. That, consistent with its needs to maintain confidentiality of the positions being taken during settlement negotiations, the agency should seek to provide potentially affected third parties with at least some notice of its competitive concerns as they develop during the course of a merger-type investigation;
17. That when the competition agency has not issued a notice in accordance with paragraph 12, it should not allow a proposed settlement to become final in a merger-type transaction, unless it has given other potentially affected market participants an effective opportunity to offer evidence or objections to the settlement;
18. When the transaction resolution is subject to judicial approval
19. The following considerations shall apply:
20. That entering into and concluding transactional resolution mechanisms should remain voluntary and that the threat of sanctions in the case of commitment procedures, and the increase of sanctions up-front, should all be considered to be unfair conduct and contrary to due process;
21. That, upon request, companies should receive a written summary of the competition authority's concerns or that verbal discussions concerning the competition concerns or objections should be recorded and handed over to companies;
22. That discussions in the framework of a transactional resolution of the case should be clearly distinguished as such and on a without prejudice basis, particularly in the case of admission of facts or liability. The competition authority should not infer liability if that it is not true;
23. That companies under investigation should have the option to withdraw their submissions and retract their willingness to settle or their undertakings;
24. That, in transactional resolutions where admission of facts or liability for infringement of competition laws is a precondition, authorities should not make use of such submissions or of the information and evidence contained in them against the company or draw any adverse inference if discussions are terminated.

Australia

2

Barbora Jedličková, Julie Clarke, and Sitesh Bhojani

2.1 Overview

The Australian competition law regime is primarily governed by the *Competition and Consumer Act 2010* (Cth) (the "CCA")[1] and is based on both private and public enforcement. However, Australian competition law is primarily enforced and regulated publicly by the Australian Competition and Consumer Commission (the "ACCC").[2] The ACCC has investigative and information-gathering powers under Part XID of the CCA. It resolves matters either by administratively encouraging consultation or negotiation to settle disputes[3] or via litigation. Nevertheless, only

The law in this chapter is up-to-date as at 1 January 2015.

[1] The Act was previously named the Trade Practices Act 1974 (Cth).

[2] The ACCC was established by the Competition Policy Reform Act 1995 (Cth). It replaced the existing Trade Practices Commission. Australia has another regulator, the Australian Energy Regulator, which was established by the Trade Practices Amendment (Australian Energy Market) Act 2004 (Cth).

[3] See ACCC, Compliance & enforcement policy (February 2014), available at http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy.

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the court has the power to declare whether particular conduct contravenes the CCA and make findings of liability. The ACCC is empowered to institute proceedings in the court for the declaration of an infringement of the CCA and for the recovery of a pecuniary penalty on behalf of the Commonwealth.[4] The ACCC may also apply for injunctions, damages and a range of orders.

The current Australian regime includes a number of transactional procedures, which may be independent of, or complementary to, the main enforcement proceedings.[5] The CCA has introduced the notion of 'enforceable undertakings' as a form of administrative settlement. The ACCC also uses other administrative settlements to encourage cooperation and disclosure of illegal activity by parties involved and to avoid lengthy and expensive litigation. These include making joint submissions as to penalties which incorporate 'discounts' for cost savings associated with cooperation and even immunity for cartel whistleblowers who meet certain criteria.[6]

The ACCC's *Cooperation Policy for Enforcement Matters* (July 2002)[7] sets out the ACCC's approach to administrative settlements associated with cooperation and reflects accepted practice in the Federal Court, which has taken into account the cost savings to the community associated with avoiding litigating complex competition law matters.[8] The court is, however, unlikely to provide much or any credit to parties where they withdraw from proceedings late following 'a period of protracted stonewalling'.[9]

Transactional resolution of competition law matters can happen at various times in the enforcement process. At its earliest, it could be utilisation of the opportunity offered by the ACCC's immunity and leniency policy for a corporation or individual to inform the ACCC of a contravention of which it is unaware. Alternatively, it could occur at any point from the commencement of proceedings through to penalty hearings following an adverse finding. Importantly, the ACCC should not ignore alleged offenders' proposals on administrative settlements. The ACCC's failure or refusal to respond to or engage with a defendant regarding the possible

[4] See ss76–77 of the CCA.

[5] The Australian competition law/policy regime is in the early stages of a major *Competition Policy Review* (colloquially known as the 'Root and Branch Review'). It is likely that the review will have an impact on transactional institutions. See Australian Government, *Competition Policy Review* http://competitionpolicyreview.gov.au/.

[6] Transactional resolutions are summarised in the ACCC's '*Cooperation Policy for Enforcement Matters*' policy (July 2002). See also ACCC, Compliance & enforcement policy (February 2014), available at http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy.

[7] The Cooperation Policy is available at https://www.accc.gov.au/publications/accc-cooperation-policy-for-enforcement-matters. It was developed and evolved from a 1998 ACCC guideline dealing with cooperation.

[8] See, for example, *TPC v TNT Australia Pty Ltd and Others* [1995] FCA 1046 at [21] to [22]; (1995) ATPR 41–375 at pp. 40,169 to 40,170; and *TPC v Patterson Cheney Pty Ltd and Others* [1990] FCA 421 at [11]; (1990) ATPR 41–059 at p. 51,759.

[9] Justice French in *TPC v CSR Ltd* [1990] FCA 521; (1991) ATPR 41–076 at pp. 52,155 to 52,156.

administrative resolution of a matter may be visited by an adverse court order as to costs by the court even if the ACCC wins the proceeding before the court.[10]

As a result of these factors, there is no 'bright line' delineating when matters may become transactional. This will depend on a variety of factors and the type of conduct involved. For example, the ACCC has very specific guidelines about when a party might be able to benefit from immunity in cartel matters; on the other hand, whether other forms of conduct are resolved through administrative processes, including s87B orders, will depend upon a variety of factors, including the willingness of parties to admit conduct, the type of concessions they may be willing to proffer to the ACCC, the seriousness of the conduct involved and their history of competition law compliance. The decision to resolve matters administratively, rather than through the courts, is generally not revocable, although this will depend on the terms of the administrative settlement and whether or not they have been complied with.

A transactional resolution cannot be imposed on defendants, although the ACCC may propose a resolution in appropriate cases or may decline to accept a proposal made by the parties. When deciding whether to accept a transactional resolution in civil cases, the ACCC assesses each case on its merits. In the case of the criminal cartel provisions, it is the Commonwealth Director of Public Prosecution who will determine whether or not immunity should be available to the parties, although it will take advice from the ACCC and will consider the same factors when making this determination.[11] To date, there have been no criminal cartel cases in Australia with the result that it is difficult to assess the effectiveness of this policy.

2.1.1 Immunity Policy

The *ACCC Immunity and Cooperation Policy for Cartel Conduct* (September 2014)[12] has been developed over the past decade to assist the ACCC to detect or prove hard-core cartels[13] and has been justified on the basis that it is necessary in order to identify covert cartel conduct. Importantly, the rationale for the immunity policy is not to 'reward' parties for cooperation but rather to provide powerful incentives to tear down the cloak of secrecy and 'blow the whistle' on these secret cartels. The destabilising impact of the leniency policy on cartels was recognised by the Federal Court in December 2003, when Justice Wilcox said:

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[10] See *ACCC v BAJV Pty Ltd* [2014] FCAFC 52 at [54] to [62] and [69] to [70].

[11] CDPP, *Immunity from Prosecution in Serious Cartel Offences*, made under s9(6D) of the Director of Public Prosecutions Act 1983 (Cth); *ACCC Immunity and Cooperation Policy for Cartel Conduct* (September 2014), paras 31–59.

[12] Available at http://www.accc.gov.au/publications/accc-immunity-cooperation-policy-for-cartel-conduct. The *ACCC Immunity and Cooperation Policy for Cartel Conduct* 2014 replaced the *ACCC Immunity Policy for Cartel Conduct* from July 2009 and its guidelines.

[13] See ACCC Media Release *"Draft Leniency Policy to break hard core cartels issued"*—4 July 2002 at www.accc.gov.au/media-release/draft-leniency-policy-to-break-hard-core-cartels-issued.

> It is sufficient to say that, because of the existence of the leniency agreement, there can be no valid argument for parity in outcome as between Tyco and FFE. If this approach leads to a perception amongst colluders that it may be wise to engage in a race to ACCC's confessional, that may not be a bad thing.[14]

The immunity policy was developed in addition to the ACCC's *Co-operation Policy for Enforcement Matters*, which recognised the benefits to the ACCC, the courts and the Community of defendants cooperating in enforcement matters. These time, resource and cost benefits justified 'rewarding' defendants for their cooperation.[15]

The *ACCC Immunity and Cooperation Policy for Cartel Conduct* applies to both individuals and corporations.[16] Immunity is granted to a corporation and/or a person/individual only if the corporation and/or the individual is the first to report the cartel, it provides full cooperation and disclosure of information and evidence to the ACCC, it is prepared to cease its involvement in the cartel, it admits that its conduct likely constitutes a contravention(s) of the CCA and it has not coerced others to join the cartel.[17] The previous policy from 2009 also required for a corporation-applicant not to be the clear leader of the cartel.[18] This can be difficult to prove in practice, and removing this criterion simplifies the decision-making process of the ACCC and opens the immunity policy to a broader range of potential whistleblowers. This change to the immunity policy should also partially improve the testimonial credence of whistleblowers, who have at times been called into question by the Federal Court.[19]

The current cartel immunity and cooperation policy reflects the amendment to the CCA, which introduced criminal penalties for cartel conduct and gave enforcement power for criminal cartel conduct to the Commonwealth Director of Public Prosecutions (the "CDPP").[20] The new policy, for the first time, clarifies the coordination of the processes for granting both civil and criminal immunity by the CDPP.[21]

The policy also includes criteria for the ACCC supporting leniency in relation to second and later immunity applicants.[22] Although the ACCC will continue assessing reductions in penalties on a case-by-case basis, the specification of these criteria is likely to improve the transparency of the existing process.

[14] *ACCC v FFE Building Services Ltd* [2003] FCA 1542 at [30].

[15] The Immunity Policy is restricted to cartel conduct; however, the cooperation policy is general and is capable of applying to any area of competition law.

[16] A corporation can also apply for so-called derivative immunity for its current and former employees, directors and officers, and it can even apply for derivative immunity for its corporate entities.

[17] *Immunity and Cooperation Policy for Cartel Conduct*, paras 16 and 28.

[18] *Immunity Policy for Cartel Conduct*, para 8.

[19] See, e.g., *ACCC v Leahy Petroleum Pty Ltd,* [2007] FCA 794, [42]–[55], [128]–[901].

[20] Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 (Cth).

[21] *Immunity and Cooperation Policy for Cartel Conduct*, paras 31–59, 63 and 80.

[22] Ibid., paras 68–84.

Furthermore, the new policy introduces the concept of 'amnesty plus'. This involves the ACCC recommending a further penalty reduction for a leniency applicant who discovered a second, unrelated, cartel in the course of cooperating in relation to the first cartel.[23]

2.1.2 Reduction of the Penalty

The *Cooperation Policy for Enforcement Matters* (for non-cartel conduct) and the *ACCC Immunity and Cooperation Policy for Cartel Conduct* (for cartel conduct) provide that the ACCC may be willing to reach an agreement with parties regarding joint submissions to be placed before the court on penalties if the corporation or individual cooperates with the ACCC.[24] When assessing whether to support leniency (which applies to all areas of competition law), the ACCC considers the different circumstances of the conduct and the company or individual concerned, such as cooperation with the ACCC, the seriousness of the conduct in question and the intention of the individuals involved. Although it is for the court to determine penalties for contravention, the ACCC may reach an agreement with parties to make a joint submission about penalties, having regard to their level of cooperation. The court is generally willing to follow the agreement but is not obliged to do so.[25]

The process of the defendants negotiating and agreeing with the ACCC the quantum of penalties to be put before the Federal Court started in 1981,[26] and it has subsequently been applied in a number of competition law matters. The process has been approved by a Full Court of the Federal Court in competition law matters[27] and civil penalty matters in other areas of the law as well.[28] However, the process was questioned in 2013 by a State Supreme Court (Court of Appeal) dealing with civil penalties in the context of a corporations law matter.[29]

[23] Ibid., paras 85–90.

[24] Such an agreement has a basis in s191(3)(a) of the *Evidence Act 1995* (Cth).

[25] *ACCC v Ticketek Pty Ltd* [2011] FCA 1489; see also, *ACCC v Telwater Pty Ltd* (2009) ATPR 42-276; *ACCC v Qantas Airways Ltd* (2008) ATPR 42-266; *ACCC v Hobie Cat Australasia Pty Ltd* [2008] FCA 402; (2008) ATPR 42-225; *ACCC v Fchem (Australia) Ltd* [2008] FCA 344; *ACCC v Francis* (2004) 142 FCR 1; *ACCC v SIP Australia Pty Ltd* [1999] FCA 858 (1999) ATPR 41-702; *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; (1997) ATPR 41-546.

[26] See Justice Sheppard in *TPC v Allied Mills Industries Pty Ltd (No. 4)* [1981] FCA 142; (1981) 37 ALR 256 at 259. This process was subsequently applied in 1995 by Justice Burchett in *TPC v TNT Australia Pty Ltd and Others*. [1995] FCA 1046 at [6] to [8].

[27] *NW Frozen Foods Pty Ltd v ACCC* [1996] FCA 1134; (1996) 71 FCR 285.

[28] *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72.

[29] *ASIC* -v- *Ingelby* [2013] VSCA 49; and see "*Some Recent Developments in Corporate Regulation – ASIC from a Judicial Perspective*" Paper by Justice Mark Weinberg, Court of Appeal, Supreme Court of Victoria presented to the Monash University Law School, Commercial CPD Seminar, Melbourne 16 October 2013, especially at p14 [50] to p22 [80]. Available at www.supremecourt.vic.gov.au/find/publications/speeches.

At present, resolving disputes in court through agreements in the form of a joint submission on penalties and other orders is more common than full-hearing cases.[30] The ACCC and the courts evaluate different public values for and against the reduction of the penalty. On one hand, cooperation policies assist with detection and are less costly than full-hearing cases.[31] The principle of *interest reipublicae ut sit finis litium* was recognised by the court in the cases of *Frozen Foods*,[32] *Real Estate Institute*[33] and cases that followed, which observed that it is in the public's best interests to avoid lengthy and expensive litigation.[34] On the other hand, agreed penalties tend to be significantly lower than the maximum allowable penalties which may limit their broader deterrence value.[35] The court has also noted the broader public concern that plea bargaining involved 'disreputable conduct'.[36]

Importantly, however, the final determination regarding penalty is a matter for the courts and is determined on a case-by-case basis.[37] Agreed penalties will only be accepted by the courts if they fall within the range a court would fix,[38] although a court will not refuse to agree to a penalty merely because the court may have 'selected a different figure'.[39]

[30] See, *ACCC v ABB Transmission and Distribution Ltd* [2001] FCA 383; (2001) ATPR 41-815, at 42,936.

[31] *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd* [2004] FCACFC 72; (2004) ATPR 41-993, at 51; also see, e.g., *ACCC v Mitsubishi Electric Australia Pty Ltd* [2013] FCA 1413, at [118]–[121]; *ACCC v Cargolux Airlines International SA* [2009] FCA 342, (2009) ATPR 42-282; *ACCC v Westminster Retail Pty Ltd* [2005] FCA 1299, (2005) ATPR 42-084.

[32] *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; (1997) ATPR 41-546.

[33] *ACCC v Real Estate Institute of Western Australia Inc* [1999] FCA 18; (1999) ATPR 41-673.

[34] Ibid, at 42,599; *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; (1997) ATPR 41-546, at 43,580.

[35] See, *ACCC v ABB Transmission and Distribution Ltd* [2001] FCA 383; (2001) ATPR 41-815, at 42,936; R Baxter, 'Trade Practices – Agreeing the Level of Penalties with the Trade Practices Commission in Lieu of Prosecution' (1995) 69 *ALJ* 243.

[36] See, e.g., *TPC v Allied Mills Industries Pty Ltd* (1981) ATPR 40-241. For further discussion on public values in connection with penalties and their reduction, see Sect. 2.1.2.

[37] *TPC v Allied Mills Industries Pty Ltd* (1981) ATPR 40-241 at 43,182. See also *ACCC v SIP Australia Pty Ltd* [1999] FCA 858 (1999) ATPR 41-702, at 43,000; *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; (1997) ATPR 41-546, at 43,557-8.

[38] See, *TPC v Simsmetal Ltd* (1996) ATPR 41-449; *TPC v TNT Australia Pty Ltd* (1995) ATPR 41-375; *TPC v Axive Pty Ltd* (1994) ATPR 41-368.

[39] *TPC v Allied Mills Industries Pty Ltd* (1981) ATPR 40-241.

The issue of a regulator, such as the ACCC, negotiating and agreeing a civil penalty with a defendant for submission to the court for its consideration[40] seems to have been thrown into some doubt by a recent decision of the High Court of Australia, in *Barbaro*,[41] dealing with sentencing in a criminal law context. This case is particularly important in the context of criminal cartel matters in Australia. As a result of this case, the prosecutor will not be permitted to make a statement to the court of the available range of sentences in any particular criminal cartel matter.

The case involved an allegation that a sentencing hearing was unfair because the sentencing judge said at the start of the sentencing hearing that she did not seek, and would not receive, any submission from the prosecution about what range of sentences she could impose on each defendant. The essence of the majority judgment's conclusion in the High Court was as follows:

> The prosecution's statement of what are the bounds of the available range of sentences is a statement of opinion. Its expression advances no proposition of law or fact which a sentencing judge may properly take into account in finding the relevant facts, deciding the applicable principles of law or applying those principles to the facts to yield the sentence to be imposed. That being so, the prosecution is not required, and should not be permitted, to make such a statement of bounds to a sentencing judge.[42]

As the High Court was considering a criminal sentencing context and did not even refer to the Full Court decision supporting the negotiated penalty process in the context of civil penalty proceedings, the High Court's decision has been distinguished and, so far, held to be inapplicable to the civil penalty proceedings context.[43] However, it is an important reminder of how processes and development

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[40] It has continued to be applied and to expand into other areas of law including consumer law—see *ACCC* v *AGL Sales Pty Ltd* [2013] FCA 1030 at [12] to [45]; corporations law—see *ASIC in the matter of Chemaq Ltd* v *Chemaq Ltd* [2006] FCA 936 at [90] to [104]; customs law (Customs Act 1901 (Cth))—see *CEO of Customs by Robert Harry Wales his duly authorised Delegate* v *Corniche Motors Pty Ltd & Others* [2003] WASC 244 at [3] to [15]; health law (Therapeutic Goods Act 1999 (Cth))—see *Secretary, Department of Health & Ageing* v *Pagasa Australia Pty Ltd* [2008] FCA 1545 at [17] to [42]; media law (*Broadcasting Services Act* 1992 (Cth))—see *Australian Communications and Media Authority* v *Radio 2UE Sydney Pty Ltd* [2009] FCA 754; industrial law—see *Australian Building & Construction Commissioner* v *Construction, Forestry, Mining and Energy Union* [2011] FCA 810 at [34]; environment law (*Environment Protection and Biodiversity Conservation Act* 1999 (Cth))—see *Minister for Sustainability, Environment, Water, Population and Communities* v *De Bono* [2012] FCA 643 at [15]; and tax law (*Tax Agent Services Act* 2009 (Cth))—see *Tax Practitioners Board* v *Shanahan* [2013] FCA 764 at [14] to [23].

[41] *Barbaro v R*; *Zirilli v R*, [2014] HCA 2; (2014) 88 ALJR 372.

[42] Ibid., at [7].

[43] See *Tax Practitioners Board v Dedic* [2014] FCA 511 at [3]; *ACCC v Mandurvit Pty Ltd* [2014] FCA 464 at [37] to [80] and *ACCC v Energy Australia Pty Ltd* [2014] FCA 336 at [113] to [152].

for competition law proceedings can be affected by cases dealing generally with the administration of justice in Australia.[44]

2.1.3 Administrative Settlements: Undertakings

Administrative settlements are based on the ACCC's belief that certain conduct contravenes the CCA but does not involve findings of infringement, which may only be determined by the courts.

In the late 1980s and early 1990s, the ACCC deliberately and vigorously settled a number of investigations via deeds of settlement governed by rules of contract law and related civil procedure rules. This was a very innovative and successful way of settling cases administratively and had the advantage of securing remedies for alleged infringements quickly with less cost and greater prediction. Nevertheless, the extent of enforceability of such deeds of settlement was questionable.[45] This changed when the ACCC was given the power to accept 'enforceable undertakings' under a new provision of the CCA, s87B. The use of undertakings has been successful, highlighted by the fact that this legislative instrument has been incorporated into other areas of the law since its introduction into the CCA.[46]

Undertakings are court-enforceable offerings by companies and individuals who are under scrutiny for a potential contravention of the CCA. The ACCC may decide to accept such an undertaking if the person accepts liability for its action(s) and agrees to remedies and compliance with competition law.[47] If the terms of the undertaking concerned are breached, the ACCC can apply to the court for orders directing the person to comply with the terms of its undertaking.[48]

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[44] A Full Court of the Federal Court is reconsidering and reviewing the agreed penalty process for civil penalties in the Queensland case of *Director of the Fair Work Building and Industry Inspectorate* v *Construction, Forestry, Mining and Energy Union (CFMEU) & Anor* QUD257 of 2013. The hearing was held in mid August 2014, and judgment was reserved and is still pending. However, as discussed above, a Full Court of the Federal Court approved the negotiated penalty process for competition law in *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; (1997) ATPR 41-546. The process has also been accepted in a non-competition law context by a Full Court in *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd* [2004] FCACFC 72; (2004) ATPR 41-993.

[45] See Sect. 2.2.1; see also C. Parker, Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings (2004) 67(2) *The Modern Law Review*, 209, 214, 219; M. Duffy, Trade Practices Amendment Bill 1992, Second Reading Speech, Parliament of Australia, 2405, 3 November 1992.

[46] See, M. Nehme, "Enforceable Undertaking: A Restorative Sanction?" (2010) 36 *Monash U.L. Rev*. 108; C. Parker, "Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings" (2004) 67(2) *The Modern Law Review*, 209.

[47] See ACCC, *Compliance & enforcement policy* (February 2014), available at http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy.

[48] For further discussion on enforceable undertakings, see Sects. 2.2.1, 2.4.1 and 2.5.1.1. Undertakings are also commonly used in Merger Control. This is discussed in Sect. 2.6.

2.1.4 Authorisations and Notifications: Obtaining Immunity Through the ACCC

Australian competition laws provide a means for a corporation or an individual confronting *some* competition law issues to obtain certainty and resolution of those issues by means of an administrative, transactional process rather than through antitrust legal proceedings through litigation and court processes. These administrative and transactional processes, known as "authorisation" or "notification", are transparent and accountable processes.

Australian Parliaments have acknowledged and allowed for the possibility that some anti-competitive conduct may produce public benefits. Accordingly, the Commonwealth Parliament through the CCA, and the State and Territory Parliaments through their Competition Codes, have conferred a right on a corporation (the CCA) or an individual (the Competition Codes) to apply to the ACCC to seek exemption or 'authorisation' for engaging in proposed specified conduct which may be at risk of breaching various competition law provisions. These include anti-competitive contracts, arrangements or understandings, collective bargaining and collective boycott arrangements, secondary boycotts, exclusive dealing and resale price maintenance. The ACCC cannot directly authorise conduct that may contravene the misuse of market power under s46 of the CCA and has no power to authorise mergers.[49] If the ACCC grants an authorisation, the corporations and persons covered by the authorisation may engage in the authorised conduct without contravening the CCA.[50]

Australian competition laws also confer a right on a corporation or individual wanting to engage in conduct which may be at risk of breaching the exclusive dealing provisions to file a 'notification' of that conduct with the ACCC. The effect of notification is that the specified conduct is deemed, by s93(7) of the CCA, not to have a substantial lessening effect on competition for the purposes of the exclusive dealing provision in s47 of the CCA.[51] In most cases, the notification will provide immediate protection from exclusive dealing proceedings by either the ACCC or a private party,[52] which will continue unless and until the notification is withdrawn by the ACCC and may only occur if certain legislative criteria are met. In addition, small business[53] may notify the ACCC of proposed collective bargaining conduct

[49] Authorisation is possible for mergers, but only the Australian Competition Tribunal has the power to grant authorisation (see Sect. 2.6). It is possible for the ACCC to grant authorisation in relation to certain acquisitions occurring outside Australia (s 88(9)); however, no such authorisation applications have been, or are likely to be, made given the limited application of s 50A of the CCA.

[50] Section 88 CCA.

[51] The ACCC is empowered to withdraw the protection but must undertake various inquiries and comply with a pre-determination hearing procedure before making its decision to withdraw the protection [sections 93(3), (4) and (5) of the CCA].

[52] Notification for some forms of exclusive dealing do not take effect for 14 days to enable the ACCC to consider its position whether or not to allow those notifications to stand.

[53] This is determined based on the value of the transactions involved.

which will confer protection for the parties against possible cartel claims after 14 days, provided the ACCC does not object within that time frame. The ACCC will object where it does not believe the proposed conduct would result in public benefits sufficient to outweigh any likely anticompetitive detriment.

Once a valid authorisation application is lodged, the ACCC puts the application on its public register and website[54] and consults with all interested parties on the application. The ACCC is obliged by law[55] to prepare and publish a draft written determination setting out a summary of its reasons. The applicant or other interested party can call for a public hearing ("conference") regarding the ACCC's draft determination. If a conference is called for, all interested persons are entitled to attend and to participate at the conference (either with or without assistance). However, persons providing assistance to an interested party are not allowed to personally participate in the discussion.[56] The ACCC is obliged to make a record of the discussions at the conference. After taking into account all matters raised at the conference, the ACCC may make and issue a final determination with its reasons in respect of the application.[57]

A similar public hearing process is contemplated if the ACCC proposes to issue a notice revoking the protection afforded by a valid notification.[58] The ACCC's decisions regarding an authorisation application or a notification are decisions under an enactment and subject to judicial review by the courts.[59]

2.2 Nature of the Settlement and Legal Consequences for the Parties

Only the court has the power to determine whether the CCA has been infringed. A finding of liability and declaration of contravention of any law or the imposition of a penalty or fine is quintessentially part of the exercise of judicial power. Accordingly, in Australia, under Chapter 3 of its Constitution, those tasks can only lawfully be undertaken by a court (judicial arm of government), not any administrative agency forming part of the executive arm of government.

[54] See ACCC, 'Authorisations Register' www.accc.gov.au/authorisationsregister.

[55] Section 90A(1) of the CCA.

[56] See sections 90A(6) and (7) of the CCA.

[57] Section 90A(11) of the CCA.

[58] See section 93A of the CCA.

[59] For example, see *Jones v ACCC* [2003] FCAFC 164; (2003) 131 FCR 216—where the Full Court of the Federal Court set aside an ACCC authorisation decision because the application for authorisation was not valid; also see *Hospital Benefit Fund of WA v ACCC* [1997] FCA 655; (1997) 76 FCR 369—where the court set aside an ACCC decision to allow a third line forcing notification to stand (which had the effect of removing a private cause of action instituted against the conduct). The ACCC had not provided the third party affected an opportunity to be heard in the matter.

As a result, only two forms of transactional resolutions involve findings of infringement and liability. First, a reduction of the penalty is part of the main litigation. This must be approved by the court. Second, granting immunity includes ancillary findings of infringement and of liability if it leads to a successful litigation.

In enforcement matters, including those where the ACCC is seeking a finding of liability and declaration of contravention, an injunction or the imposition of civil pecuniary penalties (or, of course, fines and/or imprisonment for criminal cartel offences), the ACCC's role is to investigate the matter and, if it has sufficient admissible evidence, to institute legal proceedings in the Federal Court. A defendant is fully informed of the ACCC's case through the pleadings.

The ACCC is directly involved in all forms of administrative settlements. However, only two of them, undertakings under s87B of the CCA and a penalty agreement, are enforceable by the court. Penalty agreements must be formalised in a court judgment. The court is not bound to accept the agreed penalty but is likely to do so if the agreed penalty is within the range that a court would fix.[60]

2.2.1 Administrative Settlements: Undertakings

Undertakings are not approved by the court, but s87B of the CCA permits the ACCC to decide whether to accept undertakings offered by alleged offenders. If the ACCC accepts such an undertaking and the alleged offender breaches its terms, the ACCC can apply to the court for an order or orders. Such orders include directing the entity to comply with the undertaking, compensating the Commonwealth and/or any other person for any financial benefits which arose from the breach, as well as any other orders which the court finds appropriate.[61] The Federal Court's approach to enforcing such undertakings and the importance of carefully and clearly drafting the undertakings was recently highlighted in *ACCC v Coles Group Ltd*[62] and *ACCC v Woolworths Ltd*,[63] which involved proceedings initiated by the ACCC to enforce undertakings given by Coles and Woolworths.

In the Australian context, to appreciate the role and use of enforceable undertakings for resolving competition law enforcement matters, it is necessary to understand the enforcement objectives of the ACCC. From its creation in 1995, these were the following:

1. detecting anti-competitive conduct;
2. establishing anti-competitive conduct;

[60] See, *TPC v Simsmetal Ltd* (1996) ATPR 41-449; *TPC v TNT Australia Pty Ltd* (1995) ATPR 41-375; *TPC v Axive Pty Ltd* (1994) ATPR 41-368.

[61] Section 87B of the CCA.

[62] [2014] FCA 363.

[63] [2014] FCA 364.

3. stopping anti-competitive conduct (c.f. authorising anti-competitive conduct);
4. preventing future anti-competitive conduct;
5. obtaining redress/compensation for anti-competitive conduct;
6. deterring anti-competitive conduct; and
7. punishing anti-competitive conduct.[64]

Proceeding down the path of enforcement of a competition law matter involves a judgment by the ACCC of the particular enforcement objectives it seeks to achieve through that matter. The objectives are achieved at different levels through pursuit of a particular matter. Litigation or use of enforceable undertakings is a means to an end (namely, the enforcement objectives), not the end in itself. Accordingly, if a party is willing to offer an enforceable undertaking which meets the ACCC's enforcement objectives for that particular matter, it is likely that the ACCC would be willing to resolve that competition matter on a transactional basis through the use of s87B. However, if, in a particular matter, the ACCC's enforcement objective includes deterrence through the imposition of penalties or clarification of the law, enforceable undertaking would not be acceptable to the ACCC.

The nature of enforceable undertakings as administrative settlement means that their function is not to punish the potential offenders but rather should ensure that future breaches are prevented, that the public is protected and that corrective measures take place, such as compensation for those harmed by the conduct.[65] Their function involves, therefore, restorative rather than punitive elements.[66] Those elements are reflected in sanctions, which have 'the purpose of identifying, correcting and preventing the original breach and its underlying causes',[67] and in the process of these administrative settlements because they empower both the alleged offender and the ACCC to discuss, negotiate and agree on the settlement and its sanctions.[68]

[64] They are similarly expressed by the ACCC in its Guideline on *Section 87B of the Competition and Consumer Act* April 2014, p. 3. See www.accc.gov.au/publications/section-87b-of-the-competition-consumer-act.

[65] Australian Law Reform Commission, *Compliance with Trade Practices Act 1974*, Report No 68 (1994) 38. Corrective measures are more common in consumer law undertakings than in competition law undertakings.

[66] See, e.g., M. Nehme, "Enforceable Undertaking: A Restorative Sanction?" (2010) 36 *Monash U. L.Rev*. 108; C. Parker, "Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings" (2004) 67(2) *The Modern Law Review*, 209.

[67] C. Parker, "Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings" (2004) 67(2) *The Modern Law Review*, 209, 211.

[68] See, M. Nehme, "Enforcable Undertaking: A Restorative Sanction?" (2010) 36 *Monash U.L. Rev*. 108; C. Parker, "Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings" (2004) 67(2) *The Modern Law Review*, 209.

The ACCC makes undertakings publicly available in its 'Undertaking Public Registry' unless it has 'compelling' reasons to keep an undertaking or its term (s) confidential.[69] Undertakings can, therefore, have an impact on reputation; however, this will be arguably less harmful than in the case of litigation because undertakings are voluntary commitments recognised as being less detrimental than successfully litigated cases.

The ACCC's practice is to accept undertakings only if it believes that it has sufficient evidence to prove an infringement of the CCA. Undertakings are based on an individual evaluation by the ACCC, which tries to ensure that such an administrative settlement is appropriate, preventing potential breach of the CCA and reflecting their restorative nature. It is a practical, effective and flexible way to resolve an alleged infringement of the CCA, occasionally including more innovative and preventive remedies than court orders, such as corrective advertising, broad compliance programs and community service.[70] In contrast, the court can be reluctant to impose such remedies because, as Yeung explains, the breach of such court orders involves serious consequences resulting in criminal punishment, which is not present when an enforceable and voluntary undertaking is breached.[71]

The ACCC makes its decision on the form of enforcement or settlement based on its enforcement objectives for that matter, the available evidence for the infringement of the CCA and counsel's judgment on the probability of success if the case was litigated. In order for an undertaking to be approved by the ACCC, it must be a suitable settlement ensuring specific deterrence and full and voluntary compliance, which means, amongst other things, that the alleged offender must accept responsibility for its actions.

An undertaking includes a commitment by the party offering the undertaking to cease the conduct in question and not recommence it in the future. Undertakings commonly contain an acknowledgement of, at the least, the potential risk of a breach of the CCA and/or notices and other forms of redress such as compensation and reimbursement of affected third parties, an implementation of an internal compliance program and compensation.[72] Finally, it is important for the ACCC

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[69] ACCC, *Compliance & enforcement policy* (February 2013), available at http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy; Australian Law Reform Commission (ALRC), *Compliance with the Trade Practices Act 1974*, Report 68, Sydney, June 1994, [11.5]; see, C. Parker, "Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings" (2004) 67(2) *The Modern Law Review*, 209, 216; ACCC, *Public Register of Undertakings*, available at http://registers.accc.gov.au/content/index.phtml/itemId/815599.

[70] Corrective advertising and other corrective measures are usually utilised in consumer law undertakings. They are not common in competition law undertakings. See an empirical study: C. Parker, "Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings" (2004) 67(2) *The Modern Law Review*, 209, 214–220.

[71] K. Yeung, Securing Compliance: A Principled Approach, Hart Publishing 2004, pp. 211–212.

[72] See, ACCC, *Public Register of Undertakings*, available at http://registers.accc.gov.au/content/index.phtml/itemId/815599; C. Parker, "Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings" (2004) 67(2) *The Modern Law Review*, 209, 218.

to ensure that undertakings are drafted clearly and precisely to reflect the intention of the parties.[73]

2.2.2 Authorisation and Notification

In the authorisation and notification transactional or administrative procedure, as provided for by Part VII of the CCA, the rights of the parties are generally protected. The process is initiated by the corporation or individual, not the ACCC. There is no requirement for the ACCC to make any finding about whether the proposed conduct would, or would be likely to, contravene the specified provisions of the CCA (or Code of Conduct). Subject to some relatively minor confidentiality provisions, all submissions received by the ACCC are made public and available to the parties. The ACCC is obliged to issue a draft decision in writing. Parties can call for a public hearing in respect of the ACCC's draft decision. Parties can participate at the public hearing. The ACCC is obliged to take into account the matters raised at a public hearing before issuing a final decision. The ACCC's final decision is in writing and provides reasons for the decision. The process is subject to both judicial review and a complete rehearing on the merits by way of an appeal to the Australian Competition Tribunal.

2.2.3 Incentives to Accept Transactional Resolutions and the Risk of Non-compliance

Administrative resolutions are considered by the ACCC to be lower on their 'enforcement pyramid' than litigation.[74] There are significant incentives for both the ACCC and the parties to resolve matters through transactional resolutions, including reducing the burden both on the public and private purse. They do not alter the burden and standard of proof required of the ACCC in enforcement matters, save that they may encourage parties to make admissions they might otherwise not be willing to provide. Parties, however, will always have the choice between accepting administrative resolution and defending claims of contravention in court. Consequently, while incentives to resolve matters administratively can be great for both parties, the availability of administrative options in some cases does not undermine the legal standard required of the ACCC to prove a matter in court and the parties retain the right to pursue this option.

[73] See *ACCC v Coles Group Ltd* [2014] FCA 363 and *ACCC v Woolworths Ltd* [2014] FCA 364.

[74] See, for example, L. Sylvan, Australia's competition and consumer law: ensuring compliance and enforcing the law (Trade Practices & Competition Law Conference, Sydney, 16 February 2004) https://www.accc.gov.au/system/files/Australias%20competition%20and%20consumer%20law%20ensuring%20compliance%20and%20enforcing%20the%20law.pdf. See also ACCC, 'ACCC Compliance and Enforcement Policy' (February 2014) http://www.accc.gov.au/publications/compliance-and-enforcement-policy.

The ACCC's main objective when enforcing competition law is to 'select the course of action most likely to achieve the desired marketplace outcome and lasting compliance with the Act'.[75] It ensures that appropriate steps are taken to prevent non-compliance.[76] It is common for the ACCC to include the implementation of a compliance program in the administrative settlement.[77] The ACCC used to resolve more cases through administrative settlements than by litigation[78]; however, currently, the litigated cases prevail over formal administrative settlements in competition law.[79] Therefore, transactional procedures are applied by the ACCC only when such forms of resolving the issue have a higher chance of ensuring compliance. Although accepting an undertaking will not guarantee compliance, it provides the ACCC with the opportunity to enforce the undertakings in court should they be breached by the parties.[80]

Reductions in penalty and immunity policies do not bear an obvious risk of non-compliance. A penalty reduction is at the discretion of the court and is, therefore, a part of the court judgment, while immunity is only granted if the corporation involved in the cartel fully cooperates and it is at least prepared to cease its involvement in the cartel. A cartel case will follow after granting immunity if the ACCC decides to litigate. Therefore, if the ACCC is successful, the court judgment will forbid the cartel and will include further injunctions and penalties (for the defendants—the other parties to the cartel). In addition, cartel immunity from the ACCC does not preclude a third party bringing an action for damages caused by the cartel. Finally, the court judgment and undertakings can be enforced in the event non-compliance occurs. There are, however, no significant studies in Australia reviewing the level of non-compliance with undertakings or court orders.

[75] Former policy: Trade Practices Commission, *Guideline on administrative resolution* (TPC Canberra 1993); also see ACCC, *Compliance & enforcement policy* (February 2013), available at http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy.

[76] ACCC, *Compliance & enforcement policy* (February 2013), available at http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy; for the former policy, see Trade Practices Commission, *Guideline on administrative resolution* (TPC Canberra 1993).

[77] See, for example, ACCC and Australian Energy Regulator, *Annual Report: 2012-13*, Canberra, p. 35.

[78] See, for example, Australian Law Reform Commission (ALRC), *Compliance with the Trade Practices Act 1974*, Report 68, Sydney, June 1994, [11.1].

[79] ACCC and Australian Energy Regulator, *Annual Report: 2012-13*, Canberra, p. 57.

[80] For instance, on 25 February 2014, the ACCC instituted court proceedings against supermarket chains, Coles and Woolworths, claiming they had breached the enforceable undertakings.

2.2.4 Efficiency Prompts Transactional Resolution

Transactional resolutions are not likely to result in the abandonment of efficient conduct that does not infringe upon competition law (i.e., over-intervention) or the continuance of inefficient conduct infringing upon competition law (i.e., under-intervention), particularly given the enforceable nature of the undertakings and the nature of the obligations normally imposed upon parties to such undertakings.

As discussed above, transactional resolutions are designed to supplement the litigation process and provide for maximum public benefit by addressing competition contraventions while reserving public funding for the most serious breaches of the CCA.[81] The public nature of any agreed settlement and the often significant cost (including, for example, establishing compliance programs) provide significant deterrence for minor contraventions of the CCA.

There is no apparent increase in unpredictability of the competition law itself as a result of the application of transactional resolutions. To the extent that they are used to avoid litigation that might otherwise assist in resolving interpretation issues, they may reduce predictability of competition laws, but this would not appear to occur to a significant degree.

2.3 The Principle of Fairness and Related Principles and Concerns

Australian administrative law is governed by 'the duty to accord natural justice' (procedural justice).[82] At present, this principle of procedural fairness applies to the ACCC in all situations with a limited exception in relation to the special telecommunication industry regime.[83]

In the case of administrative settlements in competition law, the *Compliance and Enforcement Policy* of the ACCC recognises the principle of fairness as one of the underpinning principles. It applies this principle in a similar way to the principle of proportionality. For example, the ACCC policy provides that fairness means that it 'seeks to strike the right balance between voluntary compliance and enforcement while responding to any competing interests'.[84]

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[81] Compare F. Zumbo, "Section 87B undertakings: there's no accounting for such conduct!" (1997) 5 *Trade Practices Law Journal* 121.

[82] See R. Creyke and J. McMillan, *Control Government Action: Text, Cases & Commentary*, 3rd ed., LexisNexis Butterworths 2012, Chapter 10.

[83] Section 151AKA, s152BCF, s152BCG and s152BD of the CCA.

[84] ACCC, *Compliance & enforcement policy* (February 2013), available at http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy. For the discussion about the principle of proportionality, see Sect. 2.4.

2.3.1 Good Administration

Good administration includes a review of the substance of the ACCC's decisions. Besides the mechanisms, which the ACCC applies itself and which arise from the *Compliance and Enforcement Policy*, there are other means of ensuring good administration in antitrust proceedings of transactional resolutions in Australia. First, it is in the power of the Australian Competition Tribunal to review the ACCC's formal merger and acquisition clearance decisions and the decisions of the ACCC in relation to authorisations and notifications.[85] Second, the Commonwealth Ombudsman can review the ACCC's decisions on good administration grounds,[86] which include, amongst others, different errors, including legal, factual and human, and decisions and actions that are unreasonable, harsh or discriminatory and government policy that has unreasonable or harsh impacts.[87]

2.3.2 Good Faith

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) includes 'bad faith' as one of the grounds for a judicial review of administrative decisions.[88] A decision based on poor or irrational decision-making does not on its own satisfy the requirements for a judicial review on the bad-faith grounds under ss5(2)(d) and 6 (2)(d): 'an exercise of a discretionary power in bad faith'. Bad faith represents personal fault usually in the form of an absence of honesty and must be demonstrated by showing 'recklessness in the exercise of power'.[89] This recklessness involves intent manifested 'in the form of actual bias'.[90]

2.3.3 Legitimate Expectation

In contrast to European Union Member States, which apply the full principle of fairness (including both procedural fairness and fairness in connection with the legitimate expectation of substance of an administrative decision), in Australia judicial review of the federal administrative decisions is based on procedural

[85] The decision by the Tribunal can be appealed to the Federal Court on a question of law (s44ZR of the CCA).

[86] The Commonwealth Ombudsman does not have enforcement powers.

[87] Commonwealth Ombudsman, *Administrative Deficiency*, available at http://www.ombudsman.gov.au/.

[88] Subsections 5(2)(d) and 6(2)(d).

[89] *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749, [756].

[90] *Minister for Immigration and Multicultural Affairs v SBAN* [2002] FCAFC 431, [8].

grounds and thus includes only procedural fairness.[91] Although this concept of fairness is based on the Australian Constitution,[92] its concept of separation of powers and relevant legislation,[93] including specific acts dealing with specific administrative decisions, it has its roots in the former English common law.

In relation to administrative decisions, the court only reviews whether a legitimate expectation was met in terms of the procedural rules and rights of the party concerned. Administrative settlements, such as undertakings, are reviewable by the Federal Court on procedural fairness grounds, including bad faith grounds.[94]

Judicial review of administrative decisions does not apply in the reduction of penalties, given that the ACCC does not have the power to make such binding decisions. As it is the court alone which has the power to determine penalties, the court will consider both the legal and factual matters in connection with fairness, which is a broader concept than legitimate expectation.[95]

2.4 The Principle of Proportionality

Australia does not include the principle of proportionality in administrative decision-making legislation. The *Administrative Decisions (Judicial Review) Act* 1977 (Cth), which provides legal grounds for a judicial review of administrative decisions and conduct related to the making of administrative decisions, applies the test of unreasonableness to the exercise of an administrative power. The focus is on whether a reasonable person would exercise his/her power in the same way.[96]

[91] See *Re Minister for Immigration and Multicultural Affairs, Ex parte Lam* (2003) 214 CLR 1, 195 ALR 502, [22]–[23]; A. Mason, Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation (2005) *AJAL* 103. Federal courts have no jurisdiction to review merits of administrative decisions. However, the judicial review on reasonable person grounds (discussed in Sect. 2.4) has the highest possible threshold and thus almost overlaps with the concept of a judicial review on merits. See discussion in P. Billings and A. E. Cassimatis, "Statutory Judicial Review in Australia" (2013) 23 *JJA* 73, 105–109; and application in *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [26] to [30]; [63] to [76] and [105].

[92] Subsection 75(v) of the Commonwealth of Australia Constitution Act 1900.

[93] Section 39B Judiciary Act 1903 (Cth) and in the Administrative Decisions (Judicial Review) Act 1977 (Cth).

[94] See *Australian Petroleum Pty Ltd v ACCC* (1997) 73 FCR 75; (1997) ATPR 41-155 Justice Lockhart held (pp. 43,685–43,688).

[95] See *Muin v Refugee Review Tribunal* (2002) 190 ALR 601; *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550.

[96] See subsections 5(2)(g) and 6(2)(g) of the Administrative Decisions (Judicial Review) Act 1977 (Cth). Nevertheless, in Australia, there is a tendency for the courts to apply a test of 'reasonable proportionality' in public law, most notably in constitutional law. The test of reasonable proportionality is used to determine the existence of a valid connection between executive action and the source of authority for that particular action. See R. Creyke and J. McMillan, *Control Government Action: Text, Cases & Commentary*, 3rd ed., LexisNexis Butterworths, 2012, p. 448. The test of reasonable proportionality was applied in the following cases in connection with administrative regulations: *Vanstone v Clark* (2005) 147 FCR 299, 224 ALR 666, 88 ALD 520; *South Australia v Tanner* (1989) 166 CLR 161, 83 ALR 631.

The ACCC refers to 'proportionality' in its *Compliance and Enforcement Policy*, which provides that its 'enforcement response is proportionate to the conduct and resulting harm'[97] as it follows from the principles of transparency, confidentiality, timeliness, consistency and fairness. It further states that the principle of fairness is projected by striking 'the right balance between voluntary compliance and enforcement while responding to many competing interests'.[98] Therefore, the ACCC's *Compliance and Enforcement Policy* is focused on appropriateness and the prescribed purpose (in other words, meeting the purpose of the ACCC's enforcement policy). The enforcement by the ACCC, which includes all of the ACCC's transactional resolutions, must be proportionate to the conduct and resulting harm and must reflect genuine interest in voluntary and effective compliance.

In practice, the ACCC applies one of three forms of resolutions—voluntary compliance, administrative resolution and settlements or court litigation—when it receives a complaint or suspects infringement of competition law. It takes into consideration its priorities and resources and evaluates the potential risk of the conduct in question and then identifies the most appropriate resolution that would 'provide the greatest overall benefit for competition and consumers'.[99] This last statement indicates that the ACCC understands and evaluates proportionality not only from the perspective of third parties directly affected by the practice in question (e.g. consumers) but also from the perspective of a broader public interest.

2.4.1 Enforceable Undertakings

To some extent, the principles of equal treatment and proportionality are followed by the ACCC and the CCA in relation to enforceable undertakings. Firstly, the ACCC accepts undertakings if it believes there is sufficient evidence to prove an infringement of the CCA. Secondly, the CCA includes one form of an *a posteriori* safeguard mechanism to ensure the ACCC does not go beyond what the court would find reasonable. Under s87B, in the case of a breach of term(s) of the undertaking concerned, the court would make only those orders that are *appropriate*. Finally, orders for a breach of undertakings are not as severe as orders and remedies available for the infringement of the CCA in the court proceedings. The reason for this is to ensure that orders are used *appropriately* and that the nature of undertakings is taken into consideration, in that they are based on situations when

[97] ACCC, *Compliance & enforcement policy* (February 2014), available at http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy.

[98] Ibid.

[99] Ibid.

a party cooperates, admits its responsibility and initiates an undertaking to resolve the issue.[100]

2.5 Fundamental and Procedural Rights

2.5.1 Right to Trial

There are two aspects to the right to trial in transactional resolutions in Australia. The first involves the determination of whether the right to trial is recognised in Australia and to what extent it covers transactional resolutions in antitrust proceedings. The second is specific to administrative settlements and their forms, as they provide a basis on which to decide whether there exists the right to trial in the form of a judicial review of administrative decisions.

2.5.1.1 General Right

Australia recognises 'the right to a fair trial before punishment or deprivation of property' (including deprivation of life and liberty) as an essential aspect of the rule of law.[101] Although the Australian Constitution does not include a list of rights, this right can be determined from provisions on judicature[102] and from the operation and the interpretation of such a right by courts.[103] Deprivation of property does not include deprivations based on social policy objectives as arising from law, such as taxation, but are rather forms of wrongdoings.[104] Besides a few specific exceptions, generally punitive deprivation of life, liberty and property should arise from a fair trial and not from the implication of executive power.[105]

Enforceable undertakings are not punitive but rather have a restorative nature (see subchapter 2.1, above). As a consequence, this general right does not apply to this form of administrative settlement. In the case of a penalty reduction, the penalty in competition law has specific and general deterrence as its objective. It also includes a secondary, punitive aim.[106] Therefore, contrary to undertakings, this must be subject to a fair trial; in other words, only the court can determine this. In the case of a penalty reduction, it is the Federal Court that has jurisdiction in this matter. Generally, decisions made by the Federal Court about the penalty can be

[100] See Australian Law Reform Commission (ALRC), *Compliance with the Trade Practices Act 1974*, Report 68, Sydney, June 1994, [11].

[101] S. Ratnapala and J. Crowe, Australian Constitutional Law: Foundations and Theory, 3rd ed., Oxford University Press 2012, p. 400.

[102] See section 80 and subsection 51(xxxi) of the Constitution.

[103] See S. Ratnapala and J. Crowe, Australian Constitutional Law: Foundations and Theory, 3rd ed., Oxford University Press 2012, pp. 400–407.

[104] Ibid, pp. 400–401.

[105] Ibid, pp. 402–403.

[106] For the punitive aim, see *ACCC v ABB Transmission & Distribution Ltd* [2001] FCA 383, at [7] and [9].

appealed to the Full Federal Court, and if a special leave to appeal is granted by the High Court of Australia, the case can be appealed from the Full Federal Court to the High Court of Australia.[107] If the decision by the Federal Court is based on trial proceedings, the Full Federal Court will allow the appeal on the ground that the trial judge made an error by applying an incorrect principle, if there was a misapprehension of the facts, or by admitting irrelevant materials or not admitting relevant materials.[108]

Only the court may make orders and decide on penalties.[109] The decision on orders and penalties is a public function, with the result that the courts must consider a number of public values. For instance, the primary objective of pecuniary penalties in competition law is deterrence, including both specific and general deterrence.[110] Retribution is also recognised as playing a certain role in penalties in competition law.[111] However, as noted by the court, the reduction of the penalty can diminish this objective.[112] The court also expresses that the absence of a trial in the case of agreed infringements of the CCA could be 'at the expense of justice',[113] for instance, because it is difficult for the court to determine the rightness of the penalty in cases without trial (and with the consent of the parties).[114] Nevertheless, the court should only decide on penalties, including agreed penalties by the parties, when it believes that it has accurate and complete information to make such a decision.[115]

The behaviour of the corporation in question in an investigation by the ACCC is a factor to be considered in determining whether the penalty should be reduced and to what extent.[116] Cooperation with the ACCC which aids in detecting anticompetitive conduct and reducing the time and cost associated with investigation and

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[107] Questions of law.

[108] See *J McPhee & Son (Australia) Pty Ltd v ACCC* [2000] FCA 365, (2000) 172 ALR 532; *Pye Industries Sales Pty Ltd v TPC* (1979) ATPR 40-124.

[109] As discussed previously (Sect. 2.1), the court usually accepts any reduced penalty agreed between the ACCC and the defendant, provided it is within the appropriate range for the infringement in question (see, e.g., *ACCC v Chaste Corp Pty Ltd* [2004] FCA 398; *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285) with the result that an appeal relating to agreed penalties is highly unlikely.

[110] See, e.g., *ACCC v Mitsubishi Electric Australia Pty Ltd* [2013] FCA 1413, at [112]; *ACCC v April International Marketing Services Australia Pty Ltd (No 8)* [2011] FCA 153, at [32]; *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285, at 294–295; *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076 (*CSR*) at 52,152; *TPC v Mobil Oil Australia Ltd* (1985) 4 FCR 296, at 298; *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* (1978) ATPR 40-091 at 17,896.

[111] See, e.g., *ACCC v ABB Transmission & Distribution Ltd* [2001] FCA 383, at [7] and [9].

[112] See, e.g., *ACCC v ABB Transmission & Distribution Ltd* [2001] FCA 383, at [5].

[113] *ACCC v ABB Transmission & Distribution Ltd* [2001] FCA 383, at [5].

[114] *ACCC v ABB Transmission & Distribution Ltd* [2001] FCA 383, at [6].

[115] See, e.g., *ACCC v Chaste Corp Pty Ltd* [2004] FCA 398.

[116] See, e.g., *ACCC v Mitsubishi Electric Australia Pty Ltd* [2013] FCA 1413, at [118]–[121]; *ACCC v Cargolux Airlines International SA* [2009] FCA 342, (2009) ATPR 42-282; *ACCC v Westminster Retail Pty Ltd* [2005] FCA 1299, (2005) ATPR 42-084; *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd* [2004] FCACFC 72; (2004) ATPR 41-993, at 51.

litigation is a substantial public value recognised as a reason for a reduction of the penalty in competition law by the court.[117] The ACCC attempts to balance all public values when determining whether to use one of its transactional resolutions. In connection with the reduction of a penalty, such a decision by the ACCC is then evaluated by the court during litigation. The fact that the court usually approves the ACCC's reduction of the penalty indicates that the ACCC's process in this regard is satisfactory and balances well with different public values.

2.5.1.2 Right to Judicial Review

The administrative decisions by the ACCC can be reviewed by the Federal Court under s163A of the CCA and the *Administrative Decisions (Judicial Review) Act 1977* (Cth); however, it is not absolutely clear which decisions made by the ACCC are decisions under the Act and are thus reviewable by the Federal Court. The courts hold that the reviewable decisions must be made under a statute[118] and must be expressly or impliedly required by that statute to have a character of a decision.[119]

Undertakings meet the first requirement because they have a basis in the CCA in s87B. In relation to the second requirement, the process of undertakings is based on negotiation rather than an administratively imposed decision. An undertaking itself is not a decision of the ACCC but rather an offer made by the alleged offender. However, the ACCC must *decide* whether or not to accept or decline the undertaking.

The Federal Court clarified in *Australian Petroleum*[120] that undertakings meet both requirements. Justice Lockhart held that an undertaking "answers the description of an 'instrument' under the [CCA]".[121] Therefore, undertakings could be subject to judicial review. It remains, however, at the discretion of the court whether to allow or refuse relief under s16 of the *Administrative Decisions (Judicial Review) Act* 1977. Furthermore, the scope for private litigation still exists where undertakings have been given; undertakings do not affect the right of third parties to sue for damages and other orders under the CCA. However, if the consequences of the undertakings are that those third parties are compensated and the practice in question stops, so that justice (particularly restorative justice) is seen to be done, affected third parties are unlikely to have a reason to litigate.

In relation to the authorisation and notification process, those resolutions are subject to both judicial review on procedural grounds and non-judicial review on

[117] See, e.g., *ACCC v Mitsubishi Electric Australia Pty Ltd* [2013] FCA 1413, at [12]–[16], [118]–[121]; *ACCC v Ticketek Pty Ltd* [2011] FCA 1489; *ACCC v Tyco Australia Pty Ltd* [2000] FCA 401; *TPC v Carlton & United Breweries Ltd* (1990) 24 FCR 532.

[118] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337.

[119] *Electricity Supply Association of Australia Ltd v ACCC* (2001) 113 FCR 230 at [76]–[79].

[120] *Australian Petroleum Pty Ltd v ACCC* [1997] FCA 175; (1997) ATPR 41-155.

[121] Ibid., at 43,685–43,688.

merits by way of a complete rehearing on appeal to the Australian Competition Tribunal. The Tribunal must make its own findings of fact and come to its own decision.[122] The general principles governing the administrative authorisation process, including the broad width of the public benefit test at the centre of the authorisation process, the future with and without (the proposed conduct) test, the discretion to authorise and the conditions which may be imposed upon authorisation, are helpfully set out by the Tribunal in *Application by Medicines Australia Inc*.[123]

2.5.2 The Principle of Impartiality: Bias and Right to an Impartial Judge

The principle of impartiality can play a role in the form of bias or in the form of breach of right to an impartial judge in Australian competition law. In the case of litigation (for instance, concerning the reduction of the penalty), the impartiality of judges, in other words, the duty to act judicially, is a well-established principle in Australia.[124] If a court makes a decision that is not impartial but is, for instance, influenced by a preconception or an unwillingness to hear the other party's argument, this could constitute grounds for appeal in the form of bias. The High Court of Australia approved the reasonable apprehension or suspicion test in the case of *Webb v R*.[125]

The principle of bias applies in a decision-making process. The grounds for bias include a decision-making process, where the decision is influenced by private communications with one of the disputing parties, including communications with both proper and improper motives.[126] These grounds could have some minor relevance in competition law, for instance, in the immunity policy of the ACCC, because the ACCC communicates privately with the party who discloses information about the cartel and decides whether to grant immunity. If immunity is granted, the party in question is not prosecuted; therefore, to some extent, it is on the other side of the dispute to the other parties in the cartel.

Nevertheless, cartel cases are decided not by the ACCC but by the courts, which determine both whether the CCA was infringed and the appropriate penalties or

[122] *Application by Medicines Australia Inc* [2007] ACompT 4 at [135].

[123] [2007] ACompT 4 at [93] to [134]; (2007) ATPR 42-164 at 47,515 [93] to 47,524 [134].

[124] See, for example, *Ebner v Official Trustee in Bankruptcy* (2000) 205 *CLR* 337; Sir Frank Kitto, "Why Write Judgments?" (1992) 66 ALJ 787; Sir Harry Gibbs, "Judgment Writing" (1993) 67 *ALJ* 494; Sir Laurence Street, introduction to "The Writing of Judgments: A Forum" (1992) 9 ABR 130; The Hon L J Priestley, 'The Writing of Judgments: A Forum' (1992) 9 *ABR* 130; The Hon John Doyle, 'Judgment Writing: Are there needs for change?' (1999) 73 *ALJ* 737.

[125] (1994) 181 CLR 41; see also *Ebner v Official Trustee in Bunkruptcy* (2000) 205 CLR 337; 63 ALD 577.

[126] See *Re JRL; Ex parte CJL* (1986) 161 CLR 342; Robin Creyke and John McMillan, *Control Government Action: Text, Cases & Commentary*, 3rd ed., LexisNexis Butterworths, 2012, p. 644.

injunctions to be applied. This should ensure the impartiality and thus the protection of the right of an impartial judge. Similarly, a decision on the reduction of the penalty is in the hands of the court; therefore, impartiality should be ensured. Undertakings are not decisions imposed upon parties by the ACCC but are voluntary submissions by those parties approved by the ACCC. If the party breaches the undertaking, the ACCC can take this matter to the court where both parties face an impartial judge.

2.5.3 Right to Equal Treatment

Neither the Australian Constitution nor the CCA provides an explicit and general provision which would ensure the right to equal treatment.[127] Nevertheless, the Australian courts apply equal treatment when deciding on penalties.[128] This is well implemented by the court in competition law cases and requires that there be even-handed treatment of the parties infringing the same law with comparable circumstances.[129]

2.5.4 *Ne Bis in Idem* and Other Concerns

Australia, as a common law country, applies the procedural defence of double jeopardy, which prevents the defendant from being tried twice for the same conduct on the same or similar charges previously decided upon by the court. Although double jeopardy has not been raised as an issue in competition law, it could theoretically occur if state and federal competition law regimes were applied simultaneously. Australian federal competition legislation, the CCA, primarily relies upon the corporations' power in s51(xx) of the Australian Constitution, which allows the Commonwealth to regulate matters related to corporations. State Competition Codes[130] apply to 'persons', a broad term that also includes corporations. However, the risk of double liability has been removed, both by the

[127] The High Court of Australia, therefore, denies ensuring the right to equal treatment [see *Kruger v Commonwealth* (1997) 190 CLR 1; *Leeth v Commonwealth* (1992) 174 CLR 455] unless it relates to religion, which is present in s116 of the Constitution, or non-discrimination based on the grounds of residency in a particular State of Australia, as provided in s117. Nevertheless, Australian legislation can, and for different situations does, protect equal treatment to outlaw arbitrary discrimination.

[128] *Lowe v The Queen* (1984) 154 CLR 606, at 609: '[P]ersons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence.'

[129] See, *ACCC v Australian Abalone Pty Ltd* [2007] FCA 1834; *ACCC v SIP Australia Pty Ltd* [2003] FCA 336; *ACCC v ABB Transmission & Distribution Ltd (No 2—Distribution Transformers)* [2002] FCA 559, (2002) 190 ALR 169; *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285.

[130] See Part XIA and Schedule 1, the Schedule version of Part IV of the CCA.

fact that the states have vested authority in the ACCC (the federal enforcer) to enforce their Competition Codes[131] and the Commonwealth has vested jurisdiction in the Federal Court to hear matters under the Codes[132] and, more importantly, because the legislation includes provisions which prevent double liability.[133]

There is no risk of being tried twice for an offence (for example, a cartel criminal offence) and for a civil contravention in a case brought by the ACCC or a private party. Section 76B of the CCA provides expressly that the court may not impose a pecuniary penalty in a situation where the entity in question has been convicted of a cartel offence and any existing civil proceedings are stayed if a criminal proceeding has commenced in relation to the conduct. It is, however, possible for the ACCC or a private party to bring proceedings for other orders, such as injunctions, declarations and damages.

In the case of undertakings and grants of immunity, the ACCC promises that it will not sue the alleged offender. However, there is nothing preventing private parties from suing the alleged offender. If harmed by the conduct, private parties can institute court proceedings to recover damages pursuant to s82 of the CCA,[134] mandatory and prohibitory injunctive reliefs under s80 and other orders under s87. Therefore, in practice, private parties could seek injunctions and damages for conduct resolved by the ACCC through transactional resolutions other than a reduction of the penalty. Importantly, however, this does not represent a case of double jeopardy because those transactional resolutions do not include findings of infringement and liability.

2.5.4.1 Collection of Evidence for Civil Litigation in Administrative Settlements

In cases of transactional resolutions, it could be difficult for private parties to collect the relevant evidence necessary to bring proceedings. Private cases for damages are commonly instituted after the ACCC's institution of court proceedings because private parties can use the findings from the ACCC's cases as *prima facie* evidence, as provided in s83 of the CCA. However, this does not include enforceable undertakings. Furthermore, Justice Carr expressed the opinion (without ruling in the matter) in *Monza Imports*[135] that s83 does not apply when the party claiming damages relies on a previous judgment on the infringement of the CCA, where the ACCC and the entity concerned reached a settlement and admitted an agreed statement of facts. Justice Carr held that s83 applies and *prima facie* evidence is established from a case on the subject matter only when findings were made after a

[131] See, e.g., s19 of the Competition Policy Reform (New South Wales) Act 1995 (NSW).

[132] See Part XIA of the CCA; Jurisdiction of Courts Legislation Amendment Act 2000 (Cth).

[133] Section 150H of the CCA; also see, e.g., s34 of the Competition Policy Reform (New South Wales) Act 1995 (NSW).

[134] The ACCC cannot sue for damages because, as a specialist, independent public enforcement regulator, it does not suffer loss or damage.

[135] *ACCC v Monza Imports Pty Ltd* [2001] FCA 1455, [2001] ATPR 41-843.

hearing of the issue at trial.[136] Undertakings under s87B and reduction of penalties based on mutual agreement and the joint submission of facts do not include trials and, thus, a finding of evidence. Justice Finkelstein made similar statements in *ABB Transmission and Distribution*.[137] Therefore, it is likely that infringement of the CCA and other claims would have to be proven, and thus the evidence must be established in private litigation that follows undertakings and a reduction of the penalties in cases based on joint submissions of the ACCC and the alleged offender.

2.5.5 Presumption of Innocence and Acknowledgement of Guilt

There is no formal requirement for parties to acknowledge guilt or liability in order to benefit from non-merger transactional resolutions.[138] However, in practice, for parties to benefit from administrative settlement resolutions, including those made pursuant to enforceable undertakings, the ACCC generally requires that parties admit that their conduct did or was likely to breach the CCA and make a positive commitment not to commit the act again.[139] In relation to cartel immunity claims, it is essential that the parties seeking immunity admit guilt before they can benefit from the policy.[140]

In criminal matters, parties have a general presumption of innocence in Australia. This includes the criminal cartel offences introduced into the CCA in 2009 and is consistent with Australia's obligations under Article 14(2) of the International Covenant on Civil and Political Rights. To be found guilty of a criminal offence, the Crown must prove the offence beyond a reasonable doubt. The Crown also bears the burden of proof in civil matters under the CCA, but a lesser standard of proof is required to establish the contravention.

2.5.6 Right Against Self-Incrimination

Australia has a common law privilege against self-incrimination, which encompasses both criminal matters and exposure to administrative or civil penalties, such as those that apply in relation to the civil contraventions of the

[136] Ibid, at [24]–[26].

[137] *ACCC v ABB Transmission and Distribution Ltd [No 2]* [2002] FCA 559, at [51]. The court referred to *Dawson v Great Central Railway* (1919) 88 LJKB 1177.

[138] Transactional resolutions for mergers (merger remedies) are considered in Sect. 2.6, below.

[139] ACCC, Section 87B of the Trade Practices Act (September 2009), p. 5. See also, for example, ACCC, 'ACCC accepts Ray White Real Estate administrative undertakings' (Media Release 016/05, 28 January 2005), at http://www.accc.gov.au/media-release/accc-accepts-ray-white-real-estate-administrative-undertakings as an example of a less formal administrative undertaking.

[140] See, *ACCC immunity and cooperation policy for cartel conduct* (September 2014).

CCA.[141] This applies to individuals but not to corporations. However, this common law privilege may be altered by statute and, in relation to the ACCC's investigatory powers under the Act, the privilege has been expressly abrogated. Both s155 (ACCC notices) and s154X (in relation to search warrants) provide that self-incrimination is no excuse for failing to provide the information or answer the questions put to them.[142]

However, in both cases, the information or other evidentiary material gathered pursuant to this power is not admissible in evidence against the *individual* in any criminal proceedings, other than those relating to failure to comply with the notice or search warrant.[143] Consequently, the information so obtained could not be used in criminal cartel proceedings but could be (and has been) used in civil proceedings which expose individuals to significant penalties. The ACCC is alive to the restrictions and treats all cartel investigations as potentially criminal until a decision is made about whether to pursue them criminally or civilly.

Apart from the limitations in s155, transactional procedures do not involve a formal or informal waiver of the right against self-incrimination or the presumption of innocence. However, parties wishing to resolve matters through administrative decisions, or seeking immunity or reduction in penalties, will generally be required to admit the conduct they have engaged in and to acknowledge that it did or may have contravened the CCA. This is not the same as a judicial finding of guilt, however, as only the court has the power to determine whether the CCA has been contravened.

2.5.7 Providing Information and Protecting Confidential Information

2.5.7.1 The Obligation to Provide Information to Authorities

There is no general duty to provide information spontaneously to the ACCC in relation to competition law matters, whether they are pursued through the courts or result in administrative resolution. However, the CCA provides the ACCC with considerable investigatory powers. These powers include requiring disclosure of information and materials where the ACCC believes a person or corporation is capable of furnishing them in relation to a matter that either does or might constitute a contravention of the Act.[144]

[141] See, for example, ALRC, 'Uniform Evidence Law' (ALRC Report 102) chapter 15 http://www.alrc.gov.au/publications/15.%20Privilege%3A%20Other%20Privileges/privilege-respect-self-incrimination-other-proceedings.

[142] Section 155(7) and 154X(3) CCA.

[143] Section 155(7) and 154X(4) CCA.

[144] See, for example, I. Wylie, "When too much power is barely enough – s155 of the Trade Practices Act and noblesse oblige" (2009) 16 *Competition and Consumer Law Journal* 314.

The key powers in this regard arise under s155 and Part XID of the CCA. Section 155 provides that where the ACCC has ‘reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a contravention of this Act’, the ACCC may serve written notice on that person requiring him/her to furnish the information, produce the documents or appear to give evidence either orally or in writing.[145] This power may be exercised any time until the ACCC commences proceedings, other than proceedings for an injunction, in which case the power extends until the close of pleadings in relation to an application for final injunction. A person who fails to comply with a s155 notice or knowingly furnishes false or misleading information is guilty of an offence, punishable by a fine or imprisonment for up to 12 months.[146] The ACCC has been proactive in working with the Commonwealth Department of Public Prosecutions to launch criminal prosecutions where they believe such conduct has taken place with some success, including imprisonment in some cases.[147]

In addition, Part XID of the CCA provides the ACCC with the ability to apply to a magistrate for a warrant, which the magistrate may issue if satisfied that there is evidential material on the premises or that there may be within the next 72 h.[148] When a warrant is being executed, the executing officer may require a person at the premises to answer questions or produce evidentiary material relating to the warrant and may seize the material. Failure to comply with such a requirement is a criminal offence.[149]

2.5.7.2 Without Prejudice, Confidentiality and Publicity of Transactional Solutions

Parties who are unsure of whether or not they will benefit from immunity[150] or leniency may, and frequently do, provide information to the ACCC on a ‘without prejudice’ or otherwise confidential basis. There are legislative measures in place to protect certain information provided to the ACCC as part of transactional resolutions. This is most notable in the case of cartel information produced for purposes of immunity applications. The ACCC considers this vital to the effective-

[145] Section 155(1) CCA.

[146] Section 155(5)(5A)(6A)CCA.

[147] I. Wylie, “When too much power is barely enough – s155 of the Trade Practices Act and noblesse oblige” (2009) 16 *Competition and Consumer Law Journal* 314, 330 and *ACCC v Rana* [2008] FCA 374.

[148] Section 154X(2) CCA.

[149] Section 154R CCA.

[150] See further, ACCC ‘Discussion Paper: Review of the ACCC’s Leniency Policy for Cartel Conduct’ (2004) (https://www.accc.gov.au/system/files/Discussion%20paper%20-%20Review%20of%20the%20ACCC%27s%20leniency%20policy%20for%20cartel%20conduct.pdf) accessed 25 April 2014.

ness of its immunity policy[151] and has indicated it 'will use its best endeavours to protect any confidential information provided by an immunity applicant'.[152]

Specific laws governing 'Protected Cartel Information' were introduced with the new cartel laws in 2009. These can be found in ss155AAA, 157B and 157C (protected cartel information provisions). Section 155AAA provides that an ACCC official 'must not' disclose protected information to any person except in a limited range of circumstances. Protected information is defined in s155AAA (21) and includes information given to the Commission and relating to a matter arising under a core statutory provision that was given in confidence, obtained under Part XID (search and seizure power) or s155.

In addition, s157B regulates disclosure of protected cartel information[153] to a court or tribunal—specifically providing that the ACCC is not required to produce to a court or tribunal a document containing 'protected cartel information except with the leave of that court or tribunal'. In assessing whether it should grant such leave, the court or tribunal must have regard to a range of factors, including the fact that the information was provided in confidence. Similarly, the ACCC may choose to disclose such information to a court or tribunal but must also have regard to a range of factors, including the fact that the information was provided in confidence and 'the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation'.[154] In addition to these statutory protections, the ACCC has indicated that it 'may be able to claim privilege and/or public interest immunity to protect confidential information from disclosure'.[155]

As discussed above, 'confidential' information provided as part of an immunity process is fiercely protected by the ACCC. A similar approach may be adopted by the ACCC with respect to other information obtained in confidence. However, most administrative settlements (in the form of general agreements between the ACCC and the parties) will be published on the ACCC website via a press release. When more formal enforceable undertakings are provided, they are published on the ACCC's website via an undertaking register.[156] Although not a statutory

[151] See also Beaton-Wells and Fisse, Australian Cartel Regulation: Law, Policy and Practice in an International Context, Cambridge University Press 2011, 147. Compare *Cadbury Schweppes Pty Ltd v Amcor Ltd* (2008) 246 ALR 137 (comments of Gordon J).

[152] *ACCC immunity and cooperation policy for cartel conduct* (Draft, April 2014), para 50. See also A. Guirguis, Risk of Disclosure of Immunity Applicant Confidential Information and Documents – The Position in Australia (IBA Annual Conference, Dublin) http://www.corrs.com.au/assets/thinking/downloads/Cartel-Paper-Ayman-Guirguis-IBA-Annual-Conference-Dublin.pdf.

[153] Defined in this section to mean information given to the ACCC in confidence and relating to breach or possible breach of the cartel provisions.

[154] Section 157B(5).

[155] *ACCC immunity and cooperation policy for cartel conduct* (Draft, April 2014), para 51.

[156] See further R. Johnstone and C. Parker, Enforceable Undertakings in Action – Report of a Roundtable Discussion with Australian Regulators, February 2010, available at http://www.law.unimelb.edu.au/files/dmfile/ParkerandJohnstoneEnforceableUndertakingsinActionReportofaRoundtableDiscussionwithAustralianRegulatorsFinalEUWorkingPaper17Feb20101.pdf.

requirement, the ACCC has expressed the view that all enforceable undertakings 'should be a matter of public record'[157] and will publish them in full. It has, however, conceded that it may sometimes be possible to grant confidentiality with respect to some aspects of undertakings provided.[158] The publication of enforceable undertakings, in particular, has the benefit of increasing transparency of processes that is otherwise negotiated in private.[159]

2.5.7.3 Legal Professional Privilege

Until relatively recently, there remained some doubt about whether legal professional privilege attached to documents and information required to be furnished pursuant to a s155 notice from the ACCC. This was initially resolved by the High Court in *Daniels Corp*,[160] which held that s155 did not abrogate legal professional privilege.[161] Subsequent to that decision and following recommendations of the Dawson Committee,[162] the CCA was amended to make clear that s155 'does not require a person to produce a document that would disclose information that is the subject of legal professional privilege',[163] although the party asserting such privilege has the onus of demonstrating that the privilege operates in relation to the documents requested. Legal professional privilege attaches to communications made for the dominant purpose of providing legal advice, including communications relating to possible transactional resolutions.

2.6 Merger Control

Australia operates a voluntary merger regime with the result that parties are not required to notify or receive clearance prior to merging. Parties concerned about whether the merger will be challenged by the ACCC or third parties have a number of options. Most commonly, they may seek 'informal clearance' from the ACCC, which involves the ACCC assessing the merger and providing an indication to parties about whether or not they will challenge the proposed merger. Where the ACCC indicates it will challenge the merger, the parties either modify or abandon their transaction or, alternatively, vigorously defend injunction proceedings

[157] ACCC, 'Section 87B of the Trade Practices Act' (September 2009) p. 5.

[158] Ibid.

[159] Compare F. Zumbo, "Section 87B undertakings: there's no accounting for such conduct!" (1997) 5 *Trade Practices Law Journal* 121.

[160] *Daniels Corp International Pty Ltd v ACCC* [2002] HCA 49; (2002) 213 CLR 543.

[161] This followed a decision in the Federal Court, which found that legal professional privilege was not protected in relation to s155 notices. See further A. Bruce, "The Trade Practices Act 1974 (Cth) and the Demise of Legal Professional Privilege" (2002) 30 *Federal Law Review* 373.

[162] *Review of the Competition Provisions of the Trade Practices Act* (January 2003) chapter 13 http://tpareview.treasury.gov.au/content/report.asp.

[163] Section 155(7A).

brought by the ACCC to prevent the transaction proceedings.[164] The 'informal' nature of the process can, however, present difficulties if the ACCC indicates it will oppose the merger but is not prepared to bring injunction proceedings. This occurred in the *AGL* case[165] and generated uncertainty for AGL which resulted in it successfully instituting court proceedings for a declaration that the proposed action would not contravene the merger provision. In the Federal Court,[166] the Judge observed:

> In this case the opposition of the ACCC is unequivocal. It has not proceeded to claim injunctive relief but has threatened post-acquisition divestiture action. It is not in the least surprising that AGL would not wish to enter into this major transaction with that sword of Damocles hanging over it and the other members of the consortium. Indeed it is difficult to see how, if the transaction were to proceed in the face of such a threat, the public interest would be served with such uncertainty hanging over the operation of a major public utility.[167]

The second option for parties preparing to merge involves 'formal clearance', which is a voluntary statutory process. This has the advantage of being binding both on the ACCC and third parties, and it provides an avenue of appeal for aggrieved parties. However, although the formal clearance process was introduced in 2006, no party has yet adopted this process, preferring the informal system.

The third option involves 'authorisation'. Parties may apply to the Australian Competition Tribunal for authorisation of a merger where the parties can demonstrate that there are public benefits that outweigh any anti-competitive detriment.

It is in relation to informal clearance that the issue of merger remedies has arisen in practice. Parties seeking clearance may propose 'enforceable undertakings' to the ACCC designed to eliminate any competition concerns the ACCC might otherwise have about their proposal.[168] The ACCC is free to accept or reject any such proposal. In practice, although it is the parties who must propose the undertaking, this will frequently occur in consultation with the ACCC.

Merger remedies may be proposed at any time during the informal clearance process. For example, parties aware of possible competition concerns may submit an undertaking proposal at the time they apply for clearance, or they might submit undertakings (or modified undertakings) following a 'statement of issues' outlining concerns the ACCC might have with the merger. Parties may submit modification or changes to proposed undertakings at any time prior to their acceptance, although this might delay the outcome of the ACCC's merger assessment. Remedies may also be varied after they have been accepted by the ACCC, but only with the consent of the

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[164] See, for example, *ACCC v Metcash Trading Limited* [2011] FCA 967 and *ACCC v Metcash Trading Limited* [2011] FCAFC 151 (appeal).

[165] *AGL* v *ACCC (No. 3)* [2003] FCA 1525.

[166] *AGL* v *ACCC (No.3)* [2003] FCA 1525 at [1] to [10] and [600] to [612]; (2003) ATPR 41-966 at 47,632 [1] to 47,634 [10] and 47,762 [600] to 47,765 [612].

[167] Ibid, at [612]; 47,765 [612].

[168] Section 87B CCA.

ACCC.[169] The ACCC's conduct in accepting or rejecting modifications to existing undertakings constitutes a 'decision' in relation to a legislative instrument and is, therefore, subject to judicial review.[170] The ACCC has an absolute discretion whether to accept or refuse a proffered undertaking (remedy), and there is no requirement that it contains any particular conditions; for example, it is not contingent on the waiver of particular rights by the notifying parties.

In relation to formal merger clearance, the ACCC requires the parties to give an undertaking that they will not conclude the merger during the clearance review period.[171] It is possible, under the statutory regime, for the ACCC to address concerns through the imposition of conditions on clearance. However, these conditions are likely to take the form of compliance with undertakings under s87B.[172]

2.6.1 Merger Remedies v Other Remedies

Enforceable undertakings (remedies) relating to mergers are designed to prevent conduct (the proposed merger) breaching the substantive competition prohibition. On the other hand, administrative settlements in the case of agreements and abuse of dominance are designed to deal with existing contraventions. Consequently, they play quite different roles. Although the rights of the parties remain essentially the same, third parties have a diminished role in relation to non-merger undertakings. They are generally not part of the negotiation or party to the ACCC decision to pursue transactional resolution, although the ACCC will take public interest into account in reaching this determination.

One of the concerns about enforceable undertakings is that it may give the ACCC the power to extract concessions from parties that are not necessary to avoid contravention of the legislation. This is a common concern in many jurisdictions and is not easily resolved. Although the parties are not required to proffer undertakings, they may feel compelled to do so to ensure that time-sensitive merger is not further delayed or opposed by the ACCC. The extent to which this is a concern in practice is difficult to assess. For example, while the ACCC may threaten to delay or refuse clearance, in Australia this does not preclude parties from merging, although often the parties themselves will make it a condition of the merger that they receive regulatory approval.

[169] See A. Guirguis, R. Flitcroft and S. Godden, "The Australian merger process: Challenges to ACCC views on mergers by litigation and in an administrative context" (2013) 58 *The Antitrust Bulletin* 401, 420–421.

[170] *Australian Petroleum Pty Ltd v ACCC* (1997) ATPR 41-555.

[171] See, for example, ACCC, *Formal Merger Review Process Guidelines* (2008), para 3.13 and CCA s95AE and regulation 73.

[172] See, for example, ACCC, *Formal Merger Review Process Guidelines* (2008), para 2.9.

2.6.2 Enforcement of Remedies

The ACCC's compliance monitoring unit oversees compliance with any agreed merger remedies, and the undertakings themselves will generally make provision for monitoring and enforcement.[173] Normally, in the case of mergers, this will involve ensuring that any agreed divestitures take place. Parties who fail to comply will be in breach of their s87B undertaking, and a court may order compliance or make any other order it considers appropriate.[174] In addition, if failure to comply means that the parties will contravene the substantive merger prohibition in s50 of the Act, the ACCC is likely to challenge the merger under that provision which may result in divestiture orders.

2.6.3 Third Parties

In relation to proposed mergers that raise competition concerns, the ACCC will generally consult with third parties about the merger and any proposed undertakings.[175] However, third parties have no 'right' to be heard and no right of access to the file.[176] As a result, there is limited risk that third parties can 'hijack' proceedings. Although they are invited to comment, they have no right to intervene or appeal in relation to the informal clearance process.

In connection with enforcement of remedies, third parties have no right to enforce merger remedies but may inform the ACCC of any suspected non-compliance.

2.7 Conclusion and Recommendations

Transactional resolutions play an important role in the Australian competition law regime. They are well-established means for the public enforcement of competition law and ensure that the enforcement objectives of the ACCC, such as detection and prevention, are met efficiently. In particular, administrative settlements in the form of enforceable undertakings are not punitive in nature, but they rather include elements of restorative justice and thus assist with the future compliance of alleged offenders and with correcting their business behaviour. Moreover, transactional resolutions serve the public interest as they allow the ACCC to allocate its time and

[173] See A. Guirguis, R. Flitcroft and S. Godden, "The Australian merger process: Challenges to ACCC views on mergers by litigation and in an administrative context" (2013) 58 *The Antitrust Bulletin* 401, 421.

[174] CCA, section 87B(4).

[175] See ACCC, *Merger Review Process Guidelines* (September 2013) and ACCC, *Formal Merger Review Process Guidelines* (June 2008), parta 3.102.

[176] See, for example, F. Zumbo, "Section 87B undertakings: there's no accounting for such conduct!" (1997) 5 *Trade Practices Law Journal* 121.

resources more effectively, allowing it to detect and deal with a higher number of potential anticompetitive practices than if the ACCC were only allowed to litigate.

Although it is possible to mount arguments for the restriction of transactional resolutions based on the importance of deterrence and punishment, in our view they do not outweigh the significant public benefits that arise from the current Australian enforcement system, which includes the targeted adoption of transactional resolutions. Based on the available information on the enforcement policy of the ACCC, the utilisation and the decision-making of the ACCC on whether to litigate or apply transactional resolutions appear to be proportionate and rightly based on the evaluation of the potential harm of the conduct in question.

It is essential to frame the due process and fundamental rights of parties within the Australian legal system, including the Australian Constitution. The framework shows, for instance, that the right to trial is ensured in cases with a punitive nature. Importantly, this right does not extend to transactional resolutions where negotiation and mutual consensus lead to the detection of anticompetitive practices and compliance and where it is not in its nature to punish alleged offenders.

In general, it appears that there are adequate checks and balances in the Australian context to ensure consistency and compatibility of transactional resolutions of antitrust proceedings brought by the ACCC with due process and fundamental rights of the parties. However, it is essential to maintain, and perhaps even increase, the transparency of transactional resolutions and the ACCC's rationale for their adoption, to provide a better opportunity to review and assess the use of resolutions and the public values on which they are said to be based.

Another recommendation which should be made lies in the field of immunity policy. The authors support the recent change of policy which removes the criterion that an immunity applicant must be the clear leader of the cartel. This will simplify the decision-making process of the ACCC when deciding whether to grant immunity and will improve the testimonial credence of the whistleblower by avoiding any doubts (so common in practice) as to whether a cartel participant was or was not a clear leader.

Finally, the recent criminal case of *Barbaro*[177] throws some doubt on the development of penalty settlements in civil law cases, including litigation initiated by the ACCC. Due to the substantial public benefits in the forms of detection, compliance and time and cost savings, it remains desirable for the option to negotiate penalties in competition law cases to be retained, subject to approval by the courts. If the High Court of Australia (or the Full Court of the Federal Court) overturns the decision on penalty agreements in *NW Frozen Foods*,[178] and thus changes or prohibits the process of the ACCC on these agreements, reform options should be considered to maintain the public interests recognised in *NW Frozen Foods* for such a process to be allowed to continue. If necessary, it could proceed with some additional safeguards, depending on the reason(s) for the process being disapproved or overturned.

[177] *Barbaro v R*; *Zirilli v R*, [2014] HCA 2; (2014) 88 ALJR 372.

[178] *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; (1997) ATPR 41-546.

Austria

3

Gerhard Fussenegger

3.1 Introduction

In the following, the term "transactional resolutions" covers settlement processes, leniency, transactions, commitments, and other types of transactional resolution.

As to *merger control law*, transactional resolutions are included in the Austrian Cartel Act (the "Kartellgesetz 2005 in der gültigen Form," the "Austrian Cartel Act 2005 as amended," the "Cartel Act"). They have been in use for many years in order to early terminate notification proceedings in phase II at the Cartel Court or (with commitments) in phase I.[1]

With regard to *antitrust law*, neither settlements as such nor its procedures or a procedure for commitments is explicitly included in the Cartel Act.

Settlements have been applied very rarely in Austria until 2012.[2] In 2012, the beer cartel proceedings concerning the boycott of supply to Cash&Carry by Austria's leading breweries were terminated by settlement.[3] Since then, all cartel proceedings in Austria, which lead to a fine, have been concluded by settlement. For instance, in 2013 and 2014, fines based on settlements were imposed on Rewe,[4] various beer producers,[5] and also dairy producers.[6]

[1] BWB Z-1511, Berglandmilch eGen und Stainzer Milch, Steirische Molkerei eGen.

[2] See, e.g., "Telekom", BWB, M-222 "ÖSV", Decision of the Cartel Court, court reference 26 Kt 42/06; "OMV/Jet Fuel", cf., press release BWB 04/2008.

[3] Brauunion, Stiegl, and Ottakringer.

[4] EUR 20 m.

[5] E.g., Rieder Beer and Schloss Eggenberg.

[6] E.g., Bergland Milch, Kärtnermilch, Emmi.

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Besides the focus on grocery, other sectors included the electronic sector[7] and the construction industry (“insulating material,” undertakings’ identities undisclosed). All these settlements covered vertical restrictions/infringements of cartel law.

From the authorities’ side, arguments put forward in favor of settlements in cartel proceedings are as follows:

1. faster termination of proceedings resulting in the authority’s conservation of its own resources;
2. reduction of proceedings (as recently confirmed by the European Commission,[8] concerning the number of its staff members, the Austrian Federal Competition Authority (the “Bundeswettbewerbsbehörde” or the “BWB”) is among the least equipped competition authorities in Europe);
3. faster termination of the infringement itself resulting in direct benefit of the consumer (settlements usually substantially lessen the duration of the proceedings concerned); for instance, concerning the beer cartel, case handlers of the BWB explicitly refer to the advantage of the settlement to immediately cease the illegal supply boycott[9];
4. occasionally, the settlement resulting in a mandatory list of measures, which will be published and which is therefore capable to influence the respective industry sector as such.[10]

From the authorities’ side, the reduction of fines based on a settlement can be *reasoned* by the parties’ cooperation with the authority. For instance, the authority may get some new facts/documents provided, which assist the authorities in investigating the undertaking’s and also other parties’ misconduct.

These arguments of the BWB in favor of settlements partly overlap with the interests of the undertakings concerned. Such as the BWB, undertakings are interested in shortening the proceedings in order to save time, money, and resources. Furthermore, undertakings are—of course—highly interested in a settlement-based reduction of the fine. Last but not least, settlement proceedings may result in less transparency (due to shortened or only summarized judgments) and less publicity.

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[7] Philips was fined with EUR 2.9 m.

[8] See European Commission, Recommendation for a Council Recommendation on Austria’s 2014 national reform programme and delivering a Council opinion on Austria’s 2014 stability programme of 2 June 2014, SWD(2014) 421 final: *Despite increases in the budget of the Austrian Federal Competition Authority, it remains significantly understaffed in comparison to the authorities of other Member States of a similar or smaller size*.

[9] A. Xeniadis and N. Harsdorf, Anmerkungen zum Bierkartell, OZK 2012/2, p. 64 ff.

[10] See, e.g., the (currently draft) guidelines with regard to vertical agreements, which have been elaborated by the BWB in connection with numerous settlement proceedings concerning vertical agreements.

From a practitioner's perspective, settlements can be considered as a very useful instrument to avoid too long and expensive proceedings, especially if the infringement itself is hard core (e.g., horizontal agreements on prices) and if the facts are sufficiently proven.

However, the Cartel Court's recent practice to base its judgments on settlements only might not always be helpful in establishing and developing the cartel law practice in Austria. For instance, concerning vertical restrictions within the grocery sector, numerous cases have been settled. However, specific legal questions concerning vertical restraints are still open. Therefore, from a practitioner's perspective, the decision of Spar (besides Rewe, the second big grocery chain in Austria) not to settle but to challenge the allegations of the BWB at the Cartel Court must be appreciated.

Concerning criminal law, there are binding decisions of the Austrian Supreme Court,[11] following which settlements between defendant and prosecutor are infringing the main principles of criminal (procedure) law and are therefore prohibited.

3.2 Transactional Resolution of Agreements and the Abuse of Dominance

3.2.1 Overview of Transactional Procedures

In Austria, transactional agreements encompass negotiated settlements, commitments based on settlements, and leniencies. Settlements are available for both cartels and abuse of dominance cases. Transactional procedures may also cover a combination of different infringements.

3.2.2 Settlements

3.2.2.1 Legal Background

In legal literature, it is disputed whether the possibility of court settlements in cartel procedures is backed up by the provisions of the Cartel Act. In the Cartel Act itself, Section 34 (1) lists "court settlements" as executory titles and Section 56 states that court settlements are not subject to court fees.[12] Beyond that, the Austrian Cartel Act provides neither general nor particular provision.

As a consequence, critics at least request guidelines published by the BWB, comparable to the guidelines published by the BWB concerning leniency procedures.

[11] See, e.g., OGH 11 Os 77/04 and OGH 13 Os 1/10 m.

[12] E. Solé, Das Verfahren vor dem Kartellgericht, Wien 2006, marginal no 271, P. Thyri, Kartellrechtsvollzug in Österreich, Wien 2007, pt 439.

However, as outlined below, the flexibility concerning rules and details of a settlement also creates advantages for the undertakings' side. The mentioned fact that settlement talks can be initiated at any time during but also before the proceedings at the Cartel Court may be of course also in the interest of undertakings. Also, the German Bundeskartellamt seems to be in favor of some flexibility in the settlement procedure in order to enable more successful negotiations on settlements.[13]

Based on this legal uncertainty, one main argument against settlements is that fines imposed by the Cartel Court reflect the exclusive power of the state to sanction infringements. Following this view, this legal power cannot be substituted by an agreement between the undertaking concerned and the BWB.[14] Other legal commendatory which is in favor of settlements refer to the general provisions of Section 30 Cartel Act (stating that cooperation of undertakings can be reflected in the amount of the fine) and Section 39 (4) Austrian Non-Contentious Proceedings Act (the "Außerstreitgesetz," or "AußStrG"), following which a judgment can be without cause in case the parties concerned agree on the outcome (the Non-Contentious Proceedings Act being the general procedural law also for cartel proceedings).[15]

3.2.2.2 Discretion

Concerning Austrian Cartel Law practice, settlements cannot be considered as binding agreements in a strict legal sense but can be summarized as a factual coordination in order to terminate cartel proceedings. Both the authorities and the undertakings concerned have full discretion in their respective decision whether to start (but also to revoke) settlement talks. Therefore, both sides can take the initiative to propose settlements (while, of course, leniency applications (at least applicants for full immunity) are, by their nature, submitted by initiative of the undertaking only).

The same applies to the preparation of documents which are elaborated in the due course of the settlement, e.g. the acknowledgement. There are no rules settled; therefore, based on the circumstances on the case, it might be that the parties to the settlement negotiate on the wording of these briefs or that the authority submits the first or even final draft.

3.2.2.3 Procedure in a Nutshell

Based on the authorities' practice, the main criteria for settlements can be summarized as follows:

[13] See R. Polley and S. Heinz, Settlements bei der Europäischen Kommission und beim Bundeskartellamt, Ein Vergleich, WuW 2012, 14.

[14] G. Kodek, Vergleichsabschluss im Kartellverfahren durch die Amtsparteien in Bundeswettbewerbsbehörde, Jahrbuch Kartellrecht 2011, pp. 27 ff.

[15] A. Xeniadis and H. Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012/3, p. 83.

The BWB is one of the two “official parties” besides the Federal Cartel Prosecutor (the “Bundeskartellanwalt,” or “FCP”) which can exclusively apply for the imposition of a fine. Therefore, the settlements must be made between the undertakings concerned and the responsible official party (depending on the case, this can be either the BWB or the FCP or both of them).

Due to its nature of settlements, there are, at least up front, no limits concerning the issues which can be negotiated and settled. In theory, there might be also cases in which the official parties are ready to reduce or abandon some objections—for instance based on poor evidence at hand—in exchange of the acceptance of infringement or a change of behavior in relation to another conduct. Following critics, such limitation is not covered by law; in their view, the BWB must base its request for fine, and therefore also settlement negotiations, always on the entire facts.[16]

In case several companies which participated in a cartel are willing to settle, the BWB usually (but not always) holds separate talks. The BWB hereby mostly follows requests by the undertakings concerned which are concerned about their business secrets (such as turnover or information about customers). Dealing with several undertakings in the same case, the BWB should base its settlements on comparable criteria: in relation to period of time of infringement, relevant products or similar percentage of reduction when calculating the starting amount of the fine.[17]

Besides discussing the legal assessment (e.g., concerning gravity and the duration of the infringement), one main issue of the settlement negotiation usually concerns the amount of fine to be imposed (as mentioned, in Austria the official parties are exclusively entitled to request for a fine; the Cartel Court is bound by the higher amount of fine requested).[18]

Following articles written by case handlers of the BWB, the reduction of the fine should be essentially smaller than fine reductions offered to leniency applicants (irrespective of the fact that accumulation of both, reductions based on leniency and settlement, should be possible[19]). Following this opinion, the *maximum* percentage of reduction should not exceed 20 %[20] compared to a regular calculation of the fine.

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[16] G. Kodek, Absprachen im Kartellverfahren, ÖJZ 2014/443, 448.

[17] A. Xeniadis and H. Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012, 83, p. 92.

[18] In principle, settlements may take place without the official parties initiating proceedings at the Cartel Court. E.g., an undertaking could agree in commitments, while the official parties refrain from initiating proceedings at the Cartel Court. However, if the settlements include also a certain amount of fine or binding commitments, proceedings must be always initiated at the Cartel Court, as the latter is the only authority which is entitled to decide on a case and, in particular, impose a fine.

[19] A. Xeniadis and H. Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012/3, p. 92.

[20] A. Xeniadis and H. Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012/3, p. 91.

However, again, as settlements must always be assessed on the facts of the case concerned, there might be and have been also situations where the reduction of the fine agreed on might be above but—of course—also below this percentage. For instance, a reduction of more than 20 % may be justified if the settlement negotiations focus on a certain specific infringement (amongst others) or a specific period of time only.[21]

It is not clear whether the BWB is formally obliged to present any kind of statement of objections. However, in practice, the BWB usually presents its preliminary assessment and provides (at least limited) access to key documents (see below Sect. 3.2.2).

Based on the negotiations (and, mostly, some kind of statement of objection), one main criterion is the *acknowledgement* of the undertaking, in which an infringement of competition law is confirmed. Depending on the circumstances of the case and the negotiations with the authority, the acknowledgment usually encompasses the undertaking's confirmation of the facts and its confession of an infringement (based on the case, liability might be additionally issued). In certain circumstances (especially, if it is unclear whether a behavior can be classified as an infringement of the cartel law[22]), it may be that the BWB and the undertakings agree in commitments only, in other words without the undertaking acknowledging any infringement.

After the official parties have reached a common understanding with the undertakings concerned on possible terms and conditions of the settlement (also with regard to a possible amount of fine to be requested), the authority then submits the facts, its evidence, and legal assessment in a brief which it submits to the Cartel Court. The brief usually also includes an application for a certain (settled) amount of a fine. As part of the settlement, the undertakings do not challenge but acknowledge this brief.

The Cartel Court, which cannot initiate proceedings on its own and which cannot impose fines which are higher than requested by the official parties, will examine in a next step whether the undertakings agreed on the settlement voluntarily and whether they were able to assess the chances and risks of a settlement. It is disputed in which detail and in which amount of independence the Cartel Court must also assess the respective facts and legal assessment as presented in the settlement.[23] Following various commentaries, at least if the Cartel Court does not accept the settled facts as being complete or fully true, own investigations must be initiated.[24]

[21] A. Xeniadis and H. Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012/3, p. 92.

[22] However, it is doubted whether in this case settlements should be even possible; cf A. Xeniadis and H. Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012/3, p. 92.

[23] S. Krenn, Verpflichtungszusagen und Transparenz, Eine Replik auf ÖZI 2012, 206, OZK 2013/2, p. 58, 60.

[24] G. Kodek, Absprachen im Kartellverfahren, ÖJZ 2014/443, 449.

In the (mostly) following oral hearing, which in general is open for the public, the authority then refers to its request for fine and the party does not challenge this request; this may be also done in writing. Additionally, the right to appeal may be waived either from the undertaking concerned or from both sides. The Cartel Court then delivers the judgment.

3.2.2.4 Publication of Settlements

In the past, judgments based on a settlement accompanied by a waiver to appeal occasionally consisted of the verdict only, i.e. no reasons were included. This was based on Section 39 (4) Austrian Non-Contentious Proceedings Act, following which a judgment does not have to be reasoned if it follows the requests/will of all parties concerned or if it is delivered orally and all parties concerned waive their right to appeal the decision.

However, following sources close to the Cartel Court,[25] the latter will—although not obliged by law—in future refrain from adopting shortened judgments based on Section 39 (4) Austrian Non-Contentious Proceedings Act (also based on essential critics, e.g., by the Austrian Chamber of Labour, that unreasoned judgments substantially restrict possible private follow-on proceedings).[26]

Additionally, based on the reform of the Cartel Act in 2013, decisions on cartels which have been initiated after 28 February 2013 must be summarized and published in the so-called *Ediktsdatei*/*Ediktsdatabase*.[27] In the publication itself, the protection of business secrets must be respected. In practice, the Cartel Court sends its written judgment to the parties concerned, which then indicate which parts of the decision should not be disclosed. If the Cartel Court does not follow the parties' arguments in this regard, the parties may appeal to the Cartel Supreme Court.[28]

However, judgments based on a settlement (and therefore on the request of fine of the official parties only) will not be that detailed as a judgment, which is based on several oral hearings and briefs, which must outweigh different arguments and which might be challenged on appeal at the Cartel Supreme Court as court of second instance (in Austria, there are only two court instances with regard to cartel law proceedings).

3.2.2.5 Point in Time of Settlement?

With regard to the earliest point of time to settle, the authorities should be convinced "that there is an infringement of cartel law, based on which proceedings have to be initiated." However, before agreeing on the settlement, the undertakings should be "enabled to examine whether the official parties' allegations are

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[25] G. Kodek, Absprachen im Kartellverfahren, ÖJZ 2014/443, 450.

[26] Cf. 16Ok14/13, decision of the Cartel Supreme Court of 27 January 2014.

[27] www.edikte.justiz.gv.at.

[28] Cf. 16Ok14/13, decision of the Cartel Supreme Court of 27 January 2014.

founded," e.g., by receiving a statement of the authority or based on the documents of a dawn raid.[29]

In general, the official parties (which are, as mentioned, the exclusive parties to request an imposition of a fine) can withdraw their request until the decision of the Cartel Court. In second and last instance, such a withdrawal of the request on fine is only possible if the other parties to the proceedings agree. Therefore, in fact a settlement (which is based on the parties' agreement anyway) can be made until the Supreme Cartel Court's ruling Section.[30]

3.2.3 Commitments

Besides a factual coordination in order to terminate the cartel proceedings, settlement negotiations can also encompass commitments.

This may but does not have to be based on Section 27 Cartel Act decisions. This latter statute stipulates that in case of a cease and desist order (cf. Section 26 Cartel Act), the Cartel Court may declare commitments of undertakings concerned and associations of undertakings binding if it is expected that these commitments preclude future infringements. As a consequence, the proceeding will be closed. However, a settlement might, but not necessarily, be the basis for an application of Art 27 Cartel Act. The court can declare commitments binding also if the official parties (or the undertakings concerned) do not agree. That is, the Cartel Court may decide on its own, often after consultation of experts, on commitments proposed by the undertakings concerned or the official parties.

It is disputed whether the Cartel Court must ascertain an infringement before declaring commitments binding.[31]

In general, commitments can contain behavioral measures, as well as structural measures. Measures may involve, e.g., a limitation of information exchange necessary for the operation of a joint venture or a limitation on third party access,[32] the divesture of certain shares,[33] or the relaunch of a nondiscriminatory and transparent tender procedures for pay-TV rights, radio rights, and rights for highlight reports on skiing events.[34]

[29] A. Xeniadis and H. Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012/3, p. 90.

[30] Cf. Section 36 (5) Cartel Act.

[31] Cf., e.g., A. Reidlinger and I. Hartung, Das österreichische Kartellrecht, p. 219.

[32] Cartel Court, reference no 25 Kt 41/06, 15 July 2009.

[33] See OMV's commitment concerning its share in FSH, a company in charge of aviation-refueling at the Vienna airport.

[34] Cartel Court, reference no 26 Kt 42/06, 18 February 2008.

So far, the BWB is also ambivalent with regard to its publication practice concerning commitments: while in some cases the commitments are published,[35] they are not disclosed in other essential proceedings.[36]

3.2.4 Leniency

3.2.4.1 Leniency Established by Law

Contrary to settlements, leniency is provided for in Austrian Competition law itself and established in Austrian practice.

Article 11 Section 3 of the Austrian Competition Act (the "Wettbewerbsgesetz," "Competition Act") stipulates that the BWB can refrain from applying for a fine against companies which

1. provide to the BWB information and evidence allowing the BWB to initiate a search warrant or—provided that the BWB already disposes of enough information to do so—submit information which is sufficient to initiate a request for fine procedure at the Cartel Court;
2. ended its involvement in the alleged cartel (violations of Article 101 Section 1 TFEU or Article 1 Section 1 of the Austrian Cartel Act);
3. cooperate with the BWB in order to fully clarify the facts of the case and supply all evidence available to them; and
4. have not coerced other undertakings to join the cartel.

The BWB has elaborated recently updated[37] leniency guidelines where it provides details as regards the authority's approach and the procedure to qualify for leniency.

Leniency applicants have to cooperate fully, seriously, truthfully, and promptly throughout the entire procedure. This obligation encompasses the presentation of all documents held by the company and information otherwise available. Moreover, the company has to issue detailed written information on other participants, including purpose, functionality, and activities up to description of individual anticompetitive meetings.

Since time is on the essence in case of leniency, companies may obtain a marker whereby the company has to submit supplementary information on the infringement within 8 weeks. In the event of a network case where the European

[35] See, e.g., the proceedings against the Austrian Skiing Federation, available at http://www.bwb.gv.at/aktuell/archiv2008/documents/orf_oesvverpflichtungszusagen.pdf#page=3&zoom=auto,-202,50.

[36] Cartel Court 9.5.2011, 26 Kr 2/08, Konstantin Film.

[37] Handbuch der Bundeswettbewerbsbehörde zur Anwendung des Section 11 Abs 3 bis 6 WettbG (Kronzeugenregelung), April 2014, www.bwb.gv.at/SiteCollectionDocuments/Leniency%20Handbuch%202014.pdf.

Commission is particularly well placed to deal with the case[38] and where the company intends to apply or has already applied for leniency to the European Commission, the BWB may assign a summary application marker.[39]

Since the BWB only grants full immunity to the first leniency applicant, companies need to act quickly. Subsequent applicants may only obtain reductions if they provide information and evidence that have significant additional value. In this connection, the BWB provides for a fixed spectrum of possible reductions.[40] Once the BWB submitted a request for a fine at the Cartel Court, leniency applications are in general rejected[41]; however, cooperation can be considered as a mitigating factor.

3.2.5 Leniency vs Settlements

Leniency and settlements may be applied in parallel, as a leniency applicant may settle with the authority regarding the assessment of the facts and legal consequences in the proceedings at the Cartel Court. So far, there seems to be at least one published case where leniency has been combined with a settlement.[42] As mentioned above, legal commendatory supports this view.[43]

However, the preconditions for application are quite different. While the early time factor concerning leniency applications is quite essential, settlements should be best agreed only in case the facts "have been investigated and clarified" and only after the undertakings concerned had the chance to assess "chances and risks" of the settlement.[44] In some cases, such assessment might be only possible after the BWB has initiated proceedings at the Cartel Court (by submitting a reasoned request for fine), while a leniency application must be submitted before this point of time. In practice, the BWB often initiates settlement talks before proceedings have been initiated before the Cartel Court.

[38] Commission notice on cooperation within the network of competition authorities, OJ 2004 C 101, pt 14.

[39] Handbuch der Bundeswettbewerbsbehörde zur Anwendung des Section 11 Abs 3 bis 6 WettbG, Kronzeugenregelung, April 2014, ("Leniency Handbook") pt 38.

[40] Leniency Handbook, pt 25: 30–50 % for the first company that fulfills the conditions of Section 11 para. 4 (iii) and (iv) of the Austrian Competition Act, 20–30 % for the second company, up to 20 % for every further company. Provided that the significant value of supplementary information is exceptionally strong, the BWB may grant further reductions of the fine in individual cases.

[41] Leniency Handbook, para. 30.

[42] Brauunion was leniency applicant and party of the settlement in the Austrian Beer/Cash&Carry Cartel (see, e.g., http://www.nachrichten.at/nachrichten/wirtschaft/Bierkartell-Kronzeuge-Brau-Union-kooperiert-mit-Wettbewerbshuetern; art. 15, 657878).

[43] A. Xeniadis and H. Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012/3.

[44] A. Xeniadis and H. Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012/3, p. 91.

Following critics, the BWB's far-reaching practice in settlement might adversely affect leniency applications. Following this view, undertakings, which are in the position to apply for a reduction (not immunity) of the fine, do not apply for leniency, as it is more attractive (and safe) to wait for a settlement procedure.[45] However, based on the BWB's experiences,[46] it seems that in practice an increase in settlements also results in an increase of leniency applications applying for reductions of fine, especially with regard to SMEs.

Still, some guidance/guidelines by the BWB with regard to details of settlement proceedings would be appreciated. Such guidance would enable undertakings to have more certainty to know whether and which transactional instrument (settlement vs leniency application) can be applied at a certain stage of the proceedings and which range of benefits can be expected. Such guidelines should also refer to the fact that while in leniency proceedings the authorities' interest also includes information of infringements of other undertakings, settlements should focus on the involvement of the undertaking concerned.

Therefore, in the author's view, leniency and settlement do not compete but serve as complement to each other. The transactional instrument of settlement and leniency might be helpful for both authorities and undertakings concerned. However, each instrument is based on different preconditions.

3.3 Fundamental and Procedural Rights of the Parties

As outlined above, there are shared powers in Austrian Cartel Law enforcement: on the one side there are the official parties, which are exclusively entitled to initiate public enforcement procedures. On the other side, there is the Cartel Court, which is the only court that can impose fines (however, not higher as requested by the BWB and/or FCP).

Therefore, the authorities' position can be compared to the position of a prosecutor in criminal law proceedings. Concerning the official parties' request for a fine, the newly introduced Section 36a Cartel Act sets certain minimum criteria for such a request, such as the identity of undertakings concerned, the facts, and the details of the authorities' allegations. However, these standards are very basic and undefined.

Furthermore, as mentioned, the proceedings in cartel law matters are subject to the Austrian Non-Contentious Proceedings Act. This act strictly follows the inquisitorial principle, following which the Court itself is obliged to investigate the essential facts of a case Section.[47] Therefore, even an indefinite request without disclosing any evidence or conclusions must be accepted in general.[48] Last but not

[45] G. Kodek, Absprachen im Kartellverfahren, ÖJZ 2014/443, 450.

[46] Following the BWB's feedback to this article.

[47] Cf. 13 and Section 16 Austrian Non-Contentious Proceedings Act.

[48] Cf E. Sole, Das Verfahren vor dem Kartellgericht, para. 128.

least, Section 41 Cartel Act grants compensation of expenses only, if the authorities acted wilfully. A strict approach by the Cartel Court in this regard excludes such compensation in practice.[49]

Concerning the level of fine requested, the official parties mainly follow the European Commission's guidelines for the method of setting fines[50] also in cases which only affect Austrian Cartel Law. This is accepted by the Cartel Supreme Court.[51] However, the latter repetitively argued that the fining system of the EU is not totally congruent with the fining principles of national cartel law. Therefore, the Commission's guidelines and the decisions of the Commission which are based on these guidelines can be only applied in national proceedings to the extent that the respective legal norms and valuations can be compared.[52] Hence, the authorities may also follow their own approach.[53]

Concerning the undertaking's advantages in agreeing to settlements, reference is made to Section 1 of this report. Companies which decide to continue are confronted with uncertainty regarding time, costs, and outcome of the case. However, it might be of course also that the Cartel Court at the end entirely rejects the request of the authority.

3.3.1 Right Against Self-Incrimination and Presumption of Innocence

The so-called *nemo tenetur principle* or the right against self-incrimination is constitutionally enshrined in Article 90 Section 2 Federal Constitutional Law (the "Bundesverfassungsgesetz," "B-VG") with regard to criminal procedures. It can be also derived from Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "ECHR"). Austrian jurisdiction applies this principle also to administrative criminal proceedings.[54]

So far, the Cartel Supreme Court[55] always avoided clarifying whether the abstract threatening of a fine according to Section 29 Cartel Act results in a direct application of Art 6 ECHR, which (only) covers criminal fines. The Austrian Cartel

[49] Decision of the Cartel Supreme Court of 17 October 2005, 16 Ok 44/05.

[50] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, JO 2006 C 210, p. 2.

[51] See the Decision of the Cartel Supreme Court of 8 October 2008, 16 Ok 5/08.

[52] See, e.g., 16 Ok 5/10.

[53] Decision of the Cartel Supreme Court of 12 September 2007, 16 Ok 4/07.

[54] A. Xeniadis and H. Kühnert, Ermittlungsverfahren vor der Bundeswettbewerbsbehörde – Vernehmung von Beteiligten und Zeugen durch die BWB, ÖZK 2011/5, page 174; VfSlg 15.600/1999.

[55] See, e.g., 16 Ok 5/10.

Supreme Court follows the ECJ's approach that certain legal clauses of the ECHR do apply in cartel proceedings.[56]

The investigations rights of the BWB as stated in the Competition Act do not affect this right of self-incrimination. The Austrian Cartel Supreme Court, in referring to EU law, confirmed in this regard that undertakings are required to respond to such request for information as long as undertakings concerned would not be compelled to provide answers which might involve an admission on its part of the existence of an infringement.[57]

Also with regard to settlements, legal commentary's view is that settlement proceedings are in line with the standards of parties' rights as set by Art 6 ECHR, as long as settlements are based on a voluntary decision (also based on the fact that undertakings in general are defended and advised by specialised lawyers).[58]

In case the settlement negotiations failed, the question whether the authorities can make use of documents or statements which companies made or submitted during the settlement has not been issued in decisions of the Cartel Court so far (at least to the author's knowledge). However, it is assumed that the statement of the company, the acknowledgement of the infringement, and the later contradiction of the statement are subject to the free appraisal of the evidence by the Cartel Court.[59] However, the undertakings will be most likely aware of this risk and therefore only provide documents in case they are sure to settle. Last, also in a succeeding proceeding, cooperation might be considered as a mitigating factor.

In settlements, there is no general obligation for parties in submitting all relevant documents or evidence which might be of interest for the authority. By contrast, a company applying for a leniency program has a formal obligation in submitting actively all kind of documents or evidence that could prove their participation in a competition law infringement, as well as the participation of other companies.

The reason for the different approach between settlements and leniency can be summarized as follows (quote referring to the Commission's approach; however, the same applies to Austrian competition law practice):

> Under the leniency notice, companies involved in cartels are rewarded for disclosing the existence of the cartel to the Commission and for providing evidence to it. Under the settlement notice, companies are rewarded for procedural efficiencies in the administrative stage.[60]

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[56] See, e.g., Art 6 para 2 ECMR with regard to its principle of presumption of innocence; 5 Ob 154/07v.

[57] Decision of the Cartel Supreme Court of 11 October 2006, 16Ok7/06.

[58] A. Xeniadis and H. Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012/3, p. 89.

[59] A. Xeniadis and H. Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012/3, p. 93.

[60] F. Laina and E. Laurinen, The EU Cartel Settlement Procedure: Current Status and Challenges, Journal of European Competition Law & Practice, 2013, p. 9.

3.3.2 Right of the Parties to Know the Case Against Them (Statement of Objections)

In general, if the authorities intend to initiate proceedings at the Cartel Court (including requests for fine[61]) and if their investigations are based on tools of investigations as stated in Sections 11, 11a, and 12 Competition Act (such as request for information, dawn raids,[62] and also leniency), the undertakings concerned do have the right to be informed and to be heard (Section 13 Competition Act).

Besides this rather general approach, no specific rule defining the right of an undertaking to get informed about investigations exists. In particular, there is no requirement comparable to sending a formal statement of objection.

Concerning settlements, it is disputed whether the BWB is obliged to give the concerned company in a settlement procedure an overview with regard to allegations, evidence, and legal conclusions. Legal commentary suggests that the BWB should provide such an overview/summary of allegations.[63] However, in practice, the BWB is mostly willing to provide or present their preliminary assessment and (at least limited) access to key documents.

Concerning *Predictability*:

With regard to leniency applications, there is always the risk that the applicant is not the first submitting information and evidence or that the information provided has not the additional value for a reduction of the fine.

Concerning settlements, the benefits of this proceeding are not predictable up front. However, it can be doubted whether such predictability in settlement proceedings is necessary as the parties to the settlement negotiations can step back from the settlements anytime. As mentioned, flexibility of the concept can be also an advantage for the undertakings.

Therefore, also the *level of fine* is difficult to predict up front. Concerning leniency, only the general rules and levels of reductions (based on not only the "first come" but also the "additional value" concept) are known up front.

With regard to settlements, such guidance/legal framework is missing. However, since the settlement procedure depends on the consent of the parties, the parties will generally insist that the amount of the fine is covered by the settlement agreement.

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[61] W. Brugger, Kein rechtliches Gehör vor einem Geldbußenantrag der BWB?, ecolex 2008, 648.

[62] Concerning dawn raids, the company will get knowledge of the case against them based on the search warrant and after examination of the documents.

[63] A. Xeniadis and H. Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012/3, p. 90.

3.3.3 Right To Be Heard and Access to File

Concerning rights to be heard, reference is made to Sect. 3.3.2 above. During the proceedings before the BWB (i.e., before proceedings at the Cartel Court are initiated), the company does not have access to the file. This is due to the fact that the authorities are considered as parties in the (later) proceeding at the Cartel Court and there is no access to the files of another party.[64]

3.3.4 Right to an Equal Treatment

Mostly based on requests of undertakings involved (which are concerned regarding their business secrets), the BWB usually (but not always) negotiates separately. However, the BWB has to make sure that the same reduction of the fine is granted in the case of a comparable conduct to provide a fair and transparent administrative behavior by the BWB.[65]

Concerning its leniency program, the BWB has established its Leniency Handbook in order to ensure transparency with regard to the proceedings and the amount of the fine applied.

3.3.5 Right to an Impartial Judge

In the settlement/leniency proceeding, the respective official party conducts the negotiation with the undertaking concerned, whereas the Cartel Court is the exclusive authority to decide on the application of the BWB (i.e., requests for fine and also requests concerning cease and desists orders or declaratory judgments).

3.3.6 Right to Trial

Depending on the respective proceedings, it might be that both BWB (with or without the FCP) and undertakings concerned submit a waiver to appeal. However, this is not a precondition for a settlement. Therefore, appeals against decision of the Cartel Court based on settlements can be admissible. In practice, special reasons should be included to increase chances of a successful appeal, e.g., a company may appeal against its own settlement agreement if other companies have received a higher reward.[66]

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[64] B. Raschauer, Die Bundeswettbewerbsbehörde und Art 6 EMRK, ÖZW 2008, 30.

[65] A. Xeniadis and H. Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012/3, p. 92.

[66] See with regard to the European settlement: Scordamaglia, The new Commission settlement procedure for cartels: A critical assessment, Global Antitrust Review, 2009/2, pp. 61–91.

3.3.7 *Ne bis in idem*

The principle of *ne bis in idem* is a fundamental right recognized in Article 50 of the EU Charter of Fundamental Rights (the "EUCFR") as well as in Article 4, Protocol 7 ECHR.

According to EU law, the principle of *ne bis in idem* only applies if the facts of the case, the person infringing the cartel law, and the legal interest to be protected are identical and if such facts have been the subject of a final decision, penalising or declaring the nonliability of the concerned company.[67] Also, the Cartel Supreme Court follows this approach.[68]

Therefore, if the settlement results in a legally binding decision of the Cartel Court, the principles of *ne bis in idem* can be applied on the settled decision.[69]

Concerning leniency, the principle of *ne bis in idem* does not protect a leniency applicant in front of other authorities[70] except cases within the ECN leniency program. Furthermore, the leniency applicant is not protected from private damage claims.

Since 2011, natural persons acting for the (now) leniency applicant in the cartel can under certain circumstances be protected from sanctions based on the Austrian Criminal Code (the "Strafgesetzbuch," "StGB"). The same applies to the respective undertaking applying (successfully) for leniency. If certain conditions are fulfilled, the undertaking cannot be held liable pursuant to the Austrian Act on Corporate Criminal Liability (the "Verbandsverantwortlichkeitsgesetz").[71]

3.4 Rights of Third Parties

In general, the question whether the BWB should concentrate on reaching legally binding judgments by the Cartel Court in order to facilitate follow-on claims for damages or should focus on its resources and therefore also accept settlements is quite complex (also due to economic theories) and heavily discussed in Austrian

[67] ECJ, 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 A/S, Irish Cement Ltd, Ciments français SA, Italcementi, Fabbriche Riunite Cemento SpA, Buzzi Unicem SpA, Cementir, Cementerie del Tirreno SpA v European Commission*, REC 2004 I-123, pt 338.

[68] Decision of the Cartel Supreme Court of 12 September 2007, 16Ok4/07.

[69] See, with regard to the European level, van Bockel, The *ne bis in idem* principle in EU law, Wolters Kluwer 2010, p. 109.

[70] T. Carmeliet, How lenient is the European leniency system? An overview of current (dis) incentives to blow the whistle, Jura Falconis Jg. 48, 2011–2012, No 3, page 502; T. Eilmansberger and A. Reidlinger in T. Thanner/R. Soyer/T. Hölzel [Hrsg], Kronzeugen-programme [2009], page 80.

[71] Provided that leniency applications are successful, Section 209b Code of Criminal Procedure obliges the FCP to inform the prosecutor that leniency undertakings itself and their natural persons cannot be held liable on the basis of criminal law.

legal commendatory.[72] The main question is whether the interest of the public in reaching transactional agreements outweighs the individual interests of private parties in receiving information in relation to the infringement.[73]

3.4.1 Right To Be Heard and Access to File

In general, there is no right of third parties to be heard in cartel proceedings.

The main provision with regard to third party access to cartel files is regulated in Section 39 para 2 Cartel Act. This clause precludes third party access to court files of competition law proceedings as long as the parties to the proceedings do not agree. The Section intends to protect in particular leniency applicants. However, the Section clearly results in a conflict of interest between the parties to the cartel proceedings and third parties' interest in effective enforcement of civil claims (stemming from competition law infringements).

In 2011, the Section was challenged in front of the EU Court by reference for preliminary ruling. The national proceeding which led to the reference was a follow-on proceeding of a decision of the Austrian Cartel Court imposing fines on members of a cartel in the printing chemical business.[74] An association representing the interests of undertakings in the printing sector requested access to file.

The Cartel Court referred the case to the ECJ for preliminary ruling on compatibility of Section 39 para 2 of the Cartel Act ("full blockage") with the "Pfleiderer"[75] and, therefore, EU law. In its ruling, the EU Court did not accept the strict protection of Section 39 para 2 Cartel Act and concluded that the general provision of Section 39 para 2 Cartel Act jeopardises the effectiveness of the private enforcement of competition damage claims.

The Court highlighted that a "weighing-up is necessary because [. . .], any rule that is rigid, [. . .] providing for absolute refusal to grant [access], is liable to undermine the effective application [of] Article 101 TFEU [. . .]." The Cartel Court therefore has to weigh up the public interest not to impede the effectiveness of antiinfringement (with regard to, e.g., leniency programs) and the interest of the requesting party in obtaining access to documents in order to prepare its action for damages. Following the ECJ judgment, nondisclosure may only be justified if there

[72] H. Kühnert and A. Xeniadis, Verpflichtungszusagen im System der Instrumente zur Verfahrensbeendigung —Eine Izeplik auf ÖZK 2013, 92, 93.

[73] A. Xeniadis and H. Kühnert, Einvernehmliche Verfahrensbeendigung in Kartellverfahren, ÖZK 2012/3, p. 87.

[74] ECJ, case C-536/11, *Donau Chemie AG, Donauchem GmbH, DC Druck-Chemie Süd GmbH & Co KG, Brenntag Austria Holding GmbH, Brenntag CEE GmbH, ASK Chemicals GmbH, formerly Ashland-Südchemie-Kernfest GmbH, ASK Chemicals Austria GmbH, v Bundeswettbewerbsbehörde* (not yet published).

[75] ECJ, case C-360/09, *Pfleiderer AG v Bundeskartellamt,* REC 2011 I-5161.

is a risk that a given document may actually undermine the public interest of the effectiveness of leniency programs.[76]

However, in practice, access to the files of Austrian competition law proceedings was already granted before based on the constitutional principle of administrative assistance (Art 20 Austrian Constitution, the "Bundes-Verfassungsgesetz"). Following this principle, the Cartel Supreme Court ruled that the Cartel Court is obliged to transfer the files—regardless of Section 39 para 2 Cartel Act[77]—to other administrative bodies like courts and prosecutors if requested.

For instance, in criminal law investigations, the request for access to file was made by a responsible prosecutor (the proceedings were held on employees of undertakings which participated in the elevator cartel).[78] After receiving the files, the prosecutor then granted access to file to all accused ones, private parties, and victims of the cartel. On appeal, access was limited by not granting access to certain (very) confidential parts of the file.[79]

Similarly, the Cartel Court transmitted the file to a civil court where the file of the Cartel Court, after it had been included in the civil proceedings, became accessible to the parties of the civil proceeding. Again, in appeal, it was ruled that the Cartel Court, before forwarding the files to the civil court, has to examine whether business or trade secrets have to be respected.[80]

3.4.2 Right to Trial

According to Article 2 Section 1 para 3 of the relevant Non-Contentious Proceedings Act companies only have the status of a party as far as the final decision directly affects their legally protected position. However, since cartel proceedings initiated by the official parties pursue the public interest of effective competition protection and do not serve individual interests, such a direct impact will regularly be dismissed. Therefore third parties cannot challenge transactional agreements, respectively the final decision of the Cartel Court thereon.

However, third companies in general also have the right to initiate regular cartel proceedings (with the exception of requests to impose fines), provided that they have a legal or economic interest in a final decision.

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[76] ECJ of 6 June 2013, case C 536/11, *Donau Chemie AG, Donauchem GmbH, DC Druck-Chemie Süd GmbH & Co KG, Brenntag Austria Holding GmbH, Brenntag CEE GmbH, ASK Chemicals GmbH, formerly Ashland-Südchemie-Kernfest GmbH, ASK Chemicals Austria GmbH, formerly Ashland Südchemie Hantos GmbH v Bundeswettbewerbsbehörde*, pt 34, 48; ECJ of 14 June 2011, case C-360/09, *Pfleiderer AG v Bundeskartellamt* ECR 2011 I-5161, pt 31.

[77] Decision of the Cartel Supreme Court of 22 June 2010, 16 Ok 3/10.

[78] Decision of the Cartel Supreme Court of 8 October 2008, 16Ok 5/08.

[79] Decision of the Higher Regional Court of Vienna, 20 Bs 381/11t.

[80] Decision of the Higher Regional Court of Vienna of 10 June 2009, 8 Ra 38/09f.

3.4.3 Right of Equal Treatment

As explained in Sect. 3.4.2 above, third parties do not obtain the status of a party in regular Cartel Court proceedings, including the ones which are based on transactional resolutions. Therefore, the denial of the right to trial does not constitute unequal treatment of third parties.

One interesting aspect in this regard is that following Section 37a (3) Cartel Act, the civil court in follow-on proceedings is bound to the final decision of the Cartel Court with regard to unlawfulness and culpability. Since third companies do not have party status in Cartel Court proceedings, they might argue that this impairs their legal position in the event of follow-on damage claims.

3.4.4 Other Issues and Rights

Transactional procedures will result in legally binding decisions of the Cartel Court. According to Section 37a (4) Cartel Act, the expiration of the limitation period is suspended for 6 months after the decision of the Cartel Court has become final.

3.4.5 Principle of Legitimate Expectation and Good Faith

The Austrian legal order principally recognizes the principle of good faith and legitimate expectation. It is not clear how far this principle will reach in settlement proceedings. In the author's view, due to the informal character of transactional settlements, it would be also counterproductive to record meetings.

It is difficult to generalize or to regulate any rules how far the authority should be limited in exerting pressure in any kind within obvious boundaries (for instance, bad faith or exchange of wrong information). Additionally, as in Austria it is not the authority but the Cartel Court which imposes a fine, the undertakings are free in stepping back from negotiations without fearing that the authority would impose an exaggerated fine. As mentioned, the Court is only limited in not increasing the amount of fine as requested by the authorities; however, the court may well refuse to impose a fine or reduce a fine.

3.4.6 Confidentiality and Publicity of the Transactional Solutions

The official parties do not grant any access to file in cartel infringement proceedings to third parties. Therefore, all documents of settlements are confidential, at least until the proceedings at the Cartel Court are not initiated (concerning third parties' rights to access to file during the proceedings of the Cartel Court, see above, Sect. 3.4.1).

Article 10b Section 2 of the Austrian Competition Act stipulates that the BWB has to announce on its website that it has filed an application to the Cartel Court.

However, business secrets have to be considered and the BWB is free in its amount of information published. Following the law, only the BWB may publish the names of the companies concerned, a brief presentation of the nature of the alleged infringement, and the relevant business sector.[81]

3.5 Merger Control

In Austria, mergers have to be notified to the official parties. If the official parties do not request an in-depth examination at the Cartel Court within a waiting period of 4 weeks (on request of the notifying party, this waiting period may be extended up to 6 weeks), the notification is legally deemed to be cleared.

In phase 2, the Cartel Court must decide within five (or on request of the notifying party six) months. If there is an appeal, the Cartel Supreme Court has two more months to decide on the notification. If the courts in phase II (first or second instance) do not decide within these respective periods of time, the respective court has to close the proceedings (by order) resulting in clearance of the notification.

Concerning remedies, the Austrian merger control procedure provides different ways to make them effective.

On the one hand, the Cartel Court is entitled, also without the parties' participation, to impose them on the notifying party. The Cartel Court hereby has the power to clear a merger under conditions and obligations if the initial notification would have led to a denying decision without those remedies.[82] However, the notifying party or the official parties can also actively propose these remedies unilaterally, i.e. without the consent of the other party.[83]

In the second alternative, the conditions and obligations are the outcome of negotiations between the notifying party and the official parties.[84] Such settlement may be "confirmed" by order of the Cartel Court (i.e., the order of the court includes the remedies as agreed on) or simply by a bilateral settlement resulting in withdrawal of the authority's request for fine (and termination of the proceedings by simple order of the court, which does not refer to the settlement/remedies as such).

Whether the Cartel Court or the official parties accept remedies does not cause different legal effects.[85] Pursuant to Section 7 Cartel Act, mergers that were cleared under conditions and obligations may be realised only accordingly. A violation

[81] Concerning the BWB's duty to publish legally binding decisions of the Cartel Court based on Section 37 Cartel Act, reference is made to Sect. 3.2.2.4 above.

[82] Section 12(3) Cartel Act.

[83] Cf. A. Reildinger, I. Hartung, Das neue österreichische Kartellrecht, 2005, p. 179.

[84] Section 17(2) Cartel Act.

[85] Cf. BWB, Tätigkeitsbericht 2010, http://www.bwb.gv.at/Fachinformationen/Taetigkeitsberichte/Documents/1530_BWB_TB_2010_HOMEPAGE.pdf, viewed on 27 March 2014; cf. as well A. Reildinger, I. Hartung, Das neue österreichische Kartellrecht, 2005, p. 196.

leads to prohibition of the transaction in both cases, as sanctions for both violations are identical.

The following chapter focuses on the second option, i.e. negotiated remedies. For this purpose, it will in a first part look on how negotiations are set up before examining the enforcement of the agreed remedies.

3.6 Negotiation of Remedies

3.6.1 Remedies Submitted in the First or Second Phase of the Procedure

3.6.1.1 Phase I

If the notifying party commits itself to comply with the negotiated conditions or obligations already in phase I, the official parties refrain from a request for a phase II examination at court.[86] Only in this case that the minimum waiting period of 4 weeks (calculated from the day of submission) will not be extended.

Due to the limited 4-week period, remedies within phase I are more likely if the parties contact the official parties already before notification. Also in the BWB's view, such so-called prenotification talks "avoid complex and costly procedures before the Cartel Court."[87] If the undertakings and the official parties agree, the latter refrain from the request for phase II and the transaction automatically gets clearance after expiry of the 4-week waiting period.

3.6.1.2 Phase II

If an agreement is achieved in phase II (i.e., in the proceedings in front of the Cartel Court), the official parties withdraw their request of a phase II examination. The Cartel Court then closes the proceedings by order.

3.6.2 The Authorities' Discretion in Negotiations

Given that the *pre-notification talks*, as well as later discussions with the official parties, do not follow formal rules, the question how to negotiate or whether to engage into negotiations at all depends to a large extend on the official parties' discretion.

With regard to the Cartel Court's empowerment to grant clearance under conditions and obligations, the provision states that the Cartel Court can take such conditional decision. Therefore, a large margin of discretion remains. The court generally must observe the parties' proposals, but it may refrain from accepting them. Under certain circumstances, even an examination may be omitted,

[86] See, e.g., BWB Z-1511, Berglandmilch eGen und Stainzer Milch, Steirische Molkerei eGen.

[87] http://www.en.bwb.gv.at/MERGERCONTROL/Seiten/default.aspx, viewed on 27 March 2014.

e.g., when the proposals are submitted at a very late stage of the procedure not allowing the court to examine the proposal within the period of time left.[88] The Cartel Supreme Court held that the Cartel Court may not impose obligations and conditions if the merger were to be cleared also without them.[89]

3.6.3 The Rights of the Notifying Party and Time Constraints

Within phase I, the notifying party might contact the authority at any time (however, the official parties are not obliged to react in a certain way). The right to be heard in cartel procedures as laid down in the Competition Act Section 13 does not cover proceedings concerning merger control. Furthermore, the notifying party does not have a right of access to the file (as intended by the legislator).[90]

Within phase II, the notifying party as formal party of the procedure has the right to be heard and the right to access to the file at any stage of the proceedings in front of the court.[91] Entering into negotiations with the official parties or the Cartel Court itself does not affect those rights, nor does the agreement on and acceptance of remedies.

Concerning time constraints, the law itself establishes maximum periods for the authorities to act (see above; 4 weeks in phase I, five months in phase II, and two additional months for the Cartel Supreme Court to decide on the appeal[92]). The Cartel Supreme Court deduces from these provisions a general duty for efficient proceedings.[93]

However, in practice, the official parties can well put pressure on the notifying party to agree on remedies. While the waiting period of phase I is quite limited (with the result that official parties sometimes request for a phase II proceeding for the simple fact that they were not able to examine the effects of the notification), phase II can be extended up to 9 months (including possibility to extend and deadline for appealing to second instance). Therefore, parties in fact will often accept remedies, even if they are excessive (or at least above the necessary level), in order to avoid waiting too long from an economic perspective.

[88] Decision of the Cartel Supreme Court of 17 December 2001, 16Ok9/01.

[89] Decision of the Cartel Supreme Court of 15 December 1998, 16Ok15/98.

[90] Cf. P. Thyri, Kartellrechtsvollzug in Österreich, 2007, p. 165: Section 11(2) WettbG, which indicates applicable provisions of the general procedural law for administrative procedures (the "AVG"). According to the author, the missing reference to the pertinent provision covering right of access to the file can only be interpreted as the will of the legislator not to provide for such right in the merger control procedure.

[91] Section 38 Cartel Act. read jointly with Section 15 and 22 AußStrG.

[92] Section 14 Cartel Act.

[93] Decision of the Cartel Supreme Court of 23 June 1997, 16Ok12/97.

3.6.4 The Role of Third Parties in Defining the Remedies

In general, undertakings, which are legally or economically affected by the transaction notified, may submit a written brief to the official parties within the first 2 weeks after notification.[94] However, the undertaking has no right that the complaint will be considered in any way.

Also in phase II proceedings, third parties may submit a written brief to the Cartel Court.[95] However, the complainant does not become party to the proceedings.[96]

In both phase I and phase II, third parties do not have access to file.

Third parties therefore cannot significantly influence the negotiations for remedies at least on the basis of legal standing.

However, pursuant to the Cartel Act, the FCA has the obligation to publish certain acts: the notification,[97] the request for examination,[98] and the award of a decision clearing with conditions and obligations.[99]

These obligations are obviously meant to inform the public, especially interested third parties. However, according to the Cartel Supreme Court, the Cartel Act intentionally grants only limited rights to third parties because their interests as competitors are already protected in procedures concerning the abuse of a dominant position.[100]

Other than affected entrepreneurs, the Austrian Chambers[101] and regulators of concerned economic branches may submit their written observations to the Cartel Court on legal basis.[102]

3.7 Enforcement of Remedies

For enforcing remedies, the Austrian legal order stipulates private as well as public enforcement.

As for private enforcement, options are given in theory; practical effects remain, however, rather remote. As can be seen in the following, the means of public

[94] Cf., Section 10 para 4 Cartel Act.

[95] At least following the BWB's recommended practice, www.bwb.gv.at/Zusammenschluesse/Seiten/default.aspx#RechteDritter.

[96] Cf. Section 10(4) and 11(3) KartG, J.P. Gruber, Österreichisches Kartellrecht, 2008, p. 264 and http://www.en.bwb.gv.at/MERGERCONTROL/Seiten/default.aspx, viewed on 27.03.2014.

[97] Section 10(4) Cartel Act.

[98] Section 11(2) Cartel Act.

[99] Section 15 Cartel Act.

[100] Decision of the Cartel Supreme Court of 1 July 2002, 16Ok2/02.

[101] Labour and management representations in the form of non-territorial self-governing bodies.

[102] Section 45 and 46 Cartel Act.

enforcement do not depend on whether the remedies had been negotiated with and accepted by the Cartel Court or the official parties.

3.7.1 Public Enforcement

Noncompliance with remedies to transactions is put under various sanctions according to the Cartel Act. A general prohibition to put measures into effect that do not respect remedies is stated in Section 17(2) KartG. The same paragraph underlines *expressis verbis* that this principle is equally valid for remedies imposed by the court and for those agreed on with the official parties.

The Cartel Court may order the termination of the prohibition's violation.[103] This order can contain behavioral or structural measures, whereas preference has to be given to the behavioral ones according to the principle of proportionality.[104] This order can be issued on application not only by the official parties but also by regulators, the Chambers, or even third parties.[105] Noncompliance with the order can be sanctioned with a periodic penalty payment (on application of the official parties).[106]

Additionally, in order to sanction a—deliberate or negligent—violation of the prohibition to put measures into effect other than according to the remedies, the Cartel Court may impose fines on the noncomplying party.[107] It may do so only on application for a fine by the official parties.[108] As with regard to cartel infringement, the fine may not exceed 10 % of the undertaking's total turnover in the preceding business year.

It might as well occur that a transaction is put into effect lawfully, i.e. according to all conditions and obligations, but nevertheless need may arise for additional ex post measures in order to weaken or abolish the negative effects of the merger.[109] The Cartel Court may order such measures pursuant to Section 16 Cartel Act, exclusively on request by the official parties.[110] By imposing measures pursuant to Section 16 Cartel Act, the Cartel Court shall neutralise negative effects on competition, but at the same time it shall respect the principle of proportionality. According to the doctrine, this provision does therefore not apply in case of minor, one-time infringements.[111] Also the noncompliance with ex post measures can be subject to fines and periodic penalty payments.[112]

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[103] Section 26 Cartel Act.

[104] Cf. P. Thyri, Kartellrechtsvollzug in Österreich, 2007, p. 121.

[105] Section 36 (4) Cartel Act.

[106] Section 35 (1) lit. a und Section 36 (2) Cartel Act.

[107] Section S29 clause 1 lit. a Cartel Act.

[108] Section 36 (2) Cartel Act.

[109] Section 16 Cartel Act.

[110] Section 36 (2) Cartel Act.

[111] Cf. J.P. Gruber, Österreichisches Kartellrecht, 2008, p. 294.

[112] Section 29 para 1 lit b and 35(1) lit a Cartel Act.

Interestingly, despite the fact that the provision on ex post measures aimed to substantially imitate the corresponding EU provisions,[113] it does not allow for the same sanctions[114]: whereas on the European level noncompliance with obligations in the clearing decision can lead to withdrawal of the decision, potentially followed by a new procedure, the Cartel Court may only impose additional measures to the initial decision which remains valid.

3.7.2 Private Enforcement

Third parties do not have the right to apply to the Cartel Court for fines or periodic penalty payments. Nevertheless, they are given two tools for private enforcement of negotiated remedies.

On the one hand, the Austrian Cartel Act explicitly obliges undertakings to compensate damage that occurred on the basis of an infringement of the prohibition of putting measures into effect contrary to conditions or obligations.[115] However, major practical effects of this possibility have not come up so far.[116]

On the other hand, the Cartel Act declares contracts void that infringe the aforementioned prohibition. Also, “interested” third parties may request cease and desist orders with regard to infringements of these prohibitions at the Cartel Court.[117] Again, the results in practice are negligible.[118]

Therefore, efficient enforcement of negotiated remedies remains mainly public, i.e. under the responsibility of the official parties, which request fines, periodic penalty payments, and additional obligations, and the Cartel Courts, which may impose fines and order such measures.

3.8 Conclusions

From a practitioner’s perspective, settlements are considered to be a very useful instrument to stop infringements and to avoid too long and expensive proceedings, especially if the facts of the infringement are sufficiently proven.

In the author’s view, flexibility is a key request in order to guarantee a successful application of settlements. Only based on flexible criteria, the circumstances of the individual case can be adequately considered in the respective settlement.

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[113] Article 8(6) and (7) of the Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004 L 24, p. 1.

[114] Cf. A: Petsche, F. Urlesberger, C. Vartian, Kartellgesetz 2005, 2007, p. 334.

[115] Section 37a (1) read jointly with Section 29 para 1 (a) Cartel Act.

[116] Cf. A. Reidlinger, I. Hartung, Das neue österreichische Kartellrecht, 2005, p. 216 f.

[117] Section 26 Cartel Act in connection with Section 36 para 4 (4) Cartel Act.

[118] See A. Reidlinger, I. Hartung, Das neue österreichische Kartellrecht, 2005, p. 198.

However, also flexible criteria should have some framework and limits in law and practice.

Therefore, on the one side, it would be highly appreciated if the instrument of a settlement in cartel proceedings as such would be included and confirmed in the Austrian Cartel Act itself (so far, settlements are only mentioned in the Cartel Act with regard to court fees and executory titles). An analogy to EU and German cartel laws is limited as the BWB—contrary to the Commission and the German Bundeskartellamt—cannot decide on its own but only petition for a fine.

On the other side, it would be also appreciated if the BWB publishes some guidelines. In such guidelines, guidance could be given with regard to essential questions such as the right point of time, the scope of settlements (limitation of allegations? duration?), or the possible reduction of a fine. However, again, guidance provided should acknowledge flexibility in order to reflect the special character of the respective case.

Within the proceedings itself, it is essential—also with regard to rights of defence—that the authority presents results of its examination and allegations (following the concept of a "statement of objections"). The BWB in practice follows this approach; again, there should be flexibility with regard to the scope and details provided.

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Belgium

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Jenna Auwerx

4.1 Introduction[1]

The entry into force of Book IV of the Code of Economic Law[2] on 6 September 2013 introduced several fundamental changes to Belgian competition law.

One of the main innovations of Book IV of the Code of Economic Law is the simplification of the structure of the Belgian Competition Authority. The former tripartite structure[3] was transformed into a single administrative body that investigates and decides upon infringements of competition law. Within this newly created administrative body, a distinction is made between the College of Competition Prosecutors (headed by the Prosecutor-General), which holds the investigative powers of the Belgian Competition Authority, and the Competition

[1] This report presents an overview of the law as at 31 December 2014.

[2] Code of Economic Law of 28 February 2013, *Belgian Official Gazette* 29 March 2013, p. 19,975. Book IV was inserted into the Code of Economic Law by Act of 3 April 2013, *Belgian Official Gazette* 26 April 2013, p. 25,216.

[3] On the one hand, alleged infringements of competition law and proposed mergers were investigated by the College of Competition Prosecutors, with the assistance of the Directorate-General for Competition. On the other hand, the Competition Council, which was totally separate from the College of Competition Prosecutors and had the characteristics and competences of an administrative court, took the final decisions relating to the investigated infringements and proposed mergers.

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College, which holds the decision-making powers.[4] The Competition College is presided over by the President of the Belgian Competition Authority.[5]

Apart from these institutional changes, Book IV of the Code of Economic Law also brought about some important changes to the Belgian transactional framework by introducing a formal settlement procedure. According to the legislator, this would enable the Belgian Competition Authority to close infringement proceedings faster, which is considered to the advantage both of the undertakings concerned (as it will help them avoid the insecurity and costs of lengthy proceedings) and of the enforcement of Belgian competition law in general.[6]

This report will focus on the compatibility of the settlement procedure and other transactional resolutions under Belgian law with due process and fundamental rights. In the first part of the report, an overview will be given of the transactional resolutions available under Belgian competition law in the framework of restrictive agreements and abuse of dominance (see Sect. 4.2.1). Subsequently, the fundamental and procedural rights of the parties to such transactional resolutions and of third parties will be discussed (see Sect. 4.2.2). In a second part, the report will deal with remedies and the enforcement thereof in the framework of Belgian merger control proceedings (see Sect. 4.3).

4.2 Transactional Resolutions of Restrictive Agreements and Abuse of Dominance

4.2.1 Overview of Transactional Procedures

Under Belgian competition law, there are currently three types of transactional procedures which may be used in the framework of restrictive agreements and/or abuse of dominant position, i.e. a settlement procedure (see Sect. 4.2.1.1), a commitment procedure (see Sect. 4.2.1.2) and a leniency programme (see Sect. 4.2.1.3).[7]

[4] Please note that, despite the fact the Competition College formally holds the decision-making powers, Book IV of the Code of Economic Law also granted certain decision-making powers to the College of Competition Prosecutors (e.g., decisions in the framework of settlement procedures, decisions regarding confidentiality of the investigation file and decisions in the framework of the simplified merger procedure).

[5] Articles IV.16 f. Code of Economic Law.

[6] Explanatory Memorandum of the House of Representatives 2012–13, No. 53-2591/001 and 53-2592/001, p. 5.

[7] In practice, the Belgian Competition Authority may also decide to informally settle a case before an investigation has been opened and thus without resorting to any of the aforementioned transactional procedures. It is clear that, under such circumstances, the undertakings concerned will not be able to benefit from the procedural and fundamental rights granted to the parties in the framework of a normal transactional procedure. As this informal settlement procedure is not recognised by Book IV of the Code of Economic Law, it will not be further discussed in this report.

4.2.1.1 Settlement Procedure

The Belgian settlement procedure is inspired by the settlement procedure introduced under European competition law in May 2004.[8] However, unlike under European competition law, the Belgian settlement procedure may be applied in the framework of an investigation by the Belgian Competition Authority in cases concerning restrictive agreements, as well as in cases concerning abuse of dominance.[9] In this sense, the Belgian settlement procedure seems to be more inspired by the French settlement procedure.[10]

The initiative to open a settlement procedure always needs to be taken by the Competition Authority itself and more in particular by the College of Competition Prosecutors. However, this does not prevent an undertaking or association of undertakings from approaching the Prosecutor informally to see whether or not a settlement could be considered. At any moment during the investigation, but in any case before a draft decision is submitted to the President of the Competition Authority, the College of Competition Prosecutors may, upon the proposal of the Prosecutor heading the investigation, decide whether or not a case is suitable for a settlement procedure.[11] In general, the legislator deemed that a case should be open for a settlement if the Prosecutor has sufficient information to establish a well-defined infringement and considers that the added value of an additional investigation does not outweigh the time and resources that such an additional investigation may cost.[12]

If the College of Competition Prosecutors is of the opinion that a case is suitable for a settlement procedure, it will fix a deadline[13] for the undertaking or association of undertakings whose conduct is subject to investigation to indicate in writing that it is prepared to engage in settlement discussions with the Competition Authority.[14] The College of Competition Prosecutors is under no

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[8] Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ 2004 L 123, p. 18.

[9] Article IV.51 Code of Economic Law.

[10] L. De Muyter and N. Neyrinck, Une transaction en droit belge de la concurrence? Approche critiques des propositions de la Direction Générale de la Concurrence et du Ministère de l'Economie, T.B.M. 2012, p. 109, para. 21.

[11] Article IV.51 Code of Economic Law. It follows from this that once the Prosecutor has closed the investigation and has submitted the draft decision to the President of the Belgian Competition Authority, the settlement procedure will no longer be available.

[12] Explanatory Memorandum of the House of Representatives 2012–13, No. 53-2591/001 and 53-2592/001, p. 13.

[13] Although Book IV of the Code of Economic Law imposes very strict procedural deadlines on the Competition Authority during the investigation phase, no time limits are imposed in the framework of the settlement procedure, leaving the College of Competition Prosecutors a very wide discretion in this respect.

[14] Article IV.51 Code of Economic Law.

obligation to take into consideration answers received after the deadline, but it may still do so.[15]

When an undertaking or association of undertakings indicates that it is prepared to engage in settlement discussions, the College of Competition Prosecutors communicates its intention to proceed to a settlement to the undertaking or association in writing. The College of Competition Prosecutors also identifies the objections it believes it can hold against the undertaking or association of undertakings. At the same time, the College of Competition Prosecutors grants access to the evidence used to support these objections, as well as to all non-confidential versions of documents and information received during the investigation. Finally, the College of Competition Prosecutors must also indicate the minimum and maximum fine it intends to propose to the Competition College for the infringement in its draft decision.[16]

Settlement discussions will then take place between the College of Competition Prosecutors and the undertaking or association of undertakings concerned, and the College of Competition Prosecutors will examine the necessary documents and information. If after these discussions a settlement still seems to be *possible*,[17] the College may fix a deadline for the undertaking to make a so-called settlement statement. The College of Competition Prosecutors is under no obligation to take into consideration statements received after the deadline. The settlement statement must, in any case, contain an acknowledgment by the undertaking of its involvement in, and its responsibility for, the quoted infringement, as well as an acceptance of the proposed sanction.[18]

If the settlement statement of the undertaking or association of undertakings contains a reproduction and acceptance of the infringement identified by the College of Competition Prosecutors, it *may*[19] inform the undertaking or association of undertakings of a draft settlement decision in which this is stated and in which the fine is determined.[20] When the investigation involves the application of Article

[15] According to the Explanatory Memorandum, the rationale behind this rule is that Article IV.51 Code of Economic Law creates the opportunity for the College of Competition Prosecutors to wrap up an infringement procedure faster with the establishment of an infringement. Therefore, the College of Competition Prosecutors is not obliged to take into account late responses. See Explanatory Memorandum of the House of Representatives 2012–13, No. 53-2591/001 and 53-2592/001, p. 37.

[16] Article IV.52 Code of Economic Law.

[17] Please note that the College of Competition Prosecutors has full discretion to determine the ‘possibility’ of a transaction.

[18] Article IV.53 Code of Economic Law.

[19] The Explanatory Memorandum mentions that, in as far as the settlement statement corresponds to the objections formulated by the College of Competition Prosecutors and the suggested sanction, the College *must* accept the transaction statement and take a transaction decision. See Explanatory Memorandum of the House of Representatives 2012–13, No. 53-2591/001 and 53-2592/001, p. 14. This obligation for the College of Competition Prosecutors was deleted from the final text of Article IV.54 Code of Economic Law.

[20] Article IV.54 Code of Economic Law.

101 or 102 TFEU, the European Commission is also informed of this draft settlement decision.[21] The College of Competition Prosecutors *may*[22] apply a reduction of 10 % to the fine calculated in accordance with the fining guidelines issued by the Belgian Competition Authority or, in the absence of such guidelines, by the European Commission.[23] When determining the fine, the College of Competition Prosecutors may also take into account commitments made by the undertaking or association of undertakings to pay damages to the victims of the infringement.[24]

In order to come to a final settlement, the undertaking or association concerned must confirm, by the deadline fixed by the College of Competition Prosecutors, that the draft settlement decision reflects the content of their settlement statement and that they accept the sanction mentioned in it.[25] Only if this is the case will the College of Competition Prosecutors take a final settlement decision, including the establishment of the fine, by virtue of which the settlement procedure is closed. In all other cases, the College of Competition Prosecutors will submit the settlement statement to the President of the Competition Authority, together with the draft decision.[26] The final settlement decision counts as a final decision of the Competition College. It is sent to the undertaking or association concerned by registered

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[21] Article IV.55 Code of Economic Law. If the European Commission formulates remarks which require an amendment of the draft decision and the College of Competition Prosecutors does not decide to stop the settlement procedure, the College of Competition Prosecutors will be obliged to make a new draft settlement decision. See Article IV.57 Code of Economic Law. In such case, the procedure referred to in Article IV.54 Code of Economic Law will have to be followed again.

[22] From the text of Article IV.54 Code of Economic Law, it can be understood that the College of Competition Prosecutors has full discretion to determine the reduction of the fine up to a maximum of 10 %. See to the contrary: Explanatory Memorandum of the House of Representatives 2012–13, No. 53-2591/001 and 53-2592/001, p. 14, in which the legislator assumes that a 10 % reduction must always be given in case of a settlement. See also A. de Crayencour and D. Gerard, La réforme du droit belge des pratiques restrictives de concurrence, T.B.M. 2013, p. 140.

[23] On 26 August 2014, the Belgian Competition Authority adopted new guidelines for the calculation of fines under Belgian Competition Law; see Guidelines on the calculation of fines for undertakings and associations of undertakings as mentioned in Article IV.70, para. 1, first indent Code of Economic Law for violations of Articles IV.1, para. 1 and/or IV.2 Code of Economic Law, or of Articles 101 and/or 102 TFEU, *Belgian Official Gazette* 10 September 2014, p. 71,456 (hereinafter “Guidelines on the calculation of fines”). As of 1 November 2014, the Guidelines on the calculation of fines repeal the previous Notice of the Competition Council concerning the method of calculating fines, which dates from 19 December 2011; see Notice of the Competition Council of 19 December 2011 concerning the method of calculating fines for restrictive practices which can be imposed by virtue of Article 63 of the Act on the Protection of Economic Competition, *Belgian Official Gazette* 18 January 2012, p. 3,217 (hereinafter “Notice on the method of calculating fines”). It should be noted that the Guidelines on the calculation of fines expressly states that for the calculation of fines, the Belgian Competition Authority will be guided by the guidelines on the method of setting fines issued by the European Commission.

[24] Article IV.54 Code of Economic Law.

[25] Article IV.54 Code of Economic Law.

[26] Explanatory Memorandum of the House of Representatives 2012–13, No. 53-2591/001 and 53-2592/001, p. 14.

letter and to the secretariat of the Belgian Competition Authority for publication.[27] If there is a complainant, the complainant will also receive a copy of the final decision.[28]

It is important to note that the College of Competition Prosecutors may, at its own discretion, stop or discontinue the settlement procedure at any time and continue its investigation.[29] In this respect, it should be noted that the undertaking or association of undertakings concerned does not have a right to a negotiated outcome.

All documents and data which are exchanged between the College of Competition Prosecutors and the undertaking or association concerned are confidential.[30] This means that the documents and data cannot be communicated to third parties (e.g., in the framework of follow-on actions for damages), even when the settlement procedure does not lead to a final settlement.

The undertaking or association of undertakings cannot lodge an appeal against the final settlement decision.[31] According to the Explanatory Memorandum, no appeal is possible against the final settlement decision because the undertaking has to agree with the settlement before the final settlement decision is taken.[32] Although it is correct that the European settlement procedure initially also did not provide a right to appeal, it was added to the European settlement procedure, as the European legislator feared that a waiver of this right could potentially breach the right to an effective remedy and a fair trial.[33] The Belgian legislator's position regarding the right to appeal can therefore be questioned. In addition, the Explanatory Memorandum also notes that the undertaking or association cannot appeal against the decision of the College of Competition Prosecutors to start or (dis)continue a settlement procedure *on the example set by EU procedure*.[34]

Since the introduction of the settlement procedure under Belgian law, no final settlement decision has yet been taken by the College of Competition Prosecutors.

[27] It is not clear whether the published settlement decision will contain an acknowledgment by the undertaking of its involvement in, and its responsibility for, the infringement. In any case, it seems that the final settlement decision will need to mention the objections and evidence used to establish them, the amount of the fine and the fact that, by the adoption of the final settlement decision, the investigation procedure against the undertaking is closed. See in this respect the Explanatory Memorandum of the House of Representatives 2012–13, No. 53-2591/001 and 53-2592/001, p. 14.

[28] Article IV.57 Code of Economic Law.

[29] Article IV.53 Code of Economic Law.

[30] Article IV.56 Code of Economic Law.

[31] Article IV.57 Code of Economic Law.

[32] Explanatory Memorandum of the House of Representatives 2012–13, No. 53-2591/001 and 53-2592/001, p. 54.

[33] Paragraph 41 of the Commission's Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Regulation 1/2003 in cartel cases, OJ 2008 C 167, p. 1.

[34] Explanatory Memorandum of the House of Representatives 2012–13, No. 53-2591/001 and 53-2592/001, p. 54.

However, given the success of the European settlement procedure, it is expected that, in the near future, a significant percentage of all cases will be dealt with under the settlement procedure.[35] In this light, it should also be noted that the settlement procedure is considered as complementary to the leniency programme.[36]

4.2.1.2 Commitments

As was the case under the former Belgian Competition Act,[37] Book IV of the Code of Economic Law allows the Competition College to close an investigation by declaring that the commitments offered by the parties are sufficient to satisfy the competition concerns and are therefore made binding.[38] This commitment procedure is available both in cases concerning restrictive agreements and in cases concerning abuse of dominant position.[39]

The initiative to propose commitments must always come from the undertaking or association concerned, and it is not for the Competition College to impose commitments on its own initiative. Commitments may be proposed by the undertaking once the Competition College has made it clear that it intends to adopt a decision which will order the termination of an infringement.[40] In principle, commitments can be proposed up to the moment when the written procedure before the Competition College has been terminated, and even after a hearing has been held.[41] However, nothing seems to prevent the undertaking or association from approaching the Competition College beforehand to propose commitments.

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[35] Report submitted by A. Vanheste to the House of Representatives on 22 January 2013, No. 53-2591/003, p. 30.

[36] L. De Muyter and N. Neyrinck, Une transaction en droit belge de la concurrence? Approche critiques des propositions de la Direction Générale de la Concurrence et du Ministère de l'Economie, T.B.M. 2012, p. 107, para. 9. However, it remains to be seen how this complementarity would work in practice as decisions in the framework of the leniency programme must always be taken by the Competition College and the final settlement decision must be taken by the College of Competition Prosecutors, without any formal intervention from the Competition College.

[37] See Article 53 of the Act on the Protection of Economic Competition as consolidated on 15 September 2006, *Belgian Official Gazette* 29 September 2006, p. 50,613 (hereinafter also referred to as the "former Belgian Competition Act"). This Act was abolished by the entry into force of Book IV of the Code of Economic Law.

[38] It should be noted that Book IV of the Code of Economic Law does not offer the possibility to propose commitments in order to prevent interim measures from being imposed.

[39] In the past, the Belgian Competition Authority has been rather reluctant to accept commitments for cartel infringements. See Decision of the Competition Council No. 2008-I/O-04 of 25 January 2008, *VEBIC*, *Belgian Official Gazette* 19 February 2008, p. 10,525, paras 59 ff.

[40] Article IV.49, para. 1 Code of Economic Law. It remains unclear when the Competition College should inform the undertakings of its intention to take an infringement decision so that the undertakings are left sufficient time to propose commitments.

[41] Decision of the Competition Council No. 2008-I/O-04 of 25 January 2008, *VEBIC, Belgian Official Gazette* 19 February 2008, p. 10,525, para. 4, in which commitments were proposed more than a month after the first hearing.

Once commitments have been proposed, the Competition College may request the Prosecutor to submit an additional report on the proposed commitments by the deadline set by the Competition College.[42] In addition, the proposed commitments may be 'market tested' by requesting the major competitors and customers on the relevant market to give their remarks. Although not included in Book IV of the Code of Economic Law, it seems reasonable that interested parties, including the complainant, should be offered an opportunity to formulate their observations on the proposed commitments as well.[43]

In practice, the Competition College and the undertaking concerned will enter into a dialogue to discuss the competition concerns of the Competition College and the commitments proposed by the undertaking to satisfy these concerns. However, the Competition College will not enter into actual negotiations with the undertaking, nor will it take a written position regarding the proposed commitments.[44] On the basis of the discussions with the Competition College, the undertaking concerned may still need to amend the commitments that were initially proposed. In this respect, it should be noted that the undertaking does not seem to be entitled to amend the proposed commitments endlessly until they satisfy the competition concerns of the Belgian Competition Authority. In other words, the Competition College may decide at any time that the proposed commitments do not satisfy its competition concerns and thus retains full discretion to end the commitment procedure when it deems appropriate.

Only when the proposed commitments satisfy the competition concerns of the Competition College may the College decide to make the commitments binding.[45] In contrast to European competition law, the Competition College is not obliged to publish its intention to make commitments binding before deciding to do so. The decision by the Competition College to make commitments binding will always conclude that there are no longer any grounds for action by the Belgian Competition Authority against the undertaking or association of undertakings and may be adopted for a predetermined period. The decision cannot be explained as an adverse acknowledgment of the undertaking concerned and is without prejudice to the competence of the national courts to establish the existence of restrictive practices.[46] In practice, the proposed commitments are annexed to the decision of the Competition College and are considered to form an integral part of the decision.

The decision of the Competition College to make commitments binding is, in principle, final. However, the President of the Belgian Competition Authority may

[42] Article IV.49, para. 1 Code of Economic Law.

[43] See in this respect also J. Ysewyn and M. De Backer, Le conditionnel imparfait: verbintenissen en toezeggingen in het Belgisch mededingingsrecht, T.B.H. 2009, p. 448, para. 94 *in fine* and Article 27, para. 4 of Regulation 1/2003 for the extensive publication measures imposed on the European Commission in the framework of the European commitment procedure.

[44] See D. Vandermeersch, De mededingingswet, Kluwer, 2007, pp. 293–294.

[45] Article IV.49, para. 1 Code of Economic Law.

[46] Article IV.49, para. 1 Code of Economic Law.

at any time decide to reopen the investigation against the undertaking or association covered by the commitment decision if requested to do so by a third party or on its own initiative if any of the facts on which the decision is based is subject to an important change, in case the undertakings concerned do not comply with their commitments or in case the decision is based on incomplete, inaccurate or misleading information provided by the parties.[47]

Although the decision to make commitments binding does not imply the finding of an infringement, if the undertaking or association of undertakings does not comply with the commitments, the Competition College can impose the same fine as if it had found the undertaking or association guilty of an infringement.[48] This means that the Competition College can impose a fine of up to 10 % of the turnover of the undertaking or association concerned. Moreover, if the Competition College decides to reopen the investigation, it may impose periodic penalty payments on the undertaking or association concerned for noncompliance with the commitments of up to 5 % of the average daily turnover, per day of non-compliance.[49]

Book IV of the Code of Economic Law does not offer the possibility of appealing to the Brussels Court of Appeal against decisions by the Competition College to make commitments binding.[50] According to the legislator, this is because the decision of the Competition College merely constitutes the acceptance of a proposal by the defendant (s). The legislator is of the opinion that this concerns a decision of the authority on the enforcement of public policy provisions which aim to protect the public interest, so that an appeal should also not be possible by third parties. The legislator notes that third parties may assert their rights before the ordinary courts and tribunals.[51]

It is clear that the commitment procedure in Article IV.49 of the Code of Economic Law has many advantages for the undertaking or association of undertakings concerned. First, it requires no acknowledgment by them of their involvement or responsibility in the infringement. Second, in its decision the Competition College merely establishes that there are no longer any grounds for action against them, without establishing the existence of an infringement. This may reduce the likelihood of follow-on actions for damages as it aggravates the burden of proof on the claimant in an action for damages. Third, as long as the commitments are complied with, the Competition College cannot impose a fine on the undertaking or association concerned. Nevertheless, the fact that Article IV.49 of the Code of Economic Law fails to address several procedural issues that may arise in the framework of a commitment procedure is regrettable.[52]

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[47] Article IV.49, para. 2 Code of Economic Law.

[48] See D. Vandermeersch, De mededingingswet, Kluwer 2007, p. 294.

[49] Article IV.70, para. 2 Code of Economic Law.

[50] Article IV.79, para. 1 Code of Economic Law.

[51] Explanatory Memorandum of the House of Representatives 2012–13, No. 53-2591/001 and 53-2592/001, p. 54.

[52] For example, the Code of Economic Law does not contain any provisions on procedural or formal requirements that must be satisfied when proposing commitments or evaluating the commitments that have been proposed.

Although the European commitment procedure has proved to be very successful in the framework of Article 101 TFEU and particularly Article 102 TFEU cases,[53] under Belgian law so far only two decisions have been taken to make commitments binding, both in cases concerning an abuse of dominant position.[54] In both cases, the accepted commitments were behavioural conditions that regulated the way in which the parties should distribute products to third parties in the future and were based on the principles of non-discrimination and transparency. In the *Distri-One* case, for example, the parties committed to communicate to consumers in a more transparent way regarding client classifications, price lists, promotions, etc.; to execute deliveries within 10 days; to allow each client to order the full product range; and, in case of shortage, to allocate existing stock objectively. In the *Banksys* case, on the other hand, the parties committed to amend the general terms of their standard agreement, to conclude all agreements for an unlimited duration, to provide uniform termination clauses, to continue to offer a wide range of products and not to offer two specified products in a joint offer. To guarantee the effectiveness of the proposed commitments, the parties were required to publish the final commitments on their websites and to report the measures taken to implement these commitments to the Belgian Competition Authority on an annual basis.

In this respect, it is also interesting to note that, in the only cartel case in which commitments have ever been proposed, the Competition Council rejected them because they did not depart from the elements in the price-setting system that formed the essence of the infringement and because they failed to respond to the harm done to competition in the past.[55]

4.2.1.3 Leniency

As is the case under European competition law, Belgian competition law includes a leniency programme, which already existed under the former Belgian Competition Act[56] but which was further elaborated by Book IV of the Code of Economic Law.

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[53] Between May 2004 and February 2014, the European Commission took 34 commitment decisions. See DG Competition, To commit or not to commit? Deciding between prohibition and commitments, Competition policy brief, Issue 3, March 2014.

[54] See decision of the Competition Council No. 2006-I/O-12 of 31 August 2006, *Banksys S.A.*, *FNUCM/Banksys* S.A. and *Unizo/Banksys S.A.*, *Belgian Official Gazette* 3 October 2006, p. 51,236, and decision of the Competition Council No. 2005-I/O-52 of 30 November 2005, *Distri-One S.A./Coca-Cola Enterprises Belgium S.P.R.L.*, *Belgian Official Gazette* 22 December 2005, p. 55,371. Please note that both decisions were taken before the commitment procedure was formally introduced by the former Belgian Competition Act, on the basis of the direct effect of Article 5 of Regulation 1/2003. No commitment decisions were taken in application of Article 53 of the former Belgian Competition Act, nor have any commitment decisions been taken yet in application of Article IV.49 of the Code of Economic Law.

[55] Decision of the Competition Council No. 2008-I/O-04 of 25 January 2008, *VEBIC*, *Belgian Official Gazette* 19 February 2008, p. 10,525, paras 59 ff.

[56] Article 49 of the former Belgian Competition Act. See also the Notice of the Competition Council on immunity from fines and reduction of fines in cartel cases, *Belgian Official Gazette*

Under Belgian competition law, immunity from fines or a reduction of fines may be granted to an undertaking or an association of undertakings which, together with others, was involved in a cartel,[57] if this undertaking or association has helped the investigators prove the existence of, and identify the participants in, the prohibited practice, for instance by providing information which the Belgian Competition Authority did not have before, by providing evidence of the prohibited practice whose existence had not yet been established or by admitting to having committed the prohibited practice.[58]

When a leniency application is filed, the Prosecutor-General may suggest that a Competition College is composed to deal with the application. At the request of the Prosecutor-General and after the undertaking or association of undertakings has submitted its observations, the Competition College makes a leniency declaration that specifies the conditions to which the exemption is subject and sends it to the undertaking or association of undertakings concerned but does not publish it. If the conditions of the leniency declaration are complied with, the Competition College *may*[59] grant the undertaking or association of undertakings concerned immunity from, or a reduction of, the fine in proportion to the contribution which was provided in order to prove the infringement.[60]

In accordance with the Notice on immunity from fines, immunity will be granted if the following conditions are cumulatively fulfilled[61]:

1. The undertaking or association of undertakings is the first[62] to submit information and evidence which enables the Belgian Competition Authority to carry out targeted inspections in connection with the alleged cartel.
2. At the time of the application, the Belgian Competition Authority did not have sufficient evidence to justify an inspection in connection with the alleged cartel or had not already carried out an inspection.
3. The undertaking or association of undertakings co-operates fully, genuinely, promptly and on a continuous basis with the Belgian Competition Authority from the time of its application until the final decision, and it provides the Belgian Competition Authority with all relevant information and evidence in its possession.

22 October 2007, p. 54,713 (hereinafter "Notice on immunity from fines"), which remains applicable after the entry into force of Book IV of the Code of Economic Law.

[57] See Notice on immunity from fines, para. 7.

[58] Article IV.46, para. 1 Code of Economic Law.

[59] In this respect, it should be noted that, according to some authors, the undertaking concerned shall be granted immunity or a reduction if the conditions of the leniency declaration are complied with. See J. Ysewyn, M. Van Schoorisse and E. Mattioli, De Belgische Mededingingswet 2013 – Een praktische en kritische analyse, Intersentia 2013, p. 124.

[60] Article IV.46, para. 1 Code of Economic Law.

[61] Notice on immunity from fines, paras 10, 14 and 20.

[62] As is the case under European competition law, the timing or ranking of the leniency application is thus very important.

4. The undertaking or association of undertakings ends its involvement in the alleged cartel immediately following its application.
5. The undertaking or association of undertakings does not take any steps to coerce another undertaking or association of undertakings to participate in, or continue, the cartel.

If the undertaking or association of undertakings does not fulfil the above-mentioned conditions, it may still be eligible for a reduction of fines if it provides evidence of the cartel which represents 'significant added value' to the evidence already in the possession of the Belgian Competition Authority, if it ends its involvement in the cartel immediately following its application and if it co-operates fully, genuinely, promptly and on a continuous basis with the Belgian Competition Authority.[63] In any case and except if expressly agreed with the Prosecutor otherwise, the applicant is not entitled to disclose the leniency application or its content until after the investigation has ended and a draft decision has been submitted to the President of the Competition Authority by virtue of Article IV.51 of the Code of Economic Law.[64]

Together with the introduction of administrative fines for individuals who have negotiated restrictive agreements or made arrangements in the name and for the account of an undertaking or association of undertakings,[65] Book IV of the Code of Economic Law allowed them to apply for leniency with regard to the infringements for which they could be individually sanctioned.[66] At the request of the Prosecutor-General, the Competition College can grant immunity from prosecution to the individual concerned if this person has contributed to gathering evidence of, and to identifying the participants in, a prohibited practice, for example by providing information which the Belgian Competition Authority did not yet have, by providing evidence of an alleged prohibited practice or by admitting to having committed the prohibited practice.[67] In this respect, it should be noted that no distinction is made between immunity from, and reductions of, fines. Individuals who fulfil the required conditions will always receive full immunity from prosecution (and thus from fines). In addition, individuals may qualify for immunity from prosecution regardless of the ranking of their leniency application.[68]

[63] Notice on immunity from fines, paras 15 and 20.

[64] Notice on immunity from fines, para. 20, 3), e.

[65] Articles IV.1, para. 4 and IV.70, para. 2 Code of Economic Law.

[66] It is to be expected that the Belgian Competition Authority will amend its Notice on immunity from fines to encompass the new rules regarding leniency applications introduced by individuals in the future. As confirmed in a press release of 6 September 2013, until this happens, the Belgian Competition Authority will apply the Notice on immunity from fines by analogy to leniency applications filed by individuals.

[67] Article IV.46, para. 2 Code of Economic Law.

[68] Explanatory Memorandum of the House of Representatives 2012–13, No. 53-2591/001 and 53-2592/001, p. 37.

As the legislator feared that the introduction of sanctions for individuals could threaten the existing leniency system for undertakings,[69] the legislator expressly provided that a leniency application filed by an individual does not preclude the granting of full immunity from fines to the undertaking.[70] In the same framework, the legislator also provided that individuals may be granted immunity from prosecution if they co-operate in the framework of the leniency application filed by the undertaking for which they act.[71] Nevertheless, several questions regarding the relationship between the leniency system for undertakings and that for individuals remain unanswered.[72] For example, should a leniency application filed by an individual be communicated to the undertaking for which he/she acts? Or should it be automatically considered as a leniency application on behalf of the undertaking as well (e.g., in the framework of ranking)?

Finally, Book IV of the Code of Economic Law provides that the documents and observations submitted by the leniency applicant in support of the application may become part of the investigation file or procedural file after the leniency declaration has been adopted or immunity has been granted to the individual or undertaking concerned.[73] This implies that access to these documents can be obtained only by the parties to the investigation, in the same manner as access to the investigation file or the procedural file. No other access to these documents and observations may be granted, with the exception of Article IV.69 of the Code of Economic Law.[74] With this provision, the legislator aimed to protect the leniency documents against disclosure in the light of follow-on actions for damages by third parties. According to the legislator, the confidentiality of the leniency application is a precondition for the functioning of the leniency programme, which has proved to be an essential element in the establishment of cartel infringements. Because an action for damages has a higher chance of success when the Belgian Competition Authority has already established an infringement, the legislator considered that the good functioning of the leniency programme is also to the advantage of the victims of an infringement.[75]

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[69] Explanatory Memorandum of the House of Representatives 2012–13, No. 53-2591/001 and 53-2592/001, p. 15.

[70] Article IV.46, para. 5 Code of Economic Law.

[71] Article IV.46, para. 2 Code of Economic Law.

[72] See also A. de Crayencour and D. Gerard, La réforme du droit belge des pratiques restrictives de concurrence, T.B.M. 2013, p. 139, para. 29.

[73] Article IV.46, para. 3 Code of Economic Law.

[74] Article IV.46, para. 3 Code of Economic Law. Article IV.69 Code of Economic Law provides that "For the purposes of the application of Articles 101 and 102 of the TFEU and of Regulation (EC) n°139/2004 of the Council of 20 January 2004 concerning the control on concentrations of undertakings, the President, the Competition Prosecutor-General and the officials of the Belgian Competition Authority may communicate to the European Commission and the competition authorities of the Member States any de facto or legal elements, including confidential information, and if applicable use as means of proof such information obtained from the European Commission or from the competition authorities of other Member States".

[75] Explanatory Memorandum of the House of Representatives 2012–13, No. 53-2591/001 and 53-2592/001, p. 14.

This line of thought is, however, contrary to the recent decision of the CJEU in the *Donau Chemie* case. After confirming that *the effectiveness of [leniency] programmes could be compromised if documents relating to leniency proceedings were disclosed to persons wishing to bring an action for damages*, the CJEU stated that this does *not necessarily mean that that access may be systematically refused, since any request for access to the documents in question must be assessed on a case-by-case basis, taking into account all the relevant factors in the case*.[76] By automatically preventing access to any documents received in the framework of a leniency application, Article 46, para. 3 Code of Economic Law thus seems to conflict with European law.

The leniency applicant cannot appeal against the leniency declaration by the Competition College. Whether or not the leniency applicant will be granted immunity or a reduction of the fine will form part of the final decision of the Competition College on the merits.[77] The final decision of the Competition College can be appealed to the Brussels Court of Appeal.[78]

4.2.2 Fundamental and Procedural Rights of the Parties

This section will discuss the way in which the transactional procedures described above take into account the fundamental and procedural rights of the parties. Given the importance of the newly introduced settlement procedure, it will mainly focus on the fundamental and procedural rights in the framework of this procedure. Where relevant, other transactional procedures will also be discussed.

4.2.2.1 Right Against Self-Incrimination

In the framework of a competition investigation, the Prosecutor may collect all necessary information from undertakings and associations of undertakings through requests for information,[79] which must be answered by the deadline set by the Prosecutor. If an undertaking or association of undertakings does not provide the information by the deadline or if the information supplied is incomplete, inaccurate or misrepresented, the Prosecutor may demand the information by a reasoned decision. This decision shall specify the information required and shall set a deadline for providing it.[80] In order to ensure compliance with this decision, the

[76] CJEU, Case C-536/11, *Bundeswettbewerbsbehörde v Donau Chemie AG and others,* not yet published, pts 42–43. See also CJEU, Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, ECR 2011 I-5161, pt 31.

[77] Explanatory Memorandum of the House of Representatives 2012–13, No. 53-2591/001 and 53-2592/001, p. 54.

[78] Article IV.79 Code of Economic Law.

[79] Requests for information may be addressed not only to the complainant or the undertakings or associations of undertakings that are subject to investigation but also to third parties (e.g., competitors, customers or suppliers of the undertaking(s) under investigation).

[80] Article IV.41, para. 2 Code of Economic Law.

Competition College may, during the investigation and at the request of the Prosecutor, impose periodic penalty payments of up to 5 % of the daily turnover per day of non-compliance.[81] In addition, the Competition College hearing the case may also impose fines on individuals, undertakings or associations of undertakings of up to 1 % of their turnover if they, deliberately or by negligence, provide inaccurate or misleading information in response to a request for information, provide incomplete information or do not provide the information by the deadline.[82]

As confirmed by the General Court of the European Union, the mere fact that an undertaking or association of undertakings is obliged to answer purely factual questions and to produce existing documents does not in itself constitute a breach of the rights of defence and the right to a fair trial.[83] However, the General Court also pointed out that the European Commission may not compel an undertaking to provide answers which might involve an admission of the existence of an infringement which it is incumbent on the Commission to prove.[84] In line with this case law of the European courts, the Belgian Competition Council has confirmed that the Prosecutor may not pose questions in such a way that an answer to these questions could amount to the undertaking or association acknowledging the existence of the infringement, as this would be in breach of the right against self-incrimination.[85]

It follows from this that undertakings and associations of undertakings have a duty to respond to requests for information and to provide the Prosecutor with the requested documents in a timely manner. Under Belgian competition law, there is thus no absolute right to remain silent. However, the duty to respond is confined by the right against self-incrimination. As requests for information may be used in all investigations carried out by the Belgian Competition Authority, they may also be relevant in the framework of a transactional procedure (e.g., following a leniency application or in preparation for the opening of a settlement procedure).

Except in the framework of the leniency programme,[86] where active co-operation is explicitly mentioned as a precondition to qualify for leniency,[87] the duty to respond to a request for information does not amount to an obligation on

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[81] Article IV.73 Code of Economic Law.

[82] Article IV.71 Code of Economic Law.

[83] GC, Cases T-236/01 and others, *Tokai Carbon Co. Ltd and others v Commission,* ECR 2004 II-1181, pt 406.

[84] GC, Cases T-25/95 and others, *Cimenteries CBR and others v Commission*, ECR 2000 II-491, pt 732.

[85] See decision of the Competition Council No. 99-RPR-1 of 21 January 1999, *FEBIAC*, *Belgian Official Gazette* 13 March 1999, p. 8,268, para. 20.

[86] In this respect, it should be noted that leniency programmes in themselves are not considered to breach the right against self-incrimination as the leniency programmes do not involve any compulsion. See R. Allendesalazar, Evidence gathered through leniency: From the prisoner's dilemma to a race to the bottom. In: European Competition Law Annual 2009, Hart Publishing 2011, p. 571–572.

[87] Notice on immunity from fines, paras 20, 3).

the undertaking to spontaneously and actively provide all the information and documents in its possession. Nevertheless, effective co-operation of the undertaking or association of undertakings outside the scope of the leniency notice and beyond its legal obligation to do so is specifically recognised as a mitigating circumstance in the framework of the calculation of the fine.[88]

4.2.2.2 Presumption of Innocence

When it comes to the presumption of innocence, a distinction should be made between the various transactional procedures under Belgian law.

In the framework of the Belgian settlement procedure, the undertaking that wishes to proceed to a settlement must submit a settlement statement in which it acknowledges its involvement in, and its responsibility for, the infringement held against it by the College of Competition Prosecutors.[89] According to the legislator, it is an essential element of the settlement procedure that the undertakings concerned acknowledge the infringement to avoid settlements harming the interests of third parties that were disadvantaged by the infringement.[90] Indeed, third parties that were disadvantaged by the infringement may be more inclined to pursue actions for damages against the undertaking concerned if the involvement of the undertaking in the infringement is established.

In this respect, it should be noted that Article IV.56 of the Code of Economic Law expressly provides that all documents and data exchanged between the College of Competition Prosecutors and the undertaking or association of undertakings concerned are confidential. Although this prevents third parties from using the information exchanged in the framework of the settlement procedure (e.g., in the framework of follow-on actions for damages), this does not as such prevent the Belgian Competition Authority from making use of the information if the settlement procedure is unsuccessful. If the College of Competition Prosecutors decides to stop the settlement procedure after the undertaking or association concerned has already acknowledged its involvement in, and responsibility for the infringement (i.e., after a settlement statement has been made), the question can be asked if the Prosecutor in charge of the investigation will be able to continue the investigation in an objective and impartial manner. Given the new monopolistic structure of the Belgian Competition Authority, some authors also doubted whether it can be guaranteed that the Competition College will not be aware of the content of the discussions held earlier during the procedure.[91]

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[88] Guidelines on the calculation of fines *juncto* paragraph 29 of the European Commission's Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, OJ 2006 C 210, p. 1.

[89] Article IV.53 Code of Economic Law.

[90] Explanatory Memorandum of the House of Representatives 2012–13, No. 53-2591/001 and 53-2592/001, p. 38.

[91] See H. Gilliams, Het nieuwe Belgisch mededingingsrecht, T.B.H. 2013, p. 487, para. 28.

Although, in the framework of the settlement procedure, the College of Competition Prosecutors continues to carry the burden of finding evidence of the infringement and must always communicate the objections it believes it can hold against the undertaking prior to the settlement statement, a precondition for the settlement procedure to succeed is that the settlement statement contains a *reproduction and acceptance of the infringement identified in the communication of the College of Competition Prosecutors*.[92] As this may certainly incentivise undertakings not to object to the objections and the evidence held against them, this could also be considered to constitute a breach of the presumption of innocence.[93]

In the framework of the commitment procedure, Article IV.49 of the Code of Economic Law expressly states that the decision of the Competition College to make commitments binding *cannot be explained as an adverse acknowledgment of the undertaking concerned*. This means that the undertaking does not acknowledge the existence of an infringement, nor does it assume any liability for the infringement, simply by proposing commitments.[94] In addition, the decision to make commitments binding will not establish an infringement by the undertaking. In theory, the presumption of innocence therefore seems to be adequately protected in the framework of the commitment procedure.

In practice, however, the Competition College is not obliged to accept the proposed commitments and may decide to make the envisaged infringement decision at any time. As Article IV.49 of the Code of Economic Law does not explicitly protect the statements of the undertaking concerned in the framework of a commitment procedure,[95] it cannot be guaranteed that these statements will not be used against the undertaking by the Competition College.

Finally, in the framework of the leniency programme, it should be noted that, by definition, applying for leniency implies the recognition that an infringement has been committed. This, however, does not mean that leniency is granted in exchange for an acknowledgment of guilt but rather in exchange for the provision of evidence that an infringement has been committed.[96] Indeed, in accordance with Article IV.46, para. 1 of the Code of Economic Law, immunity is granted to an undertaking that *has contributed to prove the existence of the prohibited practice and to identify the participants*. *Admitting the prohibited practice* is only mentioned as one

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[92] Article IV.54 Code of Economic Law.

[93] See also L. De Muyter and N. Neyrinck, Une transaction en droit belge de la concurrence? Approche critiques des propositions de la Direction Générale de la Concurrence et du Ministère de l'Economie, T.B.M. 2012, p. 107, footnote 13.

[94] J. Ysewyn and M. De Backer, Le conditionnel imparfait: verbintenissen en toezeggingen in het Belgisch mededingingsrecht, T.B.H. 2009, p. 438, para. 37 *in fine*.

[95] Article IV.49 Code of Economic law only refers to the decision of the Competition College to make the commitments binding.

[96] R. Allendesalazar, Evidence gathered through leniency: From the prisoner's dilemma to a race to the bottom. In: European Competition Law Annual 2009, Hart Publishing 2011, pp. 571–572 and M. Chammas, La nouvelle loi: lignes de force et points faibles, T.B.M. 2013, p. 294, footnote 81. See also the Notice on immunity from fines, paras 10, 12 and 15.

possible way in which the undertaking may contribute to providing evidence of the existence of an infringement, but it is certainly not the only way. Acknowledgment of guilt therefore does not seem to be a necessary precondition to qualify for leniency.

4.2.2.3 Right of the Parties to Know the Case Against Them

In the framework of the settlement procedure, Book IV of the Code of Economic Law only expressly obliges the College of Competition Prosecutors to communicate its intention to proceed to a settlement to the undertaking or association concerned in writing.[97] For the communication of objections and the minimum and maximum fine the College of Competition Prosecutors intends to propose, Book IV of the Code of Economic Law does not contain such an express obligation. However, for practical reasons, it seems likely that the College of Competition Prosecutors will also communicate (a summary of) the objections and the minimum and maximum fine to the undertaking concerned in writing.

Only after settlement discussions have taken place and a settlement statement has been issued by the undertaking or association concerned will the College of Competition Prosecutors inform the undertaking of a draft settlement decision in which the fine will be determined.[98] This draft decision must be in writing. However, other than the fine, it is not clear from the text of Article IV.54 of the Code of Economic Law what other elements should be mentioned in the draft decision or if the draft decision should reflect the discussions with the College of Competition Prosecutors. The same can be said with respect to the final settlement decision, for which it is only clear that it will contain the fine that is imposed, as well as the fact that by the adoption of the final settlement decision the investigation procedure against the undertaking is closed.[99]

As to the certainty and the predictability of the benefits of the settlement procedure, it should be noted that for the reduction of the fine to be predictable, it is indispensable that the undertaking knows up front the amount of the fine for the quoted infringement and the reduction available for co-operating with the Belgian Competition Authority in the framework of the settlement procedure.

First, with respect to the amount of the fine for the quoted infringement, it should be noted that the College of Competition Prosecutors is only obliged to indicate in its draft decision the minimum and maximum amounts it intends to propose to the Competition College if the normal investigation procedure were to continue.[100] The Competition College, however, remains free to impose another fine in its final

[97] Article IV.52 Code of Economic Law.

[98] Article IV.54 Code of Economic Law.

[99] Article IV.57 Code of Economic Law. See also M. Chammas, La nouvelle loi: lignes de force et points faibles, T.B.M. 2013, p. 295.

[100] Article IV.52 Code of Economic Law. Please note that this Article does not oblige the College of Competition Prosecutors to specify the parameters that have been used to calculate these minimum and maximum amounts.

infringement decision, taking into account the principles set out in the Guidelines on the calculation of fines.[101] Even if the normal investigation continues, the College of Competition Prosecutors would, in principle, remain free to propose a different amount of fine up until the submission of the draft decision to the President of the Belgian Competition Authority. Therefore, when engaging in settlement discussions, the undertaking concerned can never be certain of the amount of the fine that could be imposed for the quoted infringement, were the normal investigation procedure to continue.

Second, with respect to the reduction that can be granted for co-operating with the Belgian Competition Authority in the framework of a settlement procedure, it should be noted that Article IV.54 merely states that the College of Competition Prosecutors *may* grant a reduction of up to 10 %. The College of Competition Prosecutors, however, retains full discretion to determine the exact reduction it is prepared to grant to the undertaking or association concerned. This also means that the reduction that may be granted for co-operation in the framework of a settlement procedure is not certain at the moment when the undertaking commits to engage in a settlement procedure.

The final amount of the fine, including the reduction for co-operation, that the College of Competition Prosecutors intends to impose on the undertaking that has engaged in a settlement procedure will only be communicated to the undertaking at the moment of the draft settlement decision and thus after the undertaking acknowledging liability for the infringement. This implies that, in principle, the College of Competition Prosecutors retains full discretion to decide on the final amount of the fine after liability has been acknowledged.

4.2.2.4 Right To Be Heard and Access to the File

As both the decision to make commitments binding and the final decision regarding leniency are, in principle, only taken at the end of the normal investigative and decision-making phases, the undertaking that has proposed commitments or that has applied for leniency will, in principle, have similar rights to be heard and similar rights of access to the investigation and procedural files as the other undertakings or associations of undertakings whose conduct is subject to the investigation.[102] However, the situation is somewhat different in the framework of the settlement procedure.

When an undertaking or association of undertakings indicates that it is prepared to engage in settlement discussions, the College of Competition Prosecutors will grant the undertaking or association access to the evidence used to support the

[101] Please note that para. 36 of the Notice on the method of calculating fines used to recognise *the fact that the infringement was admitted during the investigation or at the latest during the procedure before the Chamber of the Council* as a mitigating circumstance which could be taken into account by the Competition College when setting the fine. However, in line with the guidelines of the European Commission, the Guidelines on the calculation of fines no longer expressly recognise this as a mitigating circumstance.

[102] See, for example, Articles IV.42, para. 4 and IV.45, paras 1 and 5 Code of Economic Law.

objections that it believes it can hold against the undertaking or association, as well as to all non-confidential documents and information received during the investigation.[103] From the text of Article IV.52 of the Code of Economic Law, it is not clear whether or not this means that access is granted to the same documents as would be the case upon the communication of objections in the normal investigation procedure,[104] nor is it clear whether or not the undertaking or association that engages in a settlement will be able to access the full investigation file.[105] Therefore, it is currently not possible to assess whether or not the undertaking or association of undertakings that engages in a settlement procedure (implicitly) waives its right of full access to the file.[106]

Moreover, no formal hearings are held in the framework of a settlement procedure. Rather, the undertaking or association concerned will engage in informal settlement discussions.

4.2.2.5 Right to Equal Treatment

Book IV of the Code of Economic Law does not provide for a right to equal treatment of undertakings or associations of undertakings whose conduct is subject to the same investigation by the Belgian Competition Authority when it comes to the opening of a settlement procedure. Moreover, Book IV of the Code of Economic Law does not regulate the situation in which not all of the undertakings or associations of undertakings to whom the opening of a settlement procedure has been proposed are prepared to engage in settlement discussions. The College of Competition Prosecutors will thus retain full discretion to decide whether or not and to whom it will propose the opening of a settlement procedure and, if certain undertakings decline to engage in settlement discussions, whether or not it will continue the settlement procedure with respect to the other undertakings.[107]

In exercising this discretion, the College of Competition Prosecutors may, for example, be guided by the fact that, when a settlement procedure is opened in parallel to a normal investigation procedure, the procedural efficiencies which are inherent to the settlement procedure will not have full effect or that the outcome of the normal procedure might compromise the validity of the settlement concluded

[103] Article IV.52 Code of Economic Law.

[104] Compare the text of Article IV.42, para. 4 Code of Economic Law with the text of Article IV.52 Code of Economic Law.

[105] See J. Ysewyn, M. Van Schoorisse and E. Mattioli, De Belgische Mededingingswet 2013 – Een praktische en kritische analyse, Antwerp, Intersentia, 2013, p. 82, footnote 284, with reference to A. de Crayencour and D. Gerard, La réforme du droit belge des pratiques restrictives de concurrence, T.B.M. 2013, p. 134, paras 12–13.

[106] See also M. Chammas, La nouvelle loi: lignes de force et points faibles, T.B.M. 2013, p. 296.

[107] It should be noted that the European Commission seems rather hesitant to engage in so-called hybrid procedures in which a settlement procedure is opened with some parties in parallel to a normal investigation procedure of other parties. See Memorandum issued by the European Commission on 19 May 2010, MEMO/10/201, Antitrust: Commission adopts first cartel settlement decision—questions & answers.

with other undertakings.[108] However, all these considerations do not seem to be of such a nature as to deny an undertaking the benefits of a settlement just because other undertaking(s) are not prepared to do so.

4.2.2.6 Right to an Impartial Decision-Making

Since the entry into force of Book IV of the Code of Economic Law, the Belgian Competition Authority has formed a single administrative body. However, this does not prejudice the fact that the investigative and decision-making powers are still separated between the College of Competition Prosecutors on the one hand and the Competition College on the other hand. In principle, as the decision-making body, the Competition College therefore has the exclusive competence to make infringement decisions and to establish the amount of the fine to be imposed on the infringing undertaking or association of undertakings.

Nevertheless, in the framework of the Belgian settlement procedure, both the competence to open the settlement procedure and the competence to take the final settlement decision, including establishing the infringement and the amount of the fine, are granted to the College of Competition Prosecutors (i.e., the investigative body).[109] As this means that the investigative body not only negotiates but also decides on the final settlement, the right to an impartial judge seems to be impaired.

Moreover, the current institutional organisation of the settlement procedure creates a difference in treatment between undertakings fined in the framework of a normal infringement procedure and undertakings fined in the framework of a settlement procedure. This difference in treatment cannot be remedied simply by referring to the fact that the final settlement decision of the College of Competition Prosecutors counts as a decision of the Competition College.[110] Therefore, the legitimacy of this difference in treatment can also be questioned.[111]

4.2.2.7 Right to Trial

Article IV.79, para. 1 of the Code of Economic Law gives an exhaustive list of the decisions of the College of Competition Prosecutors and the Competition College which can be appealed against to the Brussels Court of Appeal. It follows from this list that neither the parties concerned in the decision nor interested third parties[112] can appeal against (1) the decision of the Competition College to adopt a leniency

[108] L. De Muyter and N. Neyrinck, Une transaction en droit belge de la concurrence? Approche critiques des propositions de la Direction Générale de la Concurrence et du Ministère de l'Economie, T.B.M. 2012, p. 116, para. 62 ff. and the case law of the European Commission and the OFT cited there.

[109] Articles IV.51 and IV.57 Code of Economic Law.

[110] Article IV.57 Code of Economic Law.

[111] See also L. De Muyter and N. Neyrinck, Une transaction en droit belge de la concurrence? Approche critiques des propositions de la Direction Générale de la Concurrence et du Ministère de l'Economie, T.B.M. 2012, p. 112, para. 38.

[112] Article IV.79, para. 3 Code of Economic Law.

declaration,[113] (2) the decision of the Competition College to make commitments binding,[114] (3) the settlement decision of the College of Competition Prosecutors.[115]

Article IV.57 of the Code of Economic Law expressly states that the undertaking or association of undertakings concerned cannot lodge an appeal with a higher court against the final settlement decision. Moreover, the undertaking or association concerned cannot appeal against decisions of the College of Competition Prosecutors to open or (dis)continue a settlement procedure.

This exclusion of the right to appeal against the final settlement decision is debatable for several reasons. First, the final settlement decision is assimilated to a final decision of the Competition College in the sense of Article IV.48 of the Code of Economic Law.[116] As decisions of the Competition College may be appealed to the Brussels Court of Appeal,[117] it is hard to see why no appeal is possible against the final settlement decision of the College of Competition Prosecutors. Second, the fact that the undertaking acknowledges its involvement and responsibility for the infringement and accepts the fine (and therefore can evidently not appeal against the decision on these grounds) does not mean that the undertaking does not have any interest in appealing against the settlement decision on other grounds (e.g., procedural grounds). Third, the settlement procedure can be qualified as an administrative decision by virtue of which a fine is imposed on an undertaking or association of undertakings. In light of Article 6 of the European Convention of Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union, which both protect the right to a fair trial, such decisions should be open to appeals to a court that has full jurisdiction and the power to overturn the decision on points of fact and law.[118] Finally, it should be noted that, in light of the right to an effective remedy and a fair trial, the European Commission has added a right of appeal to the European settlement procedure.[119]

If a right of appeal against the final settlement decision were to be introduced under Belgian competition law in the future, the Brussels Court of Appeal seems to be the most adequate court to deal with these appeals. Not only does it already have a lot of experience in dealing with appeals against decisions made by the Belgian Competition Authority, but in accordance with the requirement set by the European Court of Human Rights, the Brussels Court of Appeal also has full jurisdiction in these matters.[120]

[113] Article IV.46 Code of Economic Law.

[114] Article IV.49 Code of Economic Law.

[115] Article IV.57 Code of Economic Law.

[116] Article IV.57 Code of Economic Law.

[117] Article IV.79, para. 1 Code of Economic Law.

[118] Judgment of the European Court of Human Rights of 4 March 2004, *Sylvester's Horeca Service v. Belgium*, www.echr.coe.int, pts 25–27. See also judgment of the European Court of Human Rights of 27 September 2011, *A. Menarini Diagnostics S.R.L. v. Italy*, www.echr.coe.int.

[119] See Article 41 of the European Commission's Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Regulation 1/2003 in cartel cases, OJ 2008 C 167, p. 1.

[120] Article IV.79, para. 2 Code of Economic Law.

4.2.3 Rights of Third Parties

4.2.3.1 Right To Be Heard and Access to File

In the framework of the Belgian settlement procedure, all documents and data exchanged between the College of Competition Prosecutors and the undertaking or association of undertakings concerned remain confidential.[121] It follows from this that third parties do not have access to the document containing the objections communicated by the College of Competition Prosecutors to the undertaking or association of undertakings concerned or to any other documents or data contained in the investigation file.[122] Moreover, third parties do not have any right to be heard during the settlement procedure.

In the framework of the commitment procedure, Book IV of the Code of Economic Law also does not provide a right for third parties to be heard regarding proposed commitments. However, given the interests that certain third parties may have, it seems reasonable that interested third parties should at least be offered an opportunity to formulate written observations regarding the proposed commitments.[123] In this respect, it should be noted that the Competition College may always decide to put the proposed commitments to a 'market test' by requesting the major competitors and customers on the relevant market to formulate their remarks.

Finally, with respect to the leniency procedure, it should be noted that third parties do not have access to the documents and observations submitted by the leniency applicant.[124] Nevertheless, interested parties may be granted access to the non-confidential versions of the draft decision submitted by the Prosecutor to the President of the Competition Authority and the final decision of the Competition College, which will both inevitably contain references to the documents and observations submitted by the leniency applicant.[125]

[121] Article IV.56 Code of Economic Law.

[122] Please note that under the normal investigation procedure, the complainant and other third parties that are heard by the Competition College can be granted access by the Competition College to a non-confidential version of the draft decision submitted by the Prosecutor to the President of the Competition Authority. The complainant and the other third parties that are heard by the Competition College will not be granted access to the investigation and procedural file, unless the President would decide otherwise with respect to the procedural file. See Article IV.45, paras 1 and 2 Code of Economic Law.

[123] See in this respect J. Ysewyn and M. De Backer, Le conditionnel imparfait: verbintenissen en toezeggingen in het Belgisch mededingingsrecht, T.B.H. 2009, p. 448, para. 94 *in fine*. See also Article 27, para. 4 of Regulation 1/2003 for the extensive publication measures imposed on the European Commission in the framework of the European commitment procedure.

[124] Article IV.46, para. 3 Code of Economic Law.

[125] Articles IV.45, para. 1 and IV.65 Code of Economic Law. See also H. Gilliams, Het nieuwe Belgisch mededingingsrecht, T.B.H. 2013, p. 487, para. 25.

4.2.3.2 Right to Trial

Article IV.79 of the Code of Economic Law does not provide interested third parties with a right to appeal against (1) the decision of the Competition College to adopt a leniency declaration, (2) the decision of the Competition College to make commitments binding, (3) the settlement decision of the College of Competition Prosecutors.[126]

4.2.3.3 Confidentiality and Publicity of the Transactional Solutions

It follows from Articles IV.46, para. 3, and IV.56 of the Code of Economic Law that documents and data submitted by the leniency applicant or by the undertaking concerned in the framework of a leniency application or a settlement procedure cannot be communicated to third parties, i.e. possible claimants in actions for damages. In addition, it is not yet clear which elements of the settlement will be published in the final settlement decision. Although these factors do not prevent third parties from launching actions for damages against an infringing undertaking as such, they could serve to aggravate the burden of proof on third parties and therefore could be considered as dissuasive to the parties that have suffered damages as a result of a competition law infringement.

4.3 Remedies in the Framework of Merger Control

4.3.1 Overview of the Merger Control Procedure

This section will discuss the possibility of negotiating remedies in the framework of the Belgian merger control procedure (see Sect. 4.3.1.1), as well as the way in which the negotiated remedies are subsequently enforced (see Sect. 4.3.1.2).

4.3.1.1 Negotiation of Remedies

The Belgian merger control system, which requires a pre-merger notification and approval for all concentrations above the legal thresholds,[127] allows commitments or remedies to be proposed by the undertakings concerned in both phase I and phase II of the merger control proceedings. As is the case for commitments in cases concerning restrictive agreements or abuse of dominance, the initiative to propose commitments in merger control cases must always come from the parties concerned.[128]

[126] Article IV.79, para. 3 Code of Economic Law.

[127] See Articles IV.6 to IV.8 Code of Economic Law for the conditions and thresholds above which concentrations are notifiable to the Belgian Competition Authority.

[128] Judgment of the Brussels Court of Appeal of 15 September 2005, *IMP/Rossel & Cie/De Persgroep/Editco*, *Jaarboek Handelspraktijken en Mededinging* 2005, para. 30, in which the court confirmed that the Competition College is in principle only competent to accept commitments proposed by the parties themselves.

Concentrations which are notifiable under Belgian law must be notified to the Prosecutor-General.[129] Upon receipt of the notification, or if the information to be provided is incomplete, upon receipt of the complete information, the Prosecutor designated by the Prosecutor-General begins his investigation.[130] Within 25 working days of the complete notification being submitted to the Prosecutor-General, the Prosecutor shall submit a reasoned draft decision to the President of the Competition Authority, together with the file of the documents and data on which the Prosecutor based his draft decision. This deadline is extended by a further 5 working days in cases where commitments have been proposed.[131] At the same time, the Prosecutor must also transmit a copy of the draft decision to the notifying parties and, after business secrets and confidential information have been removed, to the representatives of the largest employee representative organisation of the undertakings involved and must inform them that they may consult the file and obtain a copy thereof at the secretariat.[132]

If the Prosecutor considers that effective competition on the Belgian market or on a substantial part of it would be significantly impeded by the merger, amongst others by creating or strengthening a dominant position, he must inform the undertakings concerned at least 5 working days before submission of the reasoned draft decision to the President of the Competition Authority. The undertakings then have 5 working days to propose commitments with a view of obtaining a decision that the concentration is admissible.[133] As the undertakings must be placed in a position where they can propose commitments that satisfy the concerns of the Prosecutor, it seems to be essential that the Prosecutor clearly explains his concerns towards the undertakings. The Prosecutor must hear the undertakings regarding the proposed commitments and must adopt a position on the commitments in his draft decision.[134]

At least 10 working days after the draft decision is sent to the notifying parties, the Competition College designated to deal with the case must organise a hearing.[135] The Competition College shall hear the undertakings concerned and, when it deems necessary, any individual or company that it has summoned or any

[129] Article IV.10, para. 1 Code of Economic Law.

[130] Article IV.58, para. 1 Code of Economic Law.

[131] Article IV.58, paras 3 and 4 Code of Economic Law.

[132] Article IV.58, para. 5 Code of Economic Law.

[133] Article IV.59 Code of Economic Law. It should be noted that the proposal of commitments can in principle not be regarded as an acknowledgment by the undertakings concerned of the competition concerns of the Prosecutor. See D. Vandermeersch, De mededingingswet, Kluwer 2007, p. 379. See to the contrary: Decision of the Competition Council No. 2002-C/C-89 of 18 December 2002, *Belgacom/De Post—BPG e-Services*, *Belgian Official Gazette* 1 October 2003, p. 48,092, pt 4.

[134] Article IV.59 Code of Economic Law. In practice, the Prosecutor will often also 'market test' the proposed commitments by asking the opinion on the commitments to the most important players on the market.

[135] Article IV.60, para. 1 Code of Economic Law.

third party that can demonstrate an interest.[136] The undertakings concerned may submit their written observations to the Competition College (with a copy to the Prosecutor) until at the latest the day before the hearing. However, they may not add additional documents to the file that were not submitted during the investigation by the Prosecutor, except for evidence of a fact or an answer to objections of which they have not yet been informed.[137]

The Competition College must come to a final decision on the proposed merger within 40 working days after the day following the day on which the complete notification was received by the Prosecutor-General. This deadline is extended by 15 working days when the undertakings concerned have proposed commitments.[138] If the Competition College wishes to take into consideration conditions and/or obligations to ensure respect of the proposed commitments that have not yet been discussed by the Prosecutor in the draft decision,[139] the undertakings concerned and the Prosecutor shall be heard on this point and shall have at least 2 working days to communicate their views. In this respect, it should also be noted that the notifying undertakings have the right to modify the merger (e.g., by proposing new, amended or additional commitments) up to the time when the Competition College has made its reasoned decision.[140] In any case, the Competition College retains full discretion to decide whether or not the proposed commitments can be accepted.

In its reasoned decision, the Competition College may decide (1) that the merger is permissible, eventually subject to conditions and/or obligations intended to ensure that the undertakings concerned respect the proposed commitments;

[136] In this respect Article IV.60, para. 2 Code of Economic Law expressly provides that in the economic sectors placed under the control or supervision of a public body or another specific public institution, these bodies or institutions shall be deemed to have a sufficient interest. In addition, the chief economist and the general counsel shall be deemed to have a sufficient interest in all cases. Finally, also the members of the supervisory or executive bodies of the undertakings concerned, as well as the representatives of the most representative employee organisation of those undertakings, or those that they designate, shall be deemed to have a sufficient interest.

[137] Article IV.60, para. 2 Code of Economic Law. Especially in cases in which new commitments would be proposed after submission of the draft decision, the fact that no new documents may be added to the file may have undesired consequences. Indeed, in order to duly analyse the effectiveness of new commitments, the Competition College may need additional documents (e.g., market studies) to be submitted. See H. Gilliams, Het nieuwe Belgisch mededingingsrecht, T.B.H. 2013, p. 493, para. 50.

[138] Article IV.61, para. 2 *in fine* Code of Economic Law. The deadlines may only be extended at the request of the notifying parties and only for the duration proposed by them. The Competition College shall in each case grant an extension of 15 working days and an additional hearing if the notifying parties so request. See Article IV.61, para. 3 Code of Economic Law.

[139] Please note that the Competition College can only impose certain conditions and/or obligations to ensure that proposed commitments will be respected (e.g. deadlines, reporting obligations, periodic penalty payments, etc.), but that it cannot introduce new commitments that have not been proposed by the parties.

[140] Article IV.61, para. 2, 1° Code of Economic Law. By virtue of this provision, it seems that the undertakings concerned also remain free to withdraw the proposed commitments. See D. Vandermeersch, De mededingingswet, Kluwer, 2007, p. 385.

(2) that the merger is permissible because the undertakings concerned do not together control more than 25 % of any relevant market (through horizontal or vertical relationships); or (3) that there are serious doubts about the permissibility of the merger which requires the initiation of phase II proceedings.[141] If no decision is made by the specified deadline, the merger will be deemed permissible.[142]

If phase II proceedings are initiated, the Prosecutor must carry out a supplementary investigation and submit a supplementary draft decision to the Competition College.[143] No later than 20 working days after the decision to initiate phase II proceedings, the notifying undertakings may provide the Prosecutor with commitments, aiming at a decision of permissibility of the merger.[144] The supplementary draft decision must be submitted to the Competition College within 30 working days of the decision of the Competition College to initiate phase II proceedings. This deadline shall be extended by a period equal to that used by the notifying parties to propose their commitments.[145]

Within 10 working days of the supplementary draft decision being filed, the undertakings concerned and the intervening parties may submit their written observations to the Competition College (with a copy to the Prosecutor and the other intervening parties). However, as is the case in phase I, they may not add additional documents to the file that were not submitted during the investigation by the Prosecutor, except if they are evidence of a fact or an answer to objections of which they had not yet been informed.[146] Following the submission of these written observations, the Prosecutor has 5 working days to submit an additional draft decision, a copy of which will again be sent to the notifying parties and to the representatives of the largest organisation representing the employees of the undertakings involved. The undertakings concerned have until the day before the hearing to submit their written observations to the Competition College (with a copy to the Prosecutor), but again no additional documents may be added to the file. At this point, any additional observations made by the intervening parties must be excluded from the debate.[147]

The hearing and the decision-making procedure of the Competition College in phase II is identical to that in phase I.[148] The Competition College must take a decision on whether or not to authorise the merger within 60 working days of its

[141] Article IV.61, para. 2 Code of Economic Law.

[142] Article IV.61, para. 2 Code of Economic Law.

[143] Article IV.62, para. 1 Code of Economic Law.

[144] In this respect, it should be noted that commitments proposed during phase I proceedings may still be relevant in the framework of phase II proceedings. See decision of the Competition Council No. 2008-C/C-16 of 25 April 2008, *Tecteo/Brutélé—Câble Wallon*, *Belgian Official Gazette* 11 June 2006, p. 29,430, pts 36 and 40–41.

[145] Article IV.62, para. 2 Code of Economic Law.

[146] Article IV.62, para. 3 Code of Economic Law.

[147] Article IV.62, para. 4 Code of Economic Law.

[148] Article IV.62, para. 5 Code of Economic Law.

decision to initiate the phase II procedure. This deadline shall be extended by a period equal to that used by the notifying parties to propose commitments. The concentration shall be approved if no decision is taken by the deadline. The deadline may only be extended at the express request of the parties and for a period that may not exceed the period proposed by them. In any case, the Competition College must grant an extension of 20 working days, as well as a new hearing, if so requested by the notifying parties, in order to allow them to present new commitments.[149]

As is the case under European competition law, under Belgian competition law both behavioural and structural remedies have been accepted in the framework of merger control proceedings in the past. In most cases, however, the Belgian Competition Authority seems to be more inclined to impose behavioural remedies, such as the commitment to terminate exclusivity agreements,[150] the commitment to provide access to infrastructure,[151] the commitment to continue to offer a certain product range,[152] the commitment to terminate co-operation agreements with competitors,[153] the commitment to facilitate access to the market for competitors,[154] the commitment not to engage in tying or bundling,[155] etc. Nevertheless, in some cases, structural remedies have also been imposed.[156]

4.3.1.2 Enforcement of Remedies

The Competition College may subject its approval of a merger to conditions and/or obligations intended to ensure that the undertakings concerned respect the proposed commitments.[157] These conditions or obligations may exist in the imposition of, for

[149] Article IV.62, para. 6 Code of Economic Law.

[150] See, e.g., decision of the Competition Council No. 2006-C/C-20 of 9 October 2006, *Autogrill/Carestel*, *Belgian Official Gazette* 28 November 2006, p. 65,976.

[151] See, e.g., decision of the Competition Council No. 2003-C/C-89 of 12 November 2003, *Telenet Bidco/Canal+, Belgian Official Gazette* 6 May 2004, p. 37,071.

[152] See, e.g., decision of the Competition Council No. 2010-C/C-08 of 25 March 2010, *Mobistar/KPN Belgium Business*, *Belgian Official Gazette* 23 April 2010, p. 22,872 and decision of the Competition College No. BMA-2013-C/C-03 of 25 October 2013, *Mediahuis*, *Belgian Official Gazette* 28 November 2013, p. 92,644.

[153] See, e.g., decision of the Competition Council No. 97-C/C-25 of 17 November 1997, *Kinepolis, Belgian Official Gazette* 5 February 1998, p. 3,276.

[154] See, for example, decision of the Competition Council No. 2002-C/C-89 of 18 December 2002, *Belgacom/De Post—BPG e-Services*, *Belgian Official Gazette* 1 October 2003, p. 48,092.

[155] See, e.g. decision of the Competition Council No. 2012-C/C-31 of 31 August 2012, *Swissport/Flightcare*, *Belgian Official Gazette* 28 September 2013, p. 59,938.

[156] See, e.g., decision of the Competition Council No. 2008-C/C-59 of 7 November 2008, *Belgacom/Scarlet*, *Belgian Official Gazette* 17 December 2008, p. 66,900; decision of the Competition Council No. 2011-C/C-55 of 23 December 2011, *Belgacom/Wireless Technologies*, *Belgian Official Gazette* 16 February 2012, p. 11.173; and decision of the Competition College No. BMA-2013-C/C-02 of 24 October 2013, *Autoveiligheid/Koninklijke Belgische Touring Club*, *Belgian Official Gazette* 3 December 2013, p. 95,502.

[157] Article IV.61, para. 2 Code of Economic Law.

example, a time period during which behavioural remedies will apply, a way in which structural remedies should be realised (e.g., deadlines, selling arrangements, reporting obligations, etc.) or periodic penalty payments that may become due when certain commitments are not respected.[158]

If a decision to approve a merger made by the Competition College is not complied with, the Prosecutor can open an investigation, on his own initiative or following a complaint by a third party.[159] In accordance with Article IV.70 of the Code of Economic Law, in case of non-compliance the Competition College may impose a fine on the undertakings concerned of up to 10 % of their turnovers. In addition, the Competition College may impose periodic penalty payments on the undertakings concerned for non-compliance with its decision of up to 5 % of their average daily turnover, per day of non-compliance. As is the case under European competition law, non-compliance could also deprive the undertakings concerned of the advantage of the approval of the merger.[160]

The decision of the Competition College to accept the proposed commitments and to approve the merger is, in principle, final. Nevertheless, the Competition College sometimes allows the undertakings concerned to request the revision or withdrawal of the accepted commitments after a certain period of time or if their enforcement is no longer justified.[161] It is also possible that the undertakings concerned are required to request a revision because they are no longer in a position to comply with the accepted commitments.[162] It should be noted that Book IV of the Code of Economic Law does not provide any procedural framework to be followed if commitments are withdrawn or revised, leaving the Competition College with full discretion in this respect. In practice, the undertakings concerned will address a request for revision to the Competition College, which in turn will ask the Prosecutor to conduct market research and to submit a reasoned report and investigation file on the proposed revision. In this respect, the Brussels Court of Appeal confirmed that the revision or withdrawal of commitments should be accompanied by an

[158] See D. Vandermeersch, De mededingingswet, Kluwer, 2007, p. 394.

[159] In this respect, it is very important that commitments are published in full in an annex to the approval by the Competition College, allowing third parties to effectively evaluate whether or not the proposed and accepted commitments are indeed complied with. This is all the more true for commitments imposing behavioural remedies on the undertakings concerned, as these remedies require continuous supervision.

[160] See also D. Vandermeersch, De mededingingswet, Kluwer, 2007, p. 454.

[161] See, e.g., decision of the Competition Council No. 97-C/C-25 of 17 November 1997, *Kinepolis, Belgian Official Gazette* 5 February 1998, p. 3,276, and decision of the Competition Council No. 2003-C/C-89 of 12 November 2003, *Telenet Bidco/Canal+, Belgian Official Gazette* 6 May 2004, p. 37,071.

[162] See, e.g., decision of the Competition Council No. 2012-C/C-03 of 31 January 2012, *Belgacom/Wireless Technologies*, *Belgian Official Gazette* 16 February 2012, p. 11,190, in which Belgacom requested (and was granted) a revision of the structural remedies that had been imposed because one of the points of sales that should have been sold in accordance with these remedies had been closed between the decision of the Competition Council and the closing of the transaction.

investigation equivalent to the investigation carried out when the merger was approved.[163]

4.3.2 Fundamental and Procedural Rights

This section will briefly discuss the right to be heard and the right to access the file (see Sect. 4.3.2.1) and the right to trial (see Sect. 4.3.2.2) in the framework of the Belgian merger control procedure.

4.3.2.1 Right To Be Heard and to Access the File

The Belgian merger control procedure gives the undertakings concerned the right to be heard in relation to the proposed commitments at various stages of the procedure. When commitments are proposed in phase I, the Prosecutor must first hear the undertakings concerned regarding the proposed commitments before adopting a position in his draft decision.[164] The undertakings concerned must also be heard by the Competition College.[165] If the Competition College in its decision wishes to take into consideration conditions and/or obligations that have not yet been dealt with by the Prosecutor in the draft decision, an additional hearing will be held during which the undertakings concerned can present their views on these conditions and/or obligations.[166] If commitments are proposed in phase II, the undertakings concerned must be heard by the Competition College.[167]

In addition, the Belgian merger control procedure also provides interested third parties with the right to be heard by the Competition College, both in phase I and in phase II, and this irrespective of whether commitments have been proposed or not.[168] In practice, interested third parties must submit a written request to the Competition College in which they substantiate their interest. Although the right of interested third parties to be heard is recognised explicitly, whether this also means that third parties must have access to the file has been subject to debate.

The Belgian Supreme Court (*Cour de Cassation)* has ruled that the former Belgian Competition Act (and by extension also Book IV of the Code of Economic Law) does not grant interested third parties an automatic right of access to the file, and this irrespective of whether commitments have been proposed or not. However, this is put into perspective by adding that interested third parties could be granted

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[163] Decision of the Brussels Court of Appeal of 18 March 2008, *Federatie van Cinema's van België VZW*, not published. See also J. Ysewyn and M. De Backer, Le conditionnel imparfait: verbintenissen en toezeggingen in het Belgisch mededingingsrecht, T.B.H. 2009, p. 436, para. 31.

[164] Article IV.59 Code of Economic Law.

[165] Article IV.60, para. 2 Code of Economic Law.

[166] Article IV.61, para. 2, 1° Code of Economic Law.

[167] Article IV.62, para. 5 *juncto* Article IV.60, para. 2 Code of Economic Law. Please note that in phase II the Prosecutor is not obliged to hear the undertakings concerned regarding the proposed commitments.

[168] Article IV.62, para. 5 *juncto* Article IV.60, para. 2 Code of Economic Law.

limited access to the draft decision of the Prosecutor and to certain documents in the investigation file if this is strictly necessary to allow them to present their views on the proposed transaction in a useful way. The Competition Council must assess the need for access on a case-by-case basis, taking into account the usefulness of the views of the interested third party to assess the proposed merger, the confidential nature of the documents in the file and the necessity to take a decision within strict time limits.[169] In this respect, it seems reasonable that interested third parties that explicitly request access must at least be granted access to a non-confidential version of the proposed commitments and those parts of the draft decision that discuss them.[170]

Finally, Book IV of the Code of Economic Law does not provide interested third parties with the right to be heard on conditions and/or obligations that have not yet been dealt with by the Prosecutor in the draft decision. Nevertheless, the Brussels Court of Appeal has confirmed that the Competition College must also hear interested third parties before making these commitments binding.[171]

4.3.2.2 Right to Trial

Book IV of the Code of Economic Law expressly provides a right to appeal to the Brussels Court of Appeal against the decisions of the Competition College to approve mergers.[172] Appeals can be lodged by the undertakings concerned or by any interested third party that was heard by the Competition College in the framework of the merger control procedure.[173] The Brussels Court of Appeal does not have full jurisdiction in this respect but will only rule on the contested decision with the power of annulment.[174]

[169] Judgment of the Cour de Cassation of 22 January 2008, *Tecteo/Brutele—Câble Wallon*, *T.B.H.* 2008, p. 350, pts 19–29.

[170] J. Ysewyn and M. De Backer, Le conditionnel imparfait: verbintenissen en toezeggingen in het Belgisch mededingingsrecht, T.B.H. 2009, p. 432, pt 18. This also seems to be in line with the decisional practice of the Belgian Competition Authority. See, for example, decision of the Competition Council No. 2008-C/C-16 of 25 April 2008, *Tecteo/Brutele—Câble Wallon*, *Belgian Official Gazette* 11 June 2008, p. 29,374, pt 5; decision of the Competition Council No. 2008-C/C-59 of 7 November 2008, *Belgacom/Scarlet*, *Belgian Official Gazette* 17 December 2008, p. 66,900, pt 15; and decision of the Competition Council No. 2011-C/C-55 of 23 December 2011, *Belgacom/Wireless Technologies*, *Belgian Official Gazette* 16 February 2012, p. 11,173.

[171] Judgment of the Brussels' Court of Appeal of 15 September 2005, *IMP/Rossel & Cie/De Persgroep/Editco*, *Jaarboek Handelspraktijken en Mededinging* 2005, p. 832, pt 30.

[172] Article IV.79, para. 1 Code of Economic Law.

[173] Article IV.79, para. 3 Code of Economic Law.

[174] Article IV.79, para. 2 Code of Economic Law.

4.4 Conclusion and Recommendations

The introduction of a formal settlement procedure under Belgian law and the further elaboration of the existing commitment and leniency procedures by Book IV of the Code of Economic Law can, in my opinion, only be welcomed. Indeed, the transactional procedures may not only help to reduce the length of the proceedings before the Belgian Competition Authority (and therefore also the procedural costs) but may also enhance the enforcement of Belgian competition law in general by allowing the Belgian Competition Authority to better allocate its resources. However, in practice, it remains to be seen whether the transactional procedures under Belgian law will prove to be as effective as they are under European competition law.

The potential success of the transactional procedures depends to a great extent on the existence of a real risk that the infringing undertaking will be sanctioned for its conduct if a normal decision-making procedure were to be followed instead of a transactional procedure (i.e., the so-called deterrent effect of competition law). The higher the risk that a substantial fine may be imposed on the infringing undertaking, the higher the incentive will be for the infringing undertaking to try to reach a transactional resolution with the Belgian Competition Authority. In this respect, the procedural changes introduced by Book IV of the Code of Economic Law (e.g., individual sanctions, more efficient procedures, etc.) only seem to enhance the deterrent effect of Belgian competition law and thus possibly also the potential success of the transactional procedures.

This being said, the current procedural framework surrounding the various transactional procedures under Belgian competition law still seems to contain several important gaps with respect to the protection of due process and fundamental rights of the parties concerned, as well as of third parties. In my view, it is, for example, particularly regrettable that the benefits of engaging in settlement discussions are rather unpredictable up front and that there is no right to appeal the final settlement decision by the College of Competition Prosecutors. Moreover, the limited rights of interested third parties to access the file or give their observations with respect to the proposed transactional resolutions may seriously harm the interests of those that are disadvantaged by a competition law infringement. As the Belgian Competition Authority has not yet taken many decisions in transactional procedures (with the exception of merger control cases), it remains to be seen whether or not some of these procedural gaps will be resolved in practice. If not, it might be highly recommended for the legislator to rethink some of the procedural aspects concerning the transactional procedures and to formalise them into the text of Book IV of the Code of Economic Law.

Brazil

5

José C.M. Berardo and Bruno B. Becker

5.1 Introduction

Transactional institutions for administrative and criminal investigations have been in place in Brazil, in a modern form, since the early 1990s. Ever since, the use of such instruments by the authorities (*e.g.*, public prosecutors, Government, agencies) has grown and became regarded as a valuable tool for law enforcement. Nonetheless, because of the country's legal tradition, many practitioners still see transactional institutions as deviations from the 'public interest' and the 'rule of law', although this opinion is becoming much less common than it was in the past.

In Brazil, transactional resolutions are not limited to competition law proceedings; they were actually initially adopted to solve, prior to the beginning of litigation, environmental, consumer and public interest matters (collective redress, for example) by public prosecutors in a timely and cost-effective manner for both the Government and private parties (what became known as *Termos de Ajustamento de Conduta*).

In the field of criminal law—emulating some types of "plea bargaining" arrangements existing in other jurisdictions—the proceeding is also acceptable in Brazil for less serious crimes and other misdemeanours (*transação penal*), if the prosecution, the Court and the defendant(s) agree to the terms of the alternative sanctions that can be imposed to criminals.

Competition law enforcement in Brazil is based on Law no. 12,529/2011 (the "Competition Law") and is carried out by the Brazilian Council for Economic Defense ("CADE", in its Portuguese acronym). However, there is a palpable tendency for the dissemination of competition-related judicial claims because of (*i*) the criminal

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prosecution of local, small cartels (which is the only competition infringement in Brazil that is also considered a crime); (*ii*) direct damage claims for competition infringements by harmed parties; or (*iii*) class actions for damages by public prosecutors.

In this context, transactional proceedings set out in the Competition Law are basically (*i*) leniency applications, (*ii*) cease-and-desist commitments and (*iii*) negotiated merger remedies and are negotiated and enforced by the CADE. These proceedings may directly impact the involved parties in both criminal and civil proceedings, and *vice versa*.

As such, considering a leniency application, for instance, criminal amnesty is also provided for by the Competition Law if a leniency agreement is executed and implemented before the prosecutor in charge of the matter proposes a criminal indictment. On the other hand, the admission on anticompetitive conduct through leniency application could be negative, in the sense that it could facilitate civil claims against the whistleblower.

The arguments put forward by competition authorities in favour of transactional procedures are basically related to the effectiveness of the enforcement of the law, regarding the speed of the procedure, and the rational use of the CADE's resources. In certain cases, the CADE has advocated that transactional resolutions, such as cease-and-desist commitments in cartel cases, would (*i*) protect consumer interests, (*ii*) facilitate the investigations (since the CADE may benefit from the applicant's cooperation) and (*iii*) save public resources and time spent on the investigation. On the other hand, arguments against similar transactional procedures are that (*i*) transactional procedures may lead to violations of rights, especially rule of law principles (*e.g.*, *ne bis in idem*, impartial judge, right against self-incrimination and presumption of innocence), and (*ii*) in the case of leniency agreements, there is no legal guarantee that the whistleblower will not be prosecuted or subjected to sanctions from authorities from other jurisdictions.

Thus, transactional procedures reduce the duration of the investigations quite significantly, especially because, in Brazil, the CADE can take 4 to 5 years to issue a decision at the administrative level (*i.e.*, without considering possible appeals to Courts), while settlement negotiations are usually concluded within 6 months (sometimes less). Furthermore, in case of cease-and-desist commitments and leniency applications, the CADE requires the parties to actively collaborate with the investigation, so this can substantially speed up the fact-finding phase of the investigations.

5.2 Transactional Resolution of Agreements and the Abuse of Dominance

5.2.1 Overview of Transactional Procedures

The transaction procedures set forth by the Brazilian Competition Law are (*i*) leniency agreements,[1] (*ii*) cease-and-desist commitments[2] and (*iii*) negotiated merger remedies.[3] Under the Brazilian criminal law, there are also transactions applicable to less serious crimes and other misdemeanours.

Although there is no legal exception, leniency agreements apply exclusively to hard-core cartel infringements or similar "horizontal" violations, while settlements are available to parties being investigated for both horizontal conduct and abuse of dominance conducts.

Leniency applications require confession of the infringement (*i.e*., of the facts that consist in the unlawful conduct) as a legal prerequisite; in cease-and-desist commitments in cartel cases, the CADE has adopted the policy of requiring express confession of liability or, depending on the circumstances, of the facts that consist in the unlawful conduct.

In both cases, the agreements themselves and the decisions providing the reasoning for entering into such agreements include a section on the finding of the infringement or the corresponding liability.

Cease-and-desist commitments in unilateral conduct cases, in turn, may or may not include acknowledgment of the liability, depending on the circumstances of the case (mainly the stage of the investigation in which the settlement occurs). However, leniency agreements are generally silent about this, resulting only in the decision to stop or modify the conduct under investigation and the (also optional) payment of a certain contribution in substitution to the applicable administrative fine.

In leniency agreements, the leniency applicant must, as a requirement for the leniency to be admissible, assist the CADE in the investigation of its own misconduct and of the other parties' misconduct. Cease-and-desist commitments, on the other hand, are more flexible, but generally in cartel procedures the defendant willing to settle is requested to contribute to the investigations, particularly if the fact-finding phase is still in progress. Cooperation and assistance, in this context, are generally interpreted by the CADE very broadly and may involve the submission of evidence, declarations, technical assistance, interpretation of documents seized, etc.

Leniency (and "leniency plus" applications) are, by definition, limited to situations in which the CADE either (*a*) has not initiated an investigation, in which case the beneficiary then receives full immunity in exchange for being the

[1] Articles 86 and 87 of the Competition Law and Articles 197 to 210 of CADE's Internal Rules.

[2] Articles 85 of the Competition Law and 179 to 196 of CADE's Internal Rules.

[3] Articles 61 of the Competition Law and 125 of CADE's Internal Rules.

first one to come forward against the infringement, or (*b*) has started a formal inquiry, about the same or about a related market, but has not yet gathered sufficient evidence about the infringement, in which case the beneficiary has a right to receive a reduction in the fines.

Cease-and-desist commitments may be entered into, however, at any moment during a formal investigation until the hearing of the case is initiated. The reduction in the applicable penalties tends to be higher the sooner a proposal is made during the procedure and according to the level and (mostly in cartel cases) relevance of the cooperation of the defendant with the outcome of the investigation.

A successful leniency application results in an agreement between the party and the CADE, through which the former provides information and documents that allow the latter to see its cartel investigations facilitated. If this agreement is duly performed, the informer will obtain full criminal amnesty, as well as full immunity from fines and other penalties, or, at least, have a reduction in the applicable fines. The typical leniency agreement will contain (*i*) a determination that the informer will cease its participation in the conduct, (*ii*) a confession of the unlawful conduct and (*iii*) commitments for full cooperation with the CADE throughout the completion of the investigation, including the submission of a detailed history of the events that provide a background to the unlawful conduct. Once the investigation is finished and the finding of an infringement is confirmed, the performance of the agreement by the beneficiary is confirmed by the CADE.

Cease-and-desist commitments, in cartel cases, are becoming increasingly similar to leniency agreements, except that (*i*) they are available for any defendant at any time during the proceeding and (*ii*) they do not result in any type of immunity or amnesty. Generally, in these cases, the agreement contains (*a*) the express confession of liability or, depending on the circumstances, of the facts that consist in the unlawful conduct; (*b*) the commitment to completely cease its involvement in the conduct; (*c*) commitments regarding cooperation with the investigations, which may vary from case to case; and (*d*) the amount of the "contribution" to be paid by the defendant. Also, there is no criminal immunity (and, as such, the confession in the context of the administrative settlement may have serious implications for individuals).

In abuse of dominance cases, cease-and-desist commitments generally result in an agreement that contains all commitments necessary for ceasing the defendant's conduct or its effects or, depending on the case, modifying the conduct in order to eliminate possible anticompetitive effects. Under certain circumstances, the defendant in this type of case may also need to pay an amount as a "contribution" (a discounted fine) and, depending on the moment in which the settlement is made, to confess the unlawful conduct.

In all cases, the CADE does not, under the Competition Law, have powers to negotiate or bargain different types of infringements in exchange for one another, and this is even more stringent in cartel cases. As a result, cease-and-desist commitments are circumscribed to a specific investigation and infringement.

As a consequence of the leniency agreement, the leniency applicant may receive total immunity from the fines.

A party entering into a settlement in the context of a cartel investigation is required to pay an amount (defined as a "contribution"), which cannot be lower than the minimum fine provided for by the law. For this type of case, the CADE has a specific regulation which defines the applicable reduction in the level of the fines, according to the level of collaboration the defendant can offer to the investigation (the more evidence one can produce, the higher the discount in the fine) and the moment the defendant submits the settlement (first-comers may receive up to a 50 % discount, whereas the last ones not more than 25 %).

In unilateral/abuse of dominance cases, the negotiating process is much more intense, as the law does not require the payment of any type of amount for a settlement, and the CADE has discretion to require such payment on a case-by-case basis.

From a policy perspective, it seems that leniency agreements and cease-and-desist commitments are complementary tools for pursuing cartel cases, and it seems that a large number of leniency agreements (starting new investigations) tend to result in a large number of settlements, if the incentives are set forth correctly. As a result, companies can influence that decision only when they qualify for leniency.

In unilateral/abuse of dominance cases, cease-and-desist commitments are the only choice available, and the commitments included therein are highly specific to the facts of the infringement being investigated.

Usually, transactional resolutions with the CADE do not include discussions regarding damages to third parties; these, as a matter of fact, have very little room to participate in the negotiation of settlements with the CADE.

In any case, in cartel cases third parties that may have been victims of a cartel benefit from leniency applications and settlement to the extent these contain confessions of unlawful behaviour, which may theoretically facilitate the filing of private damage claims (even before the CADE actually issues a decision on the infringement).

From the perspective of third parties, transactional resolutions (either in cartel, unilateral or merger cases) actually tend to benefit the parties pursuing possible claims, as third parties may use the acknowledgement of the violation in leniency or settlement agreements as evidence in such private litigation. In very few cases, the CADE has submitted the product of a negotiation (*i.e.*, market test) for comments of affected third parties (competitors, customers, suppliers, etc.), as it generally believes it has gathered all relevant information (notably in unilateral and merger cases) for assessing the effects of the settlement in the course of its previous investigation.

5.2.2 Discretion of Competition Authorities and/or Judges During Proceedings

As a general policy, the CADE always emphasises that it is open to discuss settlements and, especially, leniency agreements. However, pursuant to the applicable rules, parties interested in the settlement are required to formalise their intent to initiate settlement discussions in a specific request.

The CADE has ample discretion to negotiate (or accept to negotiate) when it believes there are sufficient grounds to accept a settlement application and whether a settlement is convenient to benefit the public interest. As a result, other than adherence to the requirements established by law or set out in the CADE's own regulations, it is free to assess if a transactional resolution is a good decision for a certain investigation and the timing regarding the settlement.

Courts have upheld the view that investigated parties do not have a right to a settlement and that the law is clear that the decision to negotiate a settlement is under the CADE's discretion, in view of the public interest and of the interests protected by the Competition Law. As a result, the CADE has to adequately justify its decision to settle—in view of the public interest—in each individual case and, consequently, treat parties according to the principle of isonomy.

Although a similar rationale is applicable to leniency applications, there is no Court ruling on the CADE's powers to reject a leniency proposal; considering, however, the effects of a rejected application and the very strict requirements for a leniency agreement to be valid (including the confession of an infringement of which the CADE is not even aware of), in our view the CADE has much less discretion to reject a leniency application than it has to reject a settlement in an ongoing investigation.

Parties interested in any transactional resolution with the CADE are required to formalise their intent to settle in a specific request. In leniency applications, the parties are required to provide CADE with an initial draft of the proposed agreement, in the form of a proffer called "Infringement Report". However, the process is not straightforward, as the CADE generally requires upfront access to evidence before entering into a leniency agreement. In the case the applicants do not have information for the cooperation at the time of the request, the request may be preceded, upon request from the parties, by a simple marker (which ensures a party that it is a first-comer).

However, in cease-and-desist commitments—especially in unilateral conduct cases—the negotiation process regarding the submission of drafts is straightforward and parties have room to discuss changes to the CADE's suggestions in the Infringement Report if they have good arguments for their changes.

The CADE has wide discretion to accept or reject commitments in cease-and-desist commitments proceedings and, as discussed above, probably much less room to reject leniency applications (given the stricter legal requirements for the latter).

In cease-and-desist commitment procedures, following a negotiation period, the CADE makes a decision about the convenience of the settlement that relies on an assessment of (*i*) the level of protection of the public interest and of competition (*i.e.*, the effectiveness of the commitment or undertaking to cease the anticompetitive effects under investigations), (*ii*) the deterrent effects of the settlement (over the settling party and third parties), (*iii*) its impact on the CADE's ability to enforce the law in the future and (*iv*) the usefulness of the Infringement Report's collaboration (if applicable) to the investigation.

CADE's activities, as those of any other governmental agency, are bound by the Brazilian Constitution. By force of constitutional principles, the CADE (as any other governmental authority in Brazil) must interpret and apply the law so as to apply the principle of equal treatment (isonomy). As such, in its decision about a certain settlement, the CADE has to treat companies equally, even in the context of a settlement.

The principle of proportionality and adequacy of the intervention is considered when the CADE negotiates and accepts commitments regarding the merits of the conduct, and this element, among others, is factored in the CADE's decision.

5.2.3 Nature of the Legal Act Concluding, Approving and/or Making the Settlement Binding

The main authority enforcing competition law in Brazil, as mentioned, is the CADE. Within the CADE, there are two different bodies: the Superintendence-General,[4] which has investigative powers in infringement cases, and the CADE's Administrative Tribunal,[5] comprised of six Commissioners and the Chairman. According to the Competition Law, the Administrative Tribunal always concludes transactional resolutions, even if the CADE's own investigative body, the Superintendence-General, has participated in or led the negotiation process.

In the case of leniency agreements, however, the agreement is entered into by the party and the Superintendent-General. Even though the Superintendent-General may enter into leniency agreements without any type of interference from the CADE's Administrative Tribunal, the administrative immunity or fine reduction has to be confirmed by the Administrative Tribunal at the end of the case. In other words, the Competition Law does not make the signing of the agreement dependent upon the Administrative Tribunal's approval. When receiving the investigation, however, the Administrative Tribunal will review compliance of the party with the agreement; if it is found that the party somehow violated the leniency agreement (for instance, by withholding evidence or rejecting to cooperate with the investigations), the applicant will no longer be eligible for the leniency benefits.

The agreement entered into and signed with the CADE is a public law contract that relates to its performance (*e.g.*, whether the party or the CADE complied or not with their respective obligations). The decision adopting such agreement, however, is a unilateral administrative decision, which embodies the full legal effects of such acts in view of third parties, including Courts, as would be the case for a non-transactional resolution.

It is contained in the operative part of the decision (usually as an exhibit to the decision itself) and the reasons supporting the agreement and its public interest benefits exposed in the motivation section of the decision.

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4 "Superintendent-General" stands, in English, for *Superitendência Geral*.

5 "Administrative Tribunal" stands, in English, for *Tribunal Administrativo*.

5.2.4 Legal Consequences for the Parties

Legal consequences for the parties may vary according to the type of transactional resolution under review.

In leniency procedures, all of the relevant provisions regarding the leniency program (*e.g.*, legal requirements) are set out in the agreement itself, and the (operative part) of the final decision of the CADE generally only contains, if applicable, confirmation of the party's full performance of the agreement.

In cease-and-desist commitment procedures, the characteristics of the decision and of the agreement have varied greatly over time, but generally the agreement itself contains provisions regarding the liability for past behaviour (*i.e.*, confession of the conduct), modification of future conduct, sanctions and waiver of the right to appeal, as well as any other measures the CADE believes applicable for the case at hand. The operative part of the decision adopting the agreement, in turn, confirms these obligations from the settling party.

The sanctions in case of non-compliance with the transactional resolutions are as follows:

1. For leniency: in case of non-compliance, the lenient will lose the benefits agreed upon with the investigative body and will be prohibited to enter into a new agreement with the CADE for 3 years.
2. For cease-and-desist commitments: the investigation of the party for the underlying infringement is resumed; the party has to pay an additional fine (set out on a case-by-case basis in the settlement agreement itself) and may be required to perform specific obligations (in unilateral conduct cases) through a Court order.
3. Settlement on merger control: the failure (without good cause) to comply with performance commitments may cause the approval for the merger to be revoked, followed by opening of an administrative proceeding for the adoption of the applicable measures.

From the perspectives of a Civil Court and third parties, the agreement is an administrative act like any other, following the same principles and producing the same legal effects. As such, unless there is an explicit challenge to the administrative decision itself which is able to suspend (at least temporary) its effects, the findings (including confessions) of facts or of liability bind the Courts entirely, as administrative acts in Brazil have a presumption of legitimacy, are coercive and, most importantly, self-applicable.

However, if a third party objects or challenges the decision adopted by the CADE (which may or may not incorporate an agreement, such as a leniency or a settlement) before the Courts, the matter is controversial and far from settled. A part of the literature and of the precedents consider that the decision of the competition authority is discretionary and involves a "highly technical" subject, so the Courts would be able only to analyse the strictly legal aspects of the CADE's decision that incorporated a transactional resolution. Therefore, all findings of facts would bind the Courts, although the finding of infringement or liability could—depending on the circumstance—be subject to an analysis of legality and the limit of the competence of the CADE. On the other hand, a part of the literature and of the precedents consider that the Courts have the duty to review any acts of the Government (*inafastabilidade da tutela jurisdictional*, hereafter the "Court's Review")[6] in their full contents, so a Court may find itself not bound by any aspect of the administrative decision.

5.2.5 Fundamental and Procedural Rights of the Parties

Not all types of transactional resolutions with the CADE bear the same risks. For instance, while cease-and-desist commitments are relatively risk-free (the ultimate downside is basically having the proposal rejected by the CADE), in leniency agreements whistleblowers are not protected against private damage claims, after being granted immunity by competition authority.

The CADE can only start investigations if it properly motivates its decision to pursue a case, and the maximum fine applicable is set forth by the Competition Law itself, so it is very rare for the CADE—at least until now—to increase pressure on a certain company for a settlement if the CADE lacks facts to support the beginning of a formal investigation. If a party is confident that the assessment of the CADE is wrong about facts or liability, it can defend itself in the administrative level and further challenge an unfavourable decision before the Courts.

In some cartel investigations—especially those started by means of a leniency agreement—officials may propose that the defendants enter into a cease-and-desist commitment, but it is very rare to have them pressing excessively for a settlement.

There is not an abstract and general condition or circumstance that renders a transactional resolution more interesting for the parties to an investigation; these are generally case and fact specific. However, the consistently high level of fines imposed by the CADE, coupled with its reasonably good track record in winning Court challenges and the threat of criminal prosecutions (for cartels), often emphasises that potential reductions in fines (in cases of leniency applications and cease-and-desist commitments) are enough incentives for the companies.

The fact that the CADE's decisions are public and may be challenged in Court, coupled with the applicable legal mechanisms, results in companies not being penalised in some way for enforcing their constitutional rights.

The transactional procedures by no means involve a burden on constitutional or other procedural rights, nor do they require the party to surrender any rights, directly or indirectly. Ultimately, it is the party's decision to settle, and given the legal mechanisms in place, the current transaction procedures do not put a burden in defendants' constitutional rights.

[6] *Inafastabilidade da tutela jurisdictional* is a principle often cited by the traditional literature on the Brazilian judiciary system. It refers to the fact that, in Brazil, decisions issued by administrative agencies, such as CADE, can be discussed, and in some cases have their effects cancelled, before Judicial Courts.

5.2.5.1 Right Against Self-Incrimination and Presumption of Innocence

Parties have the right against self-incrimination and the presumption of innocence in all types of investigations (under competition law or otherwise) in Brazil.

The presumption of innocence is recognised as a general principle of law in which one is considered innocent until proven guilty. Consequently, the burden of proof is on the one who prosecutes. Closely connected with the presumption of innocence is the privilege of non-incrimination: the fairness of the proceedings requires that information about one's own conduct be protected against forced disclosure at any stage of the investigation. Thus, parties have the right to limit information provided to competition authorities.

Both procedural principles aim to protect parties and their rights against the Government. In investigation of competition law infringements (either at the administrative or the criminal level), these rights are ensured and the Courts are specially used to interfere when these rights are jeopardised.

In the course of negotiating with authorities, parties have a duty to cooperate, which, in Brazilian jurisdiction, encompasses answering questions and providing relevant information about the object of the investigation, not changing or destroying documents which may contain relevant information for the investigation, not providing wrong information, not violating the secrecy of investigations.

In some aspects, such duties differ from those related to transactional resolution proceedings in competition law. It happens because in such cases, parties assume certain obligations in exchange for immunity or reduction on penalties (the higher the cooperation, the higher the discount). As a consequence, they may have to cooperate more closely with authorities, especially because, in some cases, parties may have to provide enough evidence to support the allegations.

For instance, parties may have to cooperate with the identification of others involved in the violation and they might have to obtain information and documents proving the reported or investigated violation. The scope in cooperating with authorities between normal proceedings and in those involving transactional resolution is that in the first one there is a regular obligation to cooperate with law enforcement. In case of transactional resolution based on the applicant's cooperation, the CADE aims to spend less time and public resources on investigations. Also, parties have to provide information as a consequence of the agreement entered into with the CADE.

There is a formal duty to provide the CADE with any type of data or information it may require, under any type of procedure (investigation of conduct or merger control). A party can refuse to provide specific data or information if it believes that it will incriminate natural persons of a crime, but it is generally understood that a party cannot refuse to provide raw data about its market activities or past behaviour.

In case of transactional procedures, such as leniency and settlement agreements in case of cartels, parties and their representatives are required to respond to any questions submitted by competition authorities, as they adopted a commitment between parties and authorities to fully cooperate with authorities by confessing to have participated in the infringement.

As a result of the right against self-incrimination and the presumption of innocence principle, parties are not expected or required to submit material documents or evidence that could prove their participation in an infringement.

The transactional procedures have no impact on the right to protect communication with lawyers. Legal privilege may be waived by the party, following the attorney's consent, in view of its interest in obtaining a more favourable outcome for its negotiation of a settlement or leniency application, but of course the CADE cannot require a party to waive such right.

In cartel cases, parties may be formally or informally obliged to acknowledge guilt or liability, but that does not apply to unilateral conducts. As mentioned, leniency applications require confession of the infringement (i.e., of the facts that consist in the unlawful conduct) as a legal prerequisite; in cease-and-desist commitments in cartel cases, the CADE has adopted the policy of requiring express confession of liability or, depending on the circumstances, of the facts that consist in the unlawful conduct.

That can be deemed as a formal waiver of the right against self-incrimination and presumption of innocence. Such a waiver is compatible with the parties' right to the extent that they are voluntarily submitting to such transactional resolutions with a view to benefiting mainly from reduced fines; the fact that a party is acting on its own initiative renders these conditions compatible with the parties' own rights.

A procedure becomes transactional the moment the CADE enters into a formal agreement with the interested party (the investigative body, in leniency cases, or the Administrative Tribunal of the CADE, in all other cease-and-desist commitments). Such a decision is revocable only if the CADE based its decision on incorrect information or information that was obtained by fraud.

If one of the parties (CADE or defendant) decides not to continue with a transactional resolution, it is not allowed to make use of documents, statements and declarations submitted during negotiations.

In leniency cases, there are safeguards in place to ensure that statements during negotiations do not affect the parties negatively in the future, in case negotiations fail, such as a firewall within the Superintendence-General (a single division handles all incoming leniency applications, and this unit does not communicate with the other investigators) and the fact that the documents are only submitted in their full content once the CADE decides to enter in the agreement; the CADE has also been open, in the past, to adopt other safeguards on a case-by-case basis.

In settlement negotiations, safeguards are mostly related to the fact that the negotiations are conducted by officials not involved in the investigations, but it is mostly up to the party to use caution to negotiate without disclosing more information than necessary to obtain the CADE's agreement.

There is no clear legal impact on burden and standard of proof in connection to transactional procedures under the Brazilian competition law.

On the one hand, of course the more advanced the investigations are, the more the CADE is expected to have produced material evidence of the infringement at hand (as, except for cartel investigations initiated by leniency agreements, information is largely asymmetrical); as such, as the investigation progresses, in a typical case a settlement becomes less relevant for the CADE (as its chances of a solid finding for an infringement is higher) over time and may become more relevant for the settling party (as it may entail a reduction in the amount of the fines). So if the party believes the investigation carried out by the CADE is weak, it has less incentives to propose a settlement; however, if the party knows beforehand that an infringement took place, a settlement proposal made sooner is likely to result in larger discounts in the applicable fines.

On the other hand, if the CADE, because of a transactional resolution, has obtained material evidence of an infringement, naturally the burden and standard of proof of the remaining infringers is increased, so the less likely they are to object to evidence material and allegations.

5.2.5.2 Right of the Parties to Know the Case Against Them (Statement of Objections)

To initiate an investigation for an infringement to competition law, the CADE (through the investigative body) has to produce a written report stating the relevant facts indicating a possible infringement; the decision to open an investigation is made public through the publication of a notice in the Official Journal. The report supporting the decision to open the case summarises the facts that are under investigation and the possible legal infringements, so parties can submit their defences and views on them.

Following the conclusion of its investigations, the Superintendence-General submits to the CADE's Administrative Tribunal a detailed opinion regarding the infringement (confirming its existence or not), which could be deemed to correspond to the "statement of objections", for the Administrative Tribunal to issue its final administrative decision on the matter. Parties may, at any time of the proceeding, reply or object to the allegations made by the Superintendence-General or propose a settlement.

Both the report initiating an investigation and the investigative body opinion, of course with varying levels of detail and supporting documentation/evidence, must contain a description of the facts involved, allegations, theories of harm and liabilities of the different investigated parties. Information about the level of fines, however, is not available until the final decision from the CADE's Administrative Tribunal.

Parties may submit their proposal for a settlement at any time during the investigation, before a final decision is adopted.

The "statement of objections" (SG's opinion on the infringement) does not directly reflect the content of discussions taking place between the parties and the authorities. It usually contains only the report on the infringement itself; however, if any other party already settled the case, this report will reference to it and contain any additional information or evidence brought by this party.

The existence and extent of benefits of transactional procedures for the proponents are, of course, of great concern to the companies.

In the case of leniency, benefits to the proposing companies are certain and predictable, before they commit to it, as the leniency programme is said to be key for the CADE's investigation of cartel behaviour.

The benefits of a settlement, despite not being certain, are reasonably predictable for the companies involved before they commit to a definite resolution, but only after the party formally submits its proposal for a settlement. The CADE, however, cannot commit that a negotiated settlement will actually be adopted by the CADE's Administrative Tribunal before the actual decision is adopted, although generally there are clear, albeit informal, indications of whether that will happen or not.

As to the fines and their levels, even though the CADE has been putting a lot of effort into turning the negotiations increasingly clear and predictable, reaching a settlement with the CADE on this point, however, is still a quite complex and somehow erratic procedure.

Pursuant to the current competition law, a company[7] liable for an infringement is subject to a fine ranging from 0.1 to 20 % of the gross turnover excluding taxes (pre-tax revenues) of the "company, group or conglomerate" in the "sector of activity" (*ramo de atividade*) of the infringement, for the year prior to the formal initiation of the investigation. This fine cannot be lower than the gain obtained from the violation, if this is assessable, and it may be doubled in case of recidivism. For cartel cases, for instance, the CADE has been very aggressive in the imposition of fines, tending to push for the highest fines allowed by the law, or up to 20%.

As discussed above, a party entering into a settlement in the context of a cartel investigation is required to pay an amount (defined as a "contribution"), which cannot be lower than the minimum fine provided for by the law. For this type of case, the CADE has a specific regulation which defines the applicable reduction in the level of the fines, according to the level of collaboration the defendant can offer to the investigation (the more evidence one can produce, the higher the discount in the fine) and the moment the defendant submits the settlement (first-comers may receive up to a 50 % discount, whereas the last ones not more than 25 %).

This regulation was adopted in early 2014 to ensure predictability in cartel cases, but there is still a lot of uncertainty as to the exact application of these rules, and even more so in unilateral investigations.

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[7] There are other ancillary penalties applicable to companies (such as (a) publication of a summary of the decision in the newspapers; (b) the prohibition to enter into contracts with public banks; (c) the prohibition to take part in public bids or to enter into agreements with the government, for a minimum of 5 years; (d) the inclusion of the violator in a list of consumer offenders; (e) the recommendation for the compulsory licensing of patents held by the offender; (f) the recommendation for public authorities not to grant, or to revoke if already granted, tax payment schedules, public subsidies, or tax incentives; (g) the spin-off, transfer of control, sale of assets, or any other measure necessary for the complete cessation of the illicit behavior and its effects), as well as fines and other penalties for individuals, trade associations and other entities.

5.2.5.3 Right To Be Heard and Access to File

Parties to transactional procedures are offered the exact same rights as parties that are willing to litigate the case further. Full access to the file is a requirement to preserve an adequate defence even at early stages of an investigation, and the decision to settle should not affect that.

5.2.5.4 Right to an Equal Treatment

Transactional procedures do not pose risks of unequal treatment of companies in equal situation. Although leniency and settlement agreements may lead to a full or partial immunity from penalties or a reduction in fines, the law and regulations state clear and objective criteria for negotiations and benefits. As said before, as a Federal Governmental Agency, the CADE must comply with the constitutional principles, including, of course, the right to equal treatment (isonomy).

5.2.5.5 Right to an Impartial Judge

As CADE combines both bodies (an investigative and a decision-making body), transactional procedures are not approved or ratified by an impartial authority or judge, although the Administrative Tribunal acts in a largely independent form from the investigative body and vice versa.

In settlement cases, the transactional procedure will involve different officials to negotiate and adjudicate the resolution, which work as checks and balances that emulate an impartial authority. The investigative body may negotiate with parties, but the settlement is adopted by the Administrative Tribunal. In addition to that, most of the literature and commentators hold that as long as judicial review is available, the right to an impartial judge and jurisdiction is not denied to parties.

5.2.5.6 Right to Trial

Parties found liable for an infringement can challenge the CADE's decision before the Courts in its full extent (*i.e.*, both facts and law).

The waiver of the right to trial is not admissible in Brazil, due to the constitutional right of the effective judicial protection through the Court's Review. Parties, however, may agree to not challenge the use of certain documents obtained during searches.

As mentioned, a part of the literature and of the precedents consider that the decision of the competition authority is discretionary and involves a "highly technical" subject, so the Courts would only be able to review formal aspects of the CADE's decision that incorporated a transactional resolution. Therefore, all findings of facts would bind the Courts, although the finding of infringement or liability could—depending on the circumstance—be subject to an analysis of legality and the limit of the competence of the CADE. On the other hand, a part of the literature and of the precedents consider that the Courts have the duty to review any acts of the Government in their full contents (*i.e.*, the Court's Review), so a Court may find itself not bound by any aspect of the administrative decision.

In case of appeal, it is possible that a Court exercise its full jurisdiction over a transactional decision, as a consequence of the effective judicial protection principle. Naturally, Courts will refrain from reviewing appeals brought by parties that entered into settlements with the CADE, unless a serious offence by the CADE (*e.g.*, fraud) is raised.

5.2.5.7 *Ne Bis in Idem*

The *ne bis in idem* principle applies indistinctively to transaction resolutions and decisions in competition law proceedings. The application of this principle, however, is limited to the facts and the legal rules under which the decision was adopted (*i.e.*, the fact that a company was found liable for a cartel infringement does not prevent its clients from seeking reparation for the damages caused by the conduct or the prosecution of the individuals liable for the cartel crime).

Upon the conclusion of a transactional procedure, the immunity of the company's employees and/or of the other companies belonging to the same group depends on the exact circumstances of the case and the type of transaction entered into with the CADE (either leniency or settlement). Leniency agreements, in general, usually are drafted so as to benefit the individuals involved in the conduct and other group companies; cease-and-desist commitments, on the other hand, do not necessarily cover individuals or affiliated companies, but there is nothing preventing the cease-and-desist commitments from actually protecting those.

5.2.6 Rights of Third Parties

5.2.6.1 Right To Be Heard and Access to File

Third parties have access to full copies of the case records at any time during an investigation, but they cannot have access to information and documents deemed to be confidential. Access to confidential documents and information is granted only to the investigated parties themselves.

Their rights include the right to access the file and to submit complaints, the right to receive information and to comment what they deem relevant for the CADE's investigation. The CADE, however, can refuse to take into consideration information or commentary that is not relevant for the investigation.

5.2.6.2 Right to Trial

Third parties also have full rights to appeal from a decision before Courts, challenging whichever part of the procedure, including any type of transactional resolution, which fails to comply with the Competition Law and the public interest.

The same rights and understandings that apply to defendants are applicable to third parties and vice versa. See Sect. 5.2.5.6 above.

5.2.6.3 Other Issues and Rights

Commercial interests of third parties are taken into account by the CADE in transactional resolutions to the extent they may be relevant to assess the effects of the conduct itself, or the resolution being adopted, over competition (most importantly in unilateral cases).

Although follow-on private claims are not the focus of the CADE's decision practice and although this type of claim is still uncommon, in several instances the CADE has emphasised its concern about making sure that the leniency programs and related cease-and-desist commitments in cartel cases do create incentives for them.

5.3 Principle of Legitimate Expectation and of Good Faith

Good administration, legitimate expectations and good faith are general principles applicable to the public administration in Brazil that are also applicable to competition authorities. Those principles bind competition authorities when settling agreements or negotiating with parties. In case of transactional resolutions, the CADE's decision to accept or reject a proposal should be reasonably predictable and justified (*i.e.*, motivated).

Communications from officials to companies during negotiations are not binding upon the CADE, but they do provide substantial guidance (even if not subject to hard rules) for the parties' expectations, on the basis of the moral commitment and the repercussions for deviating from the promised behaviour; it is uncommon to find a divergence between the official communication and the decision on the settlement itself.

There is no need to adopt any particular safeguard to induce the authorities to comply with these premises; otherwise, the procedures would become extremely bureaucratic.

The unofficial disclosure of sensitive information by the participants in the negotiation proceedings, or the communication of knowingly false information about the case or the expected result of the settlement, could be deemed sufficient to constitute "unfair conduct" of the parties during the negotiation period according to the Brazilian Courts' jurisprudence and, thus, subject to judicial claim for damages.

Any sort of coercive, unreasonable or abusive conducts by the authorities are not compatible and, thankfully, not adopted or widespread until now during negotiations in Brazil. The CADE should not adopt contradictory conduct, or change its understanding without a reasonable reason, with respect to the good faith and *nemini licet venire contra factum proprium*. Their acting should be motivated and impartial and should not be motivated by personal interests of the CADE's personnel. Parties should also respect these principles, by acting according to standards of loyalty and morality normally expected. They should avoid conducts that may affront the authority and other party's legitimate expectations. In case of third parties, they should cooperate with the procedure and the findings. As a consequence, third parties should avoid acting in bad faith and excessive intervention in the process in order to threat parties or delay the procedure.

The CADE should act observing strict legality (Article 2 of Law 9,784/99) and follow the principles of good faith and legitimate expectations, as others settled in Article 37 of the Federal Constitution. However, it is also important to stress that public administration has a broad leeway. As consequence, the question whether a conduct is abusive or not will depend on an efficiency/opportunity analysis by the supervisory authority. In case of a claim of abuse of authority, it is important to analyse the alleged conducts under the principles and rules explained above. If the answer results in a positive conclusion, these acts should be revoked. Also, officials may be subject to sanctions in criminal, civil and administrative spheres.

5.4 Confidentiality and Publicity of the Transactional Solutions

The disclosure of transactional resolution materials held by competition authorities has recently been under the spotlight. On the one hand, these documents could greatly help cartel victims to prove the damage and the causation link when filing damage actions against cartelists. On the other hand, future cartelists could be deterred from applying for leniency since damage actions could be brought as a result of the information submitted by them. Neither the current legislation nor the case law has reached clarity as to how to deal with this clash of interests; as a result, judicial decisions are split, and some of them granted access to documents submitted by companies during the negotiated procedure; some of them denied.

The disclosure of information by competition authorities in transactional procedures can jeopardise leniency programs as a whole, as it may (1) seriously undermine incentive of the applicant due to higher risk of private actions; (2) in case of leniency, increase the disadvantage and risk liability of leniency applicants in comparison to other cartel members; (3) compromise the right against self-incrimination, which is an essential principle in Brazilian constitutional. By contrast, it also involves issues related to the right of third parties to be compensated when injured, once eventual restrictions to access of information may represent an obstacle to private enforcement.

In transactional resolutions, a final decision or agreement between the parties and the CADE is made public; confidential information is restricted to parties themselves. The advantages of a publicity policy for parties, thirds and the public in Brazil are to facilitate the control of the administrative acts and to render the principle of the access to information effective. On the other hand, publicity policy may jeopardise transactional resolutions, regarding that the disclosure of information may reduce applicants' interest in applying to such programs.

5.5 Merger Control

Remedies are possible under Brazilian merger control proceedings, being preferable than an outright prohibition if they are sufficient to eliminate the potential negative effects of a certain transaction on competition. Examples of admissible remedies in merger control proceedings are (*i*) sale of assets or a group of assets that constitutes a business activity, (*ii*) spinoff of the company, (*iii*) transfer of corporate control, (*iv*) maintenance of accounting or legal division of activities and (*v*) compulsory licensing of intellectual property rights. Parties are allowed to negotiate with the CADE if they formally submit their interest in doing so up until the deadline for their reply to the investigative body opinion that suggests either the prohibition of the proposed transaction or the imposition of remedies.

5.5.1 Negotiation of Remedies

Parties are allowed to submit modifications or changes to their transactions at any time, and it is incumbent upon them to do that, although officials may also informally suggest modifications to the deal if they believe these are necessary.

There is no difference between phase I and phase II remedy proposals, but the initiative to make a formal proposal is incumbent upon the notifying parties, which have the right to do so. The CADE may impose remedies as a condition for clearing a transaction in its final decision, although it will usually prefer to suggest these informally and work on a transactional resolution.

The CADE has full discretion to accept or reject remedy proposals made by the parties, as long as it formally justifies its position in view of the legal requirements and the public interest.

Objections are made by the CADE in a written statement, at least once (in the investigative body opinion) before a final decision is issued. Informal discussions, however, can be held—and are welcome—at any stage of the proceedings.

Although the CADE does not have the obligation of consulting third parties for the definition of remedies, it may—and has done more so recently—have informal or formal contacts with competitors, suppliers, etc. to "market test" a possible solution or alternatives.

Notifying parties also have the right to be formally heard, through briefs, studies, meetings, etc. at any time of the proceeding before a decision is issued.

Third parties—which may need to be qualified as such, at the initial part of a merger case—have rights to access files (but not to information and documents deemed to be confidential) and to submit complaints, information and commentaries that they deem relevant for the CADE's review of the case. The CADE, however, can refuse to take into consideration information or commentary that is not relevant for the investigation.

Authorities may use delays for authorisation, threat of excessive objections or even prohibition to extract a better set of remedies from the notifying parties, although this strategy is never explicitly adopted.

It is also fairly common to have third parties trying to use a pending merger case in order to protect their own commercial interests (as opposed to competition), but the CADE has been trying to limit these interventions whenever they fall outside CADE's jurisdiction.

5.5.2 Enforcement of Remedies

The enforcement of merger remedies is ensured by audits to verify if the remedies have been complied with, and, generally speaking, the burden of proof lies with the notifying parties. They should regularly provide documents to competition authorities able to prove their compliance with the agreement.

Withdrawal of authorisation is expressly provided in all merger control decisions adopted through settlements in case of non-compliance with the remedies.

Third parties that have grounds to believe that the remedies have not been or are not being complied with by the notifying parties can submit evidence in support of their point of view.

When compared to abuse of dominance cases, the most notable difference in the negotiation process with merger remedies is that merger remedies are directly negotiated with the officials responsible for issuing a decision. In addition, officials in negotiations of merger remedies tend to be more open and constructive, although procedurally there is not much difference. Rights of addressees and third parties are similar in both procedures.

5.5.3 Impact on Transactional Outcome and on Market Intervention

This is highly case specific, and so until now, it is not possible to identify *ex ante* what conditions, circumstances or conduct results from those type I and II errors.

Transactional resolutions may weaken the deterrent effects of competition law by mitigating sanctions, as a consequence of the negotiations between authorities and parties. Further, the strategy of competition authorities to increase success of transactional resolutions may lead to a less harsh punishment than the competition law normally provides.

The higher the number of transactional resolutions, the lower the number of Court challenges; as a result, Courts do not have the opportunity to issue precedents guiding the interpretation of the law for both the parties and the CADE. Such a reduction on the creation of precedents tends to perpetuate the CADE's view of the applicable rules, increasing the unpredictability of the competition law, both on the merits and regarding fines, a tendency which is somewhat worsened by the ample discretion granted by the law to the CADE.

5.6 Conclusion and Recommendations

The fight against cartels, including international cartels, became a reality during the last 10 years, with a number of investigations initiated by means of leniency agreements. In practice, companies that consider applying for immunity in mature jurisdictions have been gradually including Brazil in their "check-list", as the threat of high fines and the risk of criminal prosecution of individuals have become real.

As the perception of actual enforcement increases, the number of defendants that consider entering into settlement agreements has started to grow to some extent, especially after the new CADE enacted a regulation in early 2013 aiming to bring more predictability to settlement negotiations.

Transaction resolutions have developed substantially over the past few years, thus allowing the CADE to effectively bring the Brazilian business community's attention to its records. The changes made overtime to the law and the CADE's efforts to focus on anticompetitive conduct investigations and competition advocacy are important, as this has been leading the business community to devote more attention to antitrust matters.

The long cartel investigating proceedings in Brazil,[8] coupled with the possibility of having the Court reverse the decision taken by CADE, still leads some parties to litigate rather than to settle. Aiming to shorten the investigations and make their results more effective, the CADE has been working to develop an appropriate settlement procedure that can become a win-win option for both the defendants and the CADE.

Mature authorities have already stated that increasing awareness on deterrence and punishment fosters leniency programs and, consequently, competition. For these reasons, the continuity of the anti-cartel enforcement strategy, coupled with the ability to maintain the level of enforcement without having decisions overruled by the judiciary, is the key element to maintaining and increasing the perception of an effective antitrust enforcement. A clear, transparent and predictable settlement policy is fully desirable to foster settlements rather than defences and disputes that may result in long-standing investigations in administrative and judicial spheres. For such purpose, however, it is crucial that enforcement and deterrence be credible and effective.

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[8] Cartel investigations in Brazil may still last 4 to 6 years, if not more, before the administrative authority, plus 5 to 7 years before the Courts.

Czech Republic

6

Jiří Kindl and Michal Petr

6.1 Introduction

Transactional resolutions of competition proceedings before the Czech Office for Protection of Competition (in Czech: Úřad pro ochranu hospodářské soutěže, hereinafter the "Office") are quite common. The introduction of transactional institutions has had quite an interesting development in the Czech jurisdiction. After the Velvet Revolution with the advent of new competition law in the Czech Republic (at that time still part of the Czech and Slovak Federal Republic) which was enacted as Act No. 63/1991 Coll., on the protection of competition, no transactional resolutions were contemplated in the proceedings before the Office (or the respective ministry which fulfilled its role at that time). Gradually, however, the Office found its way (despite the lack of statutory provisions to that effect) to the application of some sort of transactional resolutions in its decision-making practice. Throughout the application of Act No. 63/1991 Coll., there were no formal procedures that might have led to a transactional resolution of a case. In practice, however, the Office used from time to time a form of "competition advocacy" whereby it advised (rather informally) concerned parties of objections it had towards certain practices and asked them to change these practices. If they did so, the Office either did not commence proceedings or in the commenced proceedings refrained from imposing any penalty or imposed only a 'symbolic' or nominal penalty. In addition, in the so-called exemption proceedings regarding potentially restrictive agreements the Office imposed (after rather informal negotiations with

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the parties) certain conditions and/or commitments to be complied with in order for the respective agreement to benefit from the issued individual exemption. There were, however, neither settlements nor leniency proceedings at that time. There were no commitment decisions within the control of concentration procedures either.

A new statute was enacted in 2001 in order to enhance compatibility with EU law. The respective statute was Act No. 143/2001 Coll., on protection of competition, which after several amendments still applies to these days (hereinafter "2001 Competition Act"). Initially, the situation as regards transactional institutes remained much similar to what it was under Act No. 63/1991 Coll. Subsequently, the Office (and to a certain extent also the legislature) started to formalise the procedures leading to transactional resolutions of cases. As regards restrictive practices, the Office issued soft law leniency guidance in mid-2001. That leniency programme was, however, applied only occasionally and even controversially in a case of vertical agreements.[1] That notice was subsequently replaced by a new (more EU-like) notice in June 2007, which was then applied in a number of cases.[2] Currently, there is a new Leniency Notice of November 2013 (hereinafter the "Leniency Notice") and there is a legislative basis for the leniency in Section 22ba para. 1 of the 2001 Competition Act (as of 1 December 2012).[3]

The Office also started to apply the so-called settlement procedure as of 2008. At the beginning, it did so without any legislative guidance. Conditions for the application of that procedure were spelled out only in the Office's decisions and later on in its soft law documents. The approach towards settlement procedures has changed throughout the time as it can be shown on various cases.[4] Currently, there is a new Notice on the application of settlement procedures of November 2013 (hereinafter the "Settlement Notice") and there is a legislative basis for settlements in Section 22ba para. 2 of the 2001 Competition Act (as of 1 December 2012).

In the wake of the Czech Republic's entry into the EU (and concurrent entry into force of Regulation 1/2003), the exemption proceedings were no longer available under the 2001 Competition Act, but in its practice the Office was from time to time ready to issue informal comfort letters which contained conditions which if

[1] See Office's decision in case Ref. No. S 106/04-4340/04-ORP of 12 July 2004 (*Pinelli/ATEA*).

[2] Pursuant to Office's data, the Office received two leniency applications in 2010, four in 2011 and three in 2012 Office's Information Paper No. 3/2013 available also in English at http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html (28 April 2014), p. 7.

[3] For an overview of the leniency regime applied by the Office, see also Office's Information Paper No. 3/2013 available also in English at http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html (28 April 2014). In this regard, see also Office's Information Paper No. 3/2007 and No. 1/2004 with respect to previous leniency programmes (available only in Czech).

[4] For the development of settlement procedure, see, e.g., Michal Petr. Narovnání v českém soutěžním právu [Settlement in Czech competition law]. Antitrust, 2011, No. 4, p. 176. For two early cases, see also Jiří Kindl. The Czech Office for Protection of Competition implements informal settlement procedures (Kofola—Albatros), 20 January 2009, e-Competitions Bulletin, January 2009, Art. N° 25768. For the current status and some selected cases, see Office's Information Paper No. 3/2013 available also in English at http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html (28 April 2014).

complied with should in the opinion of the Office have been sufficient for it not to commence proceedings with respect to the agreement(s) and/or practices in question.

Under the 2001 Competition Act, the possibility of commitment decisions was also introduced with respect to both restrictive agreements and the abuse of dominant position cases.

As far as the control of concentrations is concerned, the 2001 Competition Act also allowed the Office to issue some measures (remedies) and/or commitments as conditions for approval of concentrations, and the Office used that power in a number of cases.

Transactional resolutions outside competition proceedings are quite rare in the Czech Republic. It is, however, worthy to note that there are some institutions which might be considered to be similar to transactional institutions applicable in competition proceedings. Firstly, Act No. 395/2009 Coll., on significant market power in sales of agricultural and food products and its abuse, contains provisions on commitments which are practically identical to those contained in 2001 Competition Act.[5] That Act, in addition, directly provides that provisions of the 2001 Competition Act shall be applied *mutatis mutandis* to proceedings under Act No. 395/2009 Coll.[6] Secondly, the Czech Code of Criminal Procedure[7] provides for conditional suspension of criminal prosecution and the so-called settlement which represent alternatives to traditional ways of criminal prosecution and punishment.[8] It cannot be, however, said that these institutions would influence the application of transactional institutions in competition proceedings. With respect to Act No. 395/2009 Coll., it is the other way round, i.e., the 2001 Competition Act influenced the other Act. As regards criminal procedure, the respective legal provisions do not influence each other.

The arguments put forward in favour of the transactional proceedings concentrate mainly on the efficiency of administrative proceedings and, in case of leniency, on its usefulness as an investigative tool. The arguments against the use of transactional resolutions were not put strongly in the Czech Republic, and rather it was often pointed out that the Office's practice enabling such resolutions might have seemed controversial given the lack of legislative basis for that course of action and the general principles of *ex officio* investigation and non-discrimination. The lack of a legislative basis was remedied by Amendment No. 360/2012 Coll. to the 2001 Competition Act. In any case, the fact is that the transactional procedures, if applied, shorten the duration of administrative proceedings before the Office.

[5] Section 6(2)–6(4) of Act No. 395/2009 Coll. These provisions were already applied in the Office's decision Ref.No. ÚOHS-S167/2010-13046/2011/460 of 22 August 2011 (*Ahold Czech Republic*) where the case was closed without a fine by accepting commitments offered by Ahold.

[6] Section 7 of Act No. 395/2009 Coll.

[7] Act No. 141/1961 Coll., on Criminal Judicial Proceedings (Code of Criminal Procedure), as amended.

[8] See Sections 307–308 (conditional suspension of criminal prosecution) and Sections 309–314 (settlement) of the Code of Criminal Procedure. In more detail, see, e.g., Jiří Jelínek et al. Trestní právo procesní [Law of criminal procedure]. 2nd edn. Leges, 2011, p. 704 *et seq*.

6.2 Transactional Resolution of Agreements and the Abuse of Dominance

6.2.1 Overview of Transactional Procedures

There are three types of transactional resolutions of competition proceedings under the 2001 Competition Act. These are leniency, settlement and commitment decisions. Under the current state of the law, the leniency applications and related leniency procedures are available only in respect of horizontal hard-core cartels (i.e., they are applicable neither in abuse of dominant position cases nor in cases of vertical restraints). On the other hand, settlements and commitment decisions are available for both restrictive agreements (of all types) as well as abuse of dominant position cases. In addition to the above statutorily provided for transactional resolutions, there is also an informal procedure leading to a solution of competition concerns without actually initiating formal proceedings before the Office. This informal 'competition advocacy' procedure is dealt with in the Office's soft law documents only.[9] All the aforementioned transactional resolutions will be described in turn.

6.2.1.1 Leniency

The Leniency Notice issued by the Office in November 2013 currently applies in the Czech Republic. This notice provides details regarding the leniency procedure and supplements Section 22ba of the 2001 Competition Act, which provides the legislative basis for the leniency programme. The leniency procedures in the Czech Republic are harmonised with the EU model of leniency. The Leniency Notice explicitly provides[10] that it follows the ECN Model Leniency Programme[11] and the Leniency Notice of the European Commission[12] and the Office will take the said documents and the decision-making practices that relate to them into account.[13]

Accordingly, the Czech Leniency Notice can be applied only with respect to secret horizontal agreements (secret cartels), and it recognises leniency type I and leniency type II. The first deals with an immunity from fines and the second with a decrease in the amount of fine. The immunity from fines (leniency type I) can be obtained by an undertaking which first submits to the Office evidence which the Office did not have in its possession and which will enable the Office to carry out targeted inspections (on-site investigations) or by an undertaking which is the first to provide the Office with evidence which proves the existence of the respective cartel agreement. There

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[9] At present, Office's Notice of 8 November 2013 on Alternative resolution of competition issues and on suspension of cases (hereinafter the "Alternative Resolution Notice").

[10] Leniency Notice, para. 5.

[11] ECN Model Leniency Programme (as revised in November 2012). Available at: http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf (30 April 2014).

[12] Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 08/12/2006, pp. 17–22.

[13] Office's Information Paper No. 3/2013 available also in English at http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html (28 April 2014), p. 6.

are, however, some additional conditions too: the leniency applicant must admit its participation on the respective cartel agreement, it must not have taken steps to coerce other undertakings to participate in the cartel and it must actively assist the Office in the respective administrative proceedings, namely submit to the Office all available documents and information regarding the respective cartel agreement.[14] More detailed conditions are provided for in the Leniency Notice, which, for instance, explains in more detail how the assistance to the Office in the administrative proceedings should look like.[15] For obtaining type II leniency (a decrease in fine), an undertaking needs to satisfy similar conditions as in the case of leniency type I, but the character of information and/or documents provided to the Office is different. An undertaking which wants its fine to be decreased needs to provide the Office with documents and information which have significant added evidentiary value. The reduction of a fine may amount from 20 % to 50 %, at the maximum.[16]

An application for type I leniency has to be submitted by the day in which a statement of objections has been delivered to the respective undertaking (in practice it, however, needs to be submitted much earlier). An application for type II leniency needs to be submitted within 15 days from receiving the statement of objections.[17] If such applications are lodged after the set statutory deadlines, the Office may deal with them only in cases worthy of special considering.[18] More detailed procedural rules are described in the Leniency Notice, and they generally follow the European Commission's practice, i.e., the Leniency Notice provides for a so-called marker which may reserve the place of the leniency applicant in the 'non-imposition queue' in order to allow it to gather the necessary information and evidence for submitting the 'full' leniency application.[19] Also, it is possible to communicate with the Office about the potential leniency in hypothetical terms. Nevertheless, hypothetical filings do not secure one's place in the 'queue' or "leniency race". They are meant to allow the leniency applicant to ascertain whether the evidence in its possession is sufficient for satisfying the substantive conditions for application of leniency (primarily type I leniency).[20]

[14] Section 22ba (1) letter a) of the 2001 Competition Act.

[15] See, e.g., para. 15 of the Leniency Notice.

[16] Section 22ba (1) letter b) of the 2001 Competition Act and para. 10–14 of the Leniency Notice.

[17] Section 22ba (5) of the 2001 Competition Act.

[18] Section 22ba (7) of the 2001 Competition Act.

[19] Leniency Notice, paras 30 *et seq*.

[20] Leniency Notice, paras 28–29.

6.2.1.2 Settlement

In comparison with leniency, settlement is currently meant to be used only as a tool for achieving efficiencies in administrative procedure.[21] In other words, when an undertaking admits its wrongdoing, it may save time (and costs) on the side of the Office and, hence, may merit a certain reduction in fine. The legislative basis for the settlement is provided for in Section 22ba para. 2 of the 2001 Competition Act, and it provides that the Office shall decrease the amount of fine by 20 % in case the undertaking in question admitted that it committed the respective competition law offence (entered into a restrictive agreement, abused dominant position or implemented a concentration prematurely) and the Office is of the view that the resulting sanction is sufficient taking into account the character and severity of the offence in question. The procedure leading to a potential settlement is described in the Office's soft law Settlement Notice of November 2013.

The 2001 Competition Act provides that the application for settlement has to be submitted within 15 days of receiving the statement of objections at the latest.[22] However, the efficiencies sought by the settlement may be achieved much more likely if the settlement procedure is started much earlier. For that reason, the said Settlement Notice provides for the procedure that shall be typically followed when one wants to participate in settlement. It is possible to submit the application for settlement even if the undertaking in question did not follow the soft law procedure provided for in the Settlement Notice, but in that case it may be more difficult to achieve all benefits ensuing from the settlement procedure, and, hence, there is a higher risk that the Office will use its discretion to deny the settlement.[23]

The typical settlement procedure has the following stages.[24] First, the Office asks the participant(s) whether they are interested in utilising the settlement procedure. Second, if the participant(s) are interested in the procedure (and in case of more than one participant the participants waive their right to be present at oral

[21] Prior to 2011, the Office used the 'settlement procedure' (at that time even without any legislative basis) also as a sort of 'investigative tool' which were meant to ease the position of the Office when obtaining evidence from the parties. Also at that time, the reductions in fines were substantially higher and amounted quite often to 50 % or occasionally also to 80 %. The Office also used that tool to impose measures which it would otherwise hardly issue (due to the lack of appropriate power in the 2001 Competition Act) such as an obligation to provide damages to consumers which were affected by a conduct of the dominant company which had required excessive advance payments (see Office's decision Ref.No. ÚOHS-S52/2009/DP-7933/2009/820 of 24 June 2009—RWE Transgas case). This practice was, however, subject to criticism (e.g., Michal Petr et al. Zakázané dohody a zneužívání dominantního postavení v ČR [Prohibited agreements and abuse of dominant position in the CR] C.H. Beck, Prague, 2010, pp. 442–443, or Jindřiška Munková, Jiří Kindl, Pavel Svoboda. Soutěžní právo [Competition Law] 2nd edn. C.H. Beck, Prague, 2012, p. 572) and has changed from the end of 2010 firstly in the Office's practice and later on, as of 1 December 2012, by law (see current Section 22ba para. 2 of the 2001 Competition Act and the Settlement Notice).

[22] Section 22ba (6) of the 2001 Competition Act.

[23] Settlement Notice, para. 6.

[24] For details, see Part II of the Settlement Notice.

hearings with the other participants), the Office informs the participant(s) in writing about the commencement of the settlement procedure. Third, oral hearing(s) with the participant(s) take place. Fourth, the participant(s) notify the Office that they continue to be interested in the settlement procedure. Fifth, the Office issues a brief (simplified) statement of objections. Sixth, the participant(s) formally apply for the settlement and the resulting reduction of fine. Seventh, the Office issues a brief (simplified) decision in the matter. In connection with the settlement procedure, it is stressed by the Office's officials that the Office in the course of the procedure does not 'negotiate' or 'agree' with the alleged perpetrator the solution of the case but that it rather only present its findings to the participant and the participant acknowledges them and, subsequently, may obtain settlement and the resulting reduction of a fine.[25] Even though this statement is formally correct, from a practical point of view obviously some sort of 'negotiation' with or rather 'persuading' of the Office may take place when the factual and legal assessment of the case is being formed.

The Office entertains quite a considerable margin of discretion in the course of the settlement procedure, and it may terminate the procedure at any time until the issuance of the decision without giving any reason.[26] Any participant may also terminate its participation in the settlement procedure without giving any reason but only until the formal submission of the application for settlement.[27] If there are several participants to the proceedings, all have to participate in the settlement procedure for it to take place (as otherwise the sought administrative efficiencies cannot be achieved).[28] Settlement procedure can be combined with leniency, but the reduction of fine is not cumulative but consecutive.[29]

As can be seen from the foregoing, even though the settlement procedure is similar in certain respects to the settlement procedure before the European Commission,[30] it is different in several respects. First, the amount of reduction of fine is fixed at 20 % (in comparison with 10 %). In addition, the settlement procedure is applicable not only to horizontal cartels as is the case before the Commission but to

[25] See, e.g., Office's Information Paper No. 3/2013 available also in English at http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html (28 April 2014), p. 16.

[26] Settlement Notice, para. 30.

[27] Settlement Notice, para. 29.

[28] Settlement Notice, para. 16.

[29] Settlement Notice, fn 11. The 20 % reduction is calculated after establishing the final amount of fine, i.e. also after the application of leniency (type II). In other words, the maximum reduction one can achieve when both leniency II and settlement reductions are applied is 60 % of the amount of fine established in accordance with the Office's guidelines for setting fines.

[30] See Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ L 171, 01/07/2008, pp. 3–5, and 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, 02/07/2008, pp. 1–6.

any types of restrictive agreements and abuse of dominant position cases as well (and in addition, also to ‘gun-jumping’ in case of mergers).

6.2.1.3 Commitments Decisions

The Czech 2001 Competition Act contains similar procedure regarding commitment decisions as it is provided in Article 9 of Regulation 1/2003. The principle of this alternative resolution of a competition case rests in accepting the commitments offered by the suspected perpetrator(s) and terminating the administrative proceedings without declaration of an infringement. The commitment decision may be issued in respect of both restrictive agreements and abuse of dominant position cases.[31] Not all (suspected) infringements are, however, suitable for this kind of procedure. The suitable cases are the ones when the negative effect of the respective anticompetitive conduct was not substantial and the prompt removal of the competition issue is necessary in order to prevent harm to competition and the termination of the conduct in question is not of itself sufficient for restitution of the effective competition.[32] The Office provides in its Alternative Resolution Notice that examples of cases suitable for resolution via a commitment decision include restrictive agreements by effect (as opposed to restrictive agreements by object) or exclusionary abuse of dominant position when the prompt removal of competition concerns is necessary for the efficient development of competition on the affected markets.[33]

The commitment procedure may be commenced only by the participant to the proceedings. In other words, the Office cannot formally ‘impose’ commitments upon the undertakings. From a practical point of view, the Office may of course indicate that it would consider some commitments suitable in order to terminate the proceedings. The commitments have to be offered by the undertaking subject to investigation within 15 days from receiving the statement of objections at the latest. Late submissions will be considered by the Office only in extraordinary cases that are worthy of special consideration.[34] In case there are more participants to the proceedings, all have to participate in the proposal of commitments. Once the undertaking(s) submitted the commitments, it has to stop the conduct which is subject to the complaint and proceed in accordance with the commitments (even though they have not yet been accepted by the Office).[35] Subsequently, the Office evaluates the offered commitments in order to ascertain that they are sufficient for removing competition concerns and reinstating the effective competition. If the

[31] Section 7 (2) and 11 (3) of the 2001 Competition Act.

[32] Alternative Resolution Notice, para. 29. It has been also said that the suitable cases include cases when the complained of conduct does not concern serious offences and when it is difficult to ascertain whether the conduct in question is prohibited (Michal Petr et al. Zakázané dohody a zneužívání dominantního postavení v ČR [Prohibited agreements and abuse of dominant position in the CR] C.H. Beck, Prague, 2010, p. 475).

[33] Alternative Resolution Notice, para. 30.

[34] Section 7 (3) and 11 (4) of the 2001 Competition Act.

[35] Alternative Resolution Notice, para. 28.

commitments are sufficient, the Office will terminate the proceedings and impose upon the participant(s) a duty to comply with the commitments. No finding of an infringement is made. If the commitments are not found sufficient, the Office continues in the proceedings and in the final decision it will explain why it did not consider the commitments to be sufficient.

6.2.1.4 Resolution of a Case Without Commencing Proceedings

As mentioned above, the Office in its practice also provides for less formal transactional resolution of competition cases.[36] There may be cases when the Office investigates certain practices and comes to a conclusion that competition concerns may be removed without initiating formal administrative proceedings. This ‘informal’ procedure is also addressed in the Office’s Alternative Resolution Notice. The Office provides there that from a legislative point of view, the respective course of action is based on its power not to commence administrative proceedings when there is no public interest in conducting such proceedings.[37] This may apply to cases with only a limited effect on competition. Generally speaking, this option helps the Office to prioritise cases and to concentrate only on the important ones and also saves the Office’s resources. In some cases, the lack of public interest may arise when the undertaking suspected of a competition law infringement undertakes measures that remove any concerns. Obviously, not all competition issues are suitable for being addressed in this way. The Office provides some examples of practices that may be addressed in this way. These include restrictive agreements which were not yet performed and their impact on competition would in any case be only limited, decisions by associations of undertakings with only a negligible ability to uniform behaviour of larger group of undertakings and vertical agreements with limited effect on competition (including potentially also vertical agreements containing hard-core restraints if market shares of the parties are lower than 10 %).[38]

The related procedure before the Office has the following main steps: first, the Office communicates to the suspected undertaking the subject matter of the Office’s concerns; second, the undertaking in question informs the Office within 10 days that it is going to remove the respective competition problem; third, the Office requests the undertaking to propose measures to remove the competition concerns within no later than 1 month; fourth, the undertaking proposes the measures in question; fifth, the Office evaluates the sufficiency of the measures. If the Office finds the measures sufficient, it will refrain from commencing administrative proceedings for so long as the undertaking in question fulfils the measures. No decision is being issued. The

[36] This form of alternative resolution of competition cases was much used in 2006 and 2007 when the Office used it in 17 and 13 cases, respectively. Since then, the Office has used this option on average of 5 cases a year. See Office’s Annual Report for 2012, p. 12. The respective cases include both restrictive agreements and abuses of dominant position. For some examples, see, e.g., the said Annual Report, pp. 12–14 and 16–17.

[37] Section 21 (2) of the 2001 Competition Act.

[38] Alternative Resolution Notice, para. 17.

Office only makes a written record in the file and informs the respective undertaking accordingly (if there was a complainant, the Office also informs the complainant).[39]

6.2.2 Discretion of Competition Authorities and/or Judges During Proceedings

The level of discretion on the side of the Office differs depending on the type of transactional procedures described in the preceding section. It seems that the lowest amount of discretion the Office shall have in respect of leniency proceedings, given the fact that the substantive conditions are provided quite in detail in the 2001 Competition Act itself (i.e., not only in soft law) and the fact that the general principle to apply in respect of leniency is 'first come, first serve'. Nevertheless, the application of leniency depends to a large extent on the assessment of evidence provided by the leniency applicant to the Office. This holds true with respect to both type I leniency, when the Office needs to ascertain whether the provided evidence enables it to undertake targeted inspections or whether it proves the cartel agreement, and to type II leniency, when the Office evaluates the 'added value' of the provided evidence. And yet the potential mistreatment of the evidence by the Office may be subject to judicial review, and accordingly the aggrieved leniency applicant may challenge the (ab)use of the 'discretion' of the Office in this regard. Given the wording of Section 22ba para. 1 of the 2001 Competition Act, it is obvious that the leniency applicant is entitled to receive leniency if the conditions provided in the law were complied with.

With respect to the settlement procedures, the discretion on the side of the Office is much broader. This discretion seems to be recognised by the legislature in Section 22ba para. 2 of the 2001 Competition Act, and it is much emphasised in the Settlement Notice (see above). Generally speaking, when assessing whether a case is suitable for settlement and whether the settlement will take place, the Office assesses whether the achieved savings of costs and time justify the reduction in fine. Given that, there seems to be no right to settlement on the side of the parties. As mentioned above, the Office proclaims that it may terminate the settlement procedure without giving a reason practically at any time.[40]

The discretion of the Office with respect to commitment decisions is probably somewhere in between leniency and settlement procedures. On the one hand, the statutory wording provides that the Office *decides* (i.e., not 'may decide') about termination of proceedings provided that the undertaking(s) in question proposed commitments that are sufficient for protection of competition and for removal of competition concerns (i.e., the harmful situation would be eliminated by fulfilling the commitments) and provided that the practice in question did not result in a

[39] Alternative Resolution Notice, paras 22, 23 and 25.

[40] Settlement Notice, para. 30.

substantial restriction of competition.[41] Accordingly, once these conditions are fulfilled, the Office shall issue the commitment decision and there is a corresponding right (entitlement) on the receiving end. However, on the other hand, the assessment of the respective conditions allows much discretion on the side of the Office given the relatively vague wording used in the statute. It is unlikely that judicial review courts would want to 'second-guess' the Office in its assessments provided that any refusal to accept commitments is properly explained in the final decision.

An alternative resolution of a case prior to commencing administrative proceedings is governed only by soft law and depends on many discretionary assessments by the Office.

In addition to the foregoing, it is worthy to mention that in its practice the Office must respect the legitimate expectations of the undertakings concerned and also the principle of equal treatment and non-discrimination. Legitimate expectations may arise also from the Office's soft law documents. Hence, the discretion on the side of the Office is not absolute even though it may be considerable given the relatively vague wording used in the 2001 Competition Act and the Office's soft law documents. The Office shall treat similar cases alike. In addition, the Office is required to explain (provide proper reasoning) in its decisions, e.g., why it did not accept leniency applications or a proposal of commitments, and the Office's decision may be subject to judicial review. Hence, the use of Office discretion may be subject to judicial control.

6.2.3 Nature of the Legal Act Concluding, Approving and/or Making Binding the Settlement

In the Czech Republic, all the above-mentioned formal 'transactional resolutions' are concluded by an administrative decision which is unilaterally issued by the Office. This applies to leniency, settlement, as well as commitments decisions. With respect to leniency and settlements, the operative part of the decision does not contain any specific wording that would reflect the leniency and/or settlement procedures. The application of that procedure is, however, reflected in the amount of fine which is included in the operative part of the decision. The explanation of the amount of fine (or its non-imposition in case of leniency type I) is contained in the reasoning of the Office's decision. As regards commitment decisions, the wording of commitments is included in the operative part of the Office's decision, which also includes a statement that the respective administrative proceedings are terminated.

As mentioned above, if the Office comes to a conclusion that certain competition concerns may be appropriately solved without actually initiating proceedings, it does not issue any administrative decision but only makes a written record in the file

[41] Section 7 (2) and 11 (3) of the 2001 Competition Act.

and informs the undertaking in question (via a simple letter) that it will not commence proceedings for so long as the undertaking will comply with the proposed measures (see above).

6.2.4 Legal Consequences for the Parties

Decisions of the Office taken after leniency procedure and/or settlement procedure are generally no different from 'standard' findings of infringement. Accordingly, such decisions include finding and declaration of an infringement of competition law, prohibition of the respective conduct going forward, sanction (i.e., a fine, if any) and, in addition, may occasionally contain some other measures imposed by the Office (e.g., some information duties imposed on the undertakings concerned).

Pursuant to Section 135 para. 1 of the Code of Civil Procedure,[42] a civil court is bound by the finding of the Office that an offence (i.e., the infringement of competition law) occurred and as to who has committed that offence. Accordingly, in subsequent private litigations (if any), that issue is deemed conclusively proved before the civil court. The fact that there was a leniency application and/or settlement in the proceedings before the Office is not relevant in this regard.

On the other hand, as already mentioned above, commitment decisions contain no declaration of infringement. Accordingly, the respective issue (whether a violation of competition law occurred or not) would need to be ascertained before the civil court. The same is obviously the case also when the Office solves a certain case without actually commencing administrative proceedings. The Office is aware that its commitment decisions or non-initiation of proceedings may adversely affect third parties which claim they were damaged by the anticompetitive conduct because they would need to prove before a civil court that an infringement of competition law occurred on their own.[43] Nevertheless, this is a 'normal' side effect of these types of 'transactional resolution' of competition cases. A civil court can establish all the issues on its own.[44]

If an undertaking violates commitments which were made binding upon it, the Office may impose a penalty upon it in the amount of up to 10 % of turnover for the last accounting period.[45] In addition, the Office may re-commence proceedings which were terminated on the account of the accepted commitments and proceed within them further towards an imposition of fine.[46]

[42] Act No. 99/1963 Coll., as amended.

[43] Alternative Resolution Notice, para. 45.

[44] For more details concerning private competition litigation in the Czech Republic, see, e.g., Jiří Kindl, Michal Petr. Czech Republic. In: Gordon Blanke, Renato Nazzini (eds). International Competition Litigation. A Multi-jurisdictional Handbook. Wolters Kluwer, 2012.

[45] Section 22a (1) letter e) and Section 22a (2) of the 2001 Competition Act.

[46] Section 7 (4) letter b) and Section 11 (5) letter b) of the 2001 Competition Act.

6.3 Fundamental and Procedural Rights of the Parties

In the Czech Republic, fundamental procedural rights stem from three different legal sources. On national level, they are enshrined in the Charter of Fundamental Rights and Freedoms (hereinafter the “Charter CZ”),[47] which is a part of the Czech constitutional legal order. The Constitutional Court (hereinafter the “CC”) is ultimately responsible for interpreting it. Charter CZ is inspired by the European Convention on Human Rights (hereinafter the “ECHR”), which can be directly relied on by parties to the proceedings. The Czech Republic is subjected to the jurisdiction of the European Court of Human Rights (hereinafter the “ECtHR”).

Being a member of the European Union, public authorities and courts also need to observe the principles of the EU law and the fundamental rights guaranteed by the Charter of Fundamental Rights of the EU (hereinafter the “Charter EU”) when applying EU law. The Office is empowered to apply EU competition law, and while doing so, it is bound by the Charter EU and the jurisprudence of the Court of Justice of the EU (hereinafter the “CJEU”). Czech courts, including the Supreme Administrative Court (hereinafter the “SAC”), however demand that the Office interprets the Czech law in line with the EU one, and the Office is thus bound to respect the fundamental procedural rights guaranteed on the EU level, even in cases where only the Czech competition law is applied.[48]

In the Czech constitutional order, procedural rights are particularly strongly protected in “criminal” proceedings.[49] The interpretation of this notion is, however, broad, and similarly to the rights guaranteed by the ECHR,[50] these rights do also apply to proceedings concerning other ‘penal administrative’ infringements,[51] including the enforcement of competition law.

Enforcement of competition law is generally governed by the Administrative Proceedings Code,[52] which applies to all proceedings of Czech administrative authorities, with several specific provisions provided for in the 2001 Competition Act.

6.3.1 Right Against Self-Incrimination and Presumption of Innocence

The right against self-incrimination is not specifically mentioned in the Czech constitutional order. It is nonetheless held to be part of it.[53] The same applies to

[47] Constitutional Act No. 2/1993 Coll., Charter of Fundamental Rights and Freedoms of the Czech Republic, as amended.

[48] SAC, judgment Ref. No. 5 Afs 95/2007-353 of 29 May 2009 (*BILLA—Meinl I.*)

[49] Art. 37 *et seq*., Charter CZ.

[50] ECtHR, judgment of 23 November 2006, application No. 73053/01 (*Jussila v. Finland*).

[51] SAC, judgment Ref. No. 6 A 126/2002-27 of 27 October 2004.

[52] Act. No. 500/2004 Coll., Administrative Proceedings Code, as amended.

[53] CC, ruling Ref. No. I. US 636/05 of 21 August 2006.

the ECHR[54] and the Charter EU.[55] In the Charter CZ, it is explicitly mentioned that an accused has the right to refuse to give testimony.[56]

The requirements concerning privilege against self-incrimination seem to differ in the jurisprudence of the ECtHR and CJEU. It is not within the scope of this paper to discuss these differences; however, it appears to be the case that while the ECtHR gives the accused an absolute right to remain silent,[57] including as regards questions relating to facts,[58] the CJEU—specifically with respect to antitrust proceedings—proclaims that the undertakings investigated for possible antitrust infringements are obliged to provide answers to the questions on facts and to submit pre-existing documents even of incriminatory nature.[59] It might be, therefore, argued that the (general) ECtHR's case law on privilege against self-incrimination is significantly more stringent than the CJEU's (specific) jurisprudence on this question in antitrust proceedings. Even though this divergence may be caused by the fact that the ECtHR's judgments relate to "hard core" criminal proceedings, where the fair trial guarantees need to be applied in their full stringency,[60] whereas the CJEU's jurisprudence is antitrust related,[61] the national institutions applying competition law—bound both by the ECHR and the Charter EU—find themselves in a difficult position when attempting to reconcile these differences.

Claims by parties to the proceedings that they are not obliged to submit certain information due to the privilege against self-incrimination are relatively common in the Czech Republic. In a recent decision, the Regional Court in Brno (hereinafter the "Regional Court"), which reviews decisions of the Office, expressed for the first time its understanding of this issue.[62] The judgment was in principle confirmed by the SAC (judgment Ref. No. 8 Afs 25/2012-351 of 29 January 2015).

In this case, the Office invited one of the parties to the cartel proceedings (a suspected cartelist) to submit certain documents. As in any other similar requests, the Office informed the undertaking concerned that it is under a legal obligation to provide the information and that its failure to do so might result in imposition of a fine.[63]

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[54] E.g., ECtHR, judgment of 17 December 1996, application no. 19187/91 (*Saunders v. the United Kingdom*).

[55] E.g., CJEU, case 374/87 *Orkem v. Commission* [1989] ECR 3283.

[56] Arts. 37 (1) and 39 (4) Charter CZ.

[57] ECtHR, judgment of 17 December 1996, application no. 19187/91 (*Saunders v. the United Kingdom*), par. 69.

[58] ECtHR, judgment of 17 December 1996, application no. 19187/91 (*Saunders v. the United Kingdom*), par. 71.

[59] CJEU, case 374/87 *Orkem v. Commission* [1989] ECR 3283, par. 34 and 35.

[60] ECtHR, judgment of 23 November 2006, application no. 73053/01 (*Jussila v. Finland*), par. 43.

[61] See, e.g., *Wouter Wils*. Self-incrimination in EC antitrust enforcement: a legal and economic analysis. [2003] 4 *World Competition* 567.

[62] Regional Court, judgment Ref. No. 62 Af 75/2010-318 of 23 February 2012 (*Cartel CRT*).

[63] Sections 21e and 22c of the 2001 Competition Act.

The undertaking—after having repeatedly refused to do so—finally submitted the documents, but after the Office had issued its final decision finding a cartel, it appealed the decision (submitted a judicial review claim) to the Regional Court, claiming among others that its right not to incriminate oneself was breached. The court, however, rejected the appeal in its entirety.[64]

The court recalled the ECtHR's jurisprudence and admitted that even the CC had opined that even though the accused have to allow the evidence to be taken, they are not under any obligation to actively participate in the process.[65] The Regional Court than summarised the CJEU's case law and concluded that to grant the parties to the antitrust proceedings an absolute right to remain silent would go beyond what is necessary to guarantee a fair trial; it held that

> the privilege against self-incrimination is not violated if a competition authority requires certain materials or information, unless the undertaking is coerced to provide answers that would amount to accepting it breached the law, to provide answers other than those concerning solely the facts or to submit other documents than those already in existence when they were requested.[66]

The Regional Court thus held that the Office is allowed to request pre-existing documents from the undertakings suspected of having infringed competition law and that it can pose to such undertakings factual questions, unless answering them would amount to an admission of guilt. That approach is in line with the CJEU's case law. Unfortunately, even though the Regional Court recalled the ECtHR's jurisprudence (and that of the CC as well), it did not substantiate why their more stringent requirements were not applicable in the respective case.

The Office takes this judgment as an acknowledgement of its current practice. It requires the undertakings to provide it with answers to questions of facts and to submit pre-existing documents in their possession. Even though the extent to which the undertakings need to comply with such requests is disputed in several ongoing investigations, there has not been any further antitrust-related case law dealing with that issue so far.

There is no specific case law concerning transactional resolutions either. Despite the above-mentioned fact that the parties to the proceedings frequently claim a right not to incriminate themselves during proceedings, once the case is closed by adopting a commitment or settlement decision, they have never disputed the preceding process.

The commitment decisions probably do not raise any specific concerns *vis-à-vis* self-incrimination since the undertakings concerned do not have to plead guilty. The case is closed without finding an infringement.[67]

[64] Regional Court, judgment Ref. No. 62 Af 75/2010-318 of 23 February 2012 (*Cartel CRT*).

[65] CC, opinion Ref. No. Pl. US 30/10 of 30 November 2010.

[66] Translated from Czech by the author.

[67] Sections 7 (2) and 11 (3) of the 2001 Competition Act.

Conversely, concerning settlement decisions, the undertakings need to confirm that they committed an infringement, as described by the Office in the statement of objections.[68] Thus, in order to benefit from the settlement procedure, the parties cannot exercise their right not to incriminate themselves and need to plead guilty. At the same time, it might be argued that their procedural rights are not compromised because the settlement procedure is initiated by the Office, and this happens generally only in the case when the investigation is more-or-less finished and when the Office gathered sufficient amount of evidence to present its case. The settlement, therefore, does not influence the extent of the infringement, but solely the amount of fine. It also ought to be mentioned that the undertakings do not have to settle the case; it is only their right to do so after they had acquainted themselves with the statement of objections. There has not been any relevant discussion on this topic in the Czech Republic; the settlements are, however, widely considered to be a legitimate resolution of a case.

As far as leniency is concerned, applicants need to admit that they participated in the cartel at hand.[69] Unlike settlements, leniency applications are mostly submitted at the beginning of the investigation, but similarly to settlements, it is only a right of the undertakings to come forward with the leniency application; they are not in any way obliged to do so. At the same time, the admission of guilt does not result into a penalty if the full immunity is granted (leniency type I). The authors are not aware of any relevant discussion concerning the relationship between the leniency programme and the privilege against self-incrimination in the Czech Republic. Concerning the case law, the Regional Court held that a decision of the Office may be based solely on the leniency application and its accompanying documents which was confirmed by the SAC.[70] The Regional Court thus acknowledged that a leniency application may serve as a valid source of evidence against the applicant, as well as the other cartelists.

The presumption of innocence is explicitly mentioned in the Charter CZ. Its text refers to criminal proceedings, guaranteeing the presumption of innocence to anyone accused of a crime until his guilt is declared in a court's final judgment of conviction.[71] It is similarly enshrined in the Charter EU[72] and the ECHR.[73] This principle applies also to the proceedings before the Office, where the parties to the proceedings are deemed not guilty until the final decision finding an infringement is issued.

In the Czech competition case law, the claims concerning presumption of innocence are rather rare. They were mostly associated with the undertakings'

[68] Section 22ba (2) of the 2001 Competition Act.

[69] Section 22ba (1) of the 2001 Competition Act.

[70] Regional Court in Brno, judgment Ref. No. 62 Af 75/2010-318 of 23 February 2012 (*CRT Cartel*), SAC, judgment Ref. No. 8 Afs 25/2012-351 of 29 January 2015.

[71] Art. 40 (2) Charter CZ.

[72] Art. 48 (1) Charter EU.

[73] Art. 6 (2) ECHR.

complaints that the Office informed the public about its proceedings, which might have damaged their goodwill. In one such case, the SAC confirmed, *inter alia*, that the presumption of innocence was not violated when the Office mentioned in an interview with one of its representatives that it is investigating certain undertaking.[74]

The authors are not aware of any relevant discussions in the Czech Republic concerning the relationship between the presumption of innocence and transactional resolutions in antitrust cases.

6.3.2 Right of the Parties to Know the Case Against Them (Statement of Objections)

Disputes concerning the amount of information that the parties to the proceedings have the right to be granted access to file emerge frequently in proceedings before the Office. Affected parties often complain about having only limited access to the file. The extent of the information which undertakings are granted access to file does not significantly differ depending on the nature of antitrust proceedings (with the exception of leniency applications, which are accessible only after the statement of objections has been issued). All the parties to the proceedings have full access to the file. A statement of objections is produced in all types of proceedings, and the possibility to conduct oral hearings is not limited to a particular stage of the proceedings.

In the context of the Czech legal order, a transactional resolution of a case does not have any direct impact on information the parties to the proceedings receive, with the exception that in case of settlement procedure the Office may (if the respective conditions are fulfilled) issue only a brief statement of objections (see below).

The statement of objections was only introduced into the Czech competition law in 2009.[75] Before that, parties to the proceedings sometimes claimed that they had the right to receive a similar document. Courts, however, rejected such claims, stating that the Office did not have such a duty.[76]

In the statement of objections, the Office informs the parties to the proceedings about the facts of the case, principal evidence supporting these findings and legal qualification thereof[77]; also, the anticipated amount of fine needs to be indicated.[78] After the statement of objections, the parties to the proceedings are awarded access to all the evidence (including the leniency documentation, see below) and are awarded at least 15 days to express their observations and suggest further evidence.

[74] SAC, judgment Ref. No. 7 Afs 86/2007-107 of 31 October 2008 (*Česká lékárnická komora*).

[75] Act. No. 155/2009 Coll., on the amendment of the Act on the protection of competition.

[76] E.g., SAC, judgment Ref. No. 5 Afs 7/2011-619 of 29. 3. 2012 (*Bakeries Cartel II.*).

[77] Section 7 (3) of the 2001 Competition Act.

[78] Section 21b of the 2001 Competition Act.

Even though the parties to the proceedings frequently claim that the statement of objections is not sufficiently detailed, the court has not yet annulled any Office's decision due to this reason. A statement of objections is issued in "normal" as well as transactional procedures. In the case of settlement procedure, however, the Office issues only a simplified version.[79] Apart from legal qualification and indication of fine, it includes only the description of the basic facts of the case and of the principal evidence supporting it. If the parties to the proceedings are not willing to settle the case after having received the simplified statement of objections, they may abandon the settlement procedure.[80] In such a case, a complete statement of objections would be issued.

6.3.3 Right To Be Heard and Access to File

It is possible to distinguish between two formal stages of an investigation of any particular case. Before the formal proceedings are initiated, the Office is empowered to carry out a limited investigation, on the basis of which it will decide whether to open formal proceedings.[81]

During the preliminary investigation, the undertakings concerned do not enjoy to the full extent the rights of the parties to the proceedings. In particular, they are not entitled to access the file unless they can prove their legal interest or any other serious reason to access the file, under condition that the rights of other persons concerned or the public interest would not be prejudiced.[82] The Office's practice is rather restrictive, and it only rarely enables the access to file before formal proceedings have been initiated.

On the other hand, in the course of the formal proceedings, the participants thereto and their legal representatives are without further limitations allowed to inspect the files.[83] The files may thus be inspected from the first day of the proceedings going forward. There are, however, certain limitations to that right.

Firstly, parts of the file containing classified information or facts subject to the duty of non-disclosure, imposed or recognised by law, are excluded from the inspection.[84] Apart from that, the 2001 Competition Act stipulates further limitations concerning business secrets[85] and the materials relating to the leniency programme.

[79] Para. 23 of the Settlement Notice.

[80] Para. 29 of the Settlement Notice.

[81] SAC, judgment Ref. No. 5 Aps 4/2011-326 of 22 September 2011 (*Telefónica*).

[82] Section 38 (2) of the Administrative Proceedings Code.

[83] Section 38 (1) of the Administrative Proceedings Code.

[84] Section 38 (6) of the Administrative Proceedings Code. Such information is defined in Act No. 412/2005 Coll., on the protection of classified information and security qualifications, as amended.

[85] The same rules that apply to business secrets also apply to banking and similar secrets protected by law; the Office has, however, so far only dealt with business secrets.

As far as business secrets are concerned,[86] the parts of file documentation containing business secrets are excluded from the inspection. The file nonetheless needs to contain documents from which the business secrets were deleted or a comprehensible summary of the information, omitting the business secret.[87] Such non-confidential documents need to be provided by those who claim the right to the business secret.[88]

This limitation to the right to access the file has been repeatedly challenged. The CC, however, confirmed that as long as the Office sufficiently substantiates the reasoning of its decision, the right to a fair trial is not violated.[89] There have not been many cases in which the court would annul the Office's decision due to access to file violations. On one instance, the Office addressed several telecom operators in order to establish the market share of the undertaking concerned. The answers of the operators were excluded from the file inspection, and only the final outcome—the market share of the undertaking—was mentioned. The SAC decided that under those conditions, where the party to the proceedings was not aware of the criteria determining which operators would be addressed or of the algorithm employed to determine the market share, the undertaking concerned was not able to exercise its right to defence and the Office's decision was annulled.[90]

Concerning the leniency programme, a specific regulation was adopted only in 2012.[91] Under the Competition Act currently in force, the leniency applications, as well as the documents attached to it, are not part of the files until the statement of objections is issued. Thereafter, these documents would be included in the files and may be accessed, but it is not possible to make copies of them.[92] There has not been yet any court judgment on this procedure and the respective statutory provisions.

The Office prevented the parties to the proceedings from inspecting the information concerning leniency applications even prior to this specific legislation. Despite the lack of explicit legal basis, the Regional Court confirmed that the Office was right to deny the participants the right to inspect the leniency documents before the issuance of the statement of objections.[93] The SAC confirmed this position.

Concerning the right to be heard, Czech administrative law does not provide for any "state of play meetings" or "hearing officers", as is the case under the EU law. The Administrative Proceedings Code anticipates oral hearings; they are, however,

[86] Section 504 of Act. No. 89/2012 Coll., Civil Code.

[87] Section 21c (1) of the 2001 Competition Act.

[88] Section 21c (2) of the 2001 Competition Act.

[89] CC, Ruling Ref. No. II. ÚS 192/05 of 11 July 2007 (*Telefónica*).

[90] SAC, judgment Ref. No. 9 Afs 59/2011-644 of 28 March 2012 (*Mobile Operators: T-Mobile III.*).

[91] Act No. 360/2012 Coll., on the amendment of the Act on the protection of competition.

[92] Section 21c (3), (4) of the 2001 Competition Act.

[93] Regional Court in Brno, judgment Ref. No. 62 Af 75/2010-318 of 23 February 2012 *(CRT Cartel)*.

not meant primarily to be a forum to discuss the case, but rather a tool to gather evidence. As the Regional Court observed with respect to the second instance proceedings, where the decision is taken on the basis of suggestion of the "appellate committee" (see below):

> if the proposed oral hearing was meant to [. . .] provide a possibility to challenge the proposal of the appellate committee [. . .], there is no reason to summon oral hearings for that purpose in this case, as the claimants were able to present their opinions in written observations and it was a duty of the [Office] to respond to these not in course of a "discussion" during oral hearing, but in a final decision on the merits.[94]

In the Office's practice, oral hearings are thus not performed primarily in order to enable the undertakings concerned to exercise their right to be heard, but rather to gather evidence.

The only exception relates to settlement procedures with more parties to the proceedings. Normally, all the parties may attend the oral hearings. In the course of settlement procedures, the Office, however, wishes to discuss the case individually with every participant, without the presence of the others. All the participants to the settlement procedure are, therefore, invited to waive their right to take part in the oral hearing concerning the settlement procedure, where the settlement would be discussed with the other parties.[95]

6.3.4 Right to an Equal Treatment

The right to an equal treatment is explicitly guaranteed by the Charter CZ,[96] as well as the Administrative Proceedings Code.[97]

In the Office's practice, claims concerning unequal treatment are rare. The authors are aware of only one judgment in which the court decided that the right to an equal treatment was violated.[98] Despite that finding, the court did not annul the Office's decision due to that reason. The case concerned a cartel investigation with three parties to the proceedings, two of them represented by the same lawyer. When the Office set a deadline for the parties to express their views to the evidence gathered,[99] it decided to award 5 working days for one of the participants and 10 for the other two. Thus, technically speaking, the lawyer of the two parties had 5 days

[94] Regional Court in Brno, judgment Ref. No. 62 Ca 37/2009-680 of 21 April 2011 (*České dráhy*) (translated from Czech by the author). The judgment is currently under review before the SAC.

[95] Paras. 16 and 19 *et seq*. of the Settlement Notice.

[96] Art. 37 (3) Charter CZ.

[97] Section 7 of the Administrative Proceedings Code.

[98] Regional Court in Brno, judgment Ref. No. 62 Af 71/2012-831 of 20. 9. 2012 *(Bakeries Cartel III.)*.

[99] In this case, the statement of objections was not issued because the proceedings started before it was enshrined in the 2001 Competition Act.

for each of the parties, but in fact, the deadline for each of these parties was 10 working days, but only 5 for the first one. Even though the Regional Court found that the first participant was not treated equally, it did not conclude that her right to a fair trial was significantly breached, as she was not able to demonstrate that she was not able to prepare a proper position document.

Transactional resolution of antitrust cases has only a limited direct impact on equal treatment of the parties. In case of commitments, all the participants need to be involved.[100] The same is the case with respect to settlements as currently contemplated.[101]

6.3.5 Right to an Impartial Judge

The Office adopts decisions on two levels. The first-instance decision is effectively adopted by the vice chairman of the Office, responsible for enforcement of competition law—both the investigative and decision-making phases. Such a decision may be appealed to the chairman of the Office.

The chairman is not directly linked to the investigation or the first-instance decision-making. The chairman's decision is based on a recommendation of the "appellate committee", a group of experts from both within the Office (but not those involved previously in the same case) and from other institutions, both lawyers and economists. The chairman is solely responsible for the second-instance decision and is not bound by the recommendation of the committee.[102]

The chairman's decision is final and cannot be further challenged within the Office; it may, however, be appealed to (subjected to judicial review by) a court.

On several occasions, the impartiality of the Office's chairman has been challenged. A review of the chairman's impartiality is, however, complicated by the fact that the provisions of the Administrative Proceedings Code regarding challenge on the grounds of partiality do not apply to him (there is no other person or body that could substitute him).[103] The CC, however, ruled that despite these provisions, claims concerning the alleged partiality of the Office's chairman need to be reviewed in a similar way as claims concerning any other officials. The difference is that such review may be undertaken only by a judicial review court (not the Office itself).[104]

Commitment and settlement decisions are as a matter of principle not appealed to courts.

[100] Section 7 (2) and 11 (3) of the 2001 Competition Act.

[101] Office's Information Paper No. 3/2013 available also in English at http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html (28 April 2014), p. 16.

[102] Section 152 of the Administrative Proceedings Code.

[103] Section 14 (6) of the Administrative Proceedings Code. The impartiality rules similarly do not apply to top representatives of other similar institutions as the Office.

[104] CC, ruling Ref. No. Pl. ÚS 30/09 of 2 April 2013 (*Dopravní podnik Ústeckého kraje*).

6.3.6 Right to Trial

The chairman's decision is final and cannot be further challenged within the Office; it may be, however, appealed to (a judicial review claim may be submitted to) a court. Such claim (appeal) may be brought only against the chairman's decisions, i.e., if the first-instance decision was not challenged, it cannot be reviewed by a court.[105] The Office's decisions are reviewed by the Regional Court in Brno in full jurisdictions; questions of both fact and law may be disputed, as well as the amount of fine. The court may confirm the Office's decision or annul it; it may also reduce the fine.[106] Unless a settlement is reached or commitments are accepted, the vast majority of the Office's decisions are appealed. The Regional Court's judgment may further be appealed to the SAC by the so-called cassation appeal. Its review is, however, limited to questions of law and procedure.[107]

As a matter of principle, every decision of the Office may be challenged by the parties. They cannot waive the right to the appeal prior to the issuance of the decision. At the same time, it is highly improbable that the parties would challenge a settlement decision, based on their consent to the facts, legal qualification and the amount of fine, or a commitment decision, making binding the commitments that the parties themselves proposed. In the Office's experience, those types of decisions have never been challenged. As far as not-settled leniency cases are concerned, the Office's decision is usually challenged by the participants other than the leniency applicant(s). Should the court find that there is a reason to change or annul a decision, such a judgment would apply to those who have not appealed as well since the decision would be changed or annulled in its entirety.

6.3.7 *Ne bis in Idem*

The *ne bis in idem* principle is enshrined in the Charter CZ, under which *no one may be criminally prosecuted for an act for which she has already been finally convicted or acquitted of the charges*.[108] This principle applies to antitrust proceedings as well.[109]

Any decision of the Office, when confirmed by the Chairman or when not appealed to him, is deemed to be final, and the *ne bis in idem* principle applies to it. The case cannot be reopened unless the decision was annulled by the court or unless there were specific reasons to reopen the case expressly provided for in the Administrative Proceedings Code.[110]

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[105] Section 68 of Act No. 150/2002 Coll., Code of Administrative Justice, as amended.

[106] Section 78 of the Code of Administrative Justice.

[107] Section 103 of the Code of Administrative Justice.

[108] Art. 40 (5) Charter CZ.

[109] SAC, judgment Ref. No. 5 Afs 9/2008-328 of 31 October 2008 (*RWE Transgas I.*).

[110] The proceedings may be reopened if new facts emerge within 3 years after the decision was issued (Art. 100 *et seq.* of the Administrative Proceedings Code) or if it comes out within a year that the decision was illegal (Art. 94 *et seq.* of the Administrative Proceedings Code).

In settlement and leniency cases, "standard" decisions finding an infringement are issued, and the *ne bis in idem* principle thus applies as in other infringement cases. Conversely, commitment decisions do not declare that there was an infringement; the proceedings are merely stopped provided that the commitments would be fulfilled.[111] If the commitments are not fulfilled, the parties to the proceedings may be imposed a fine[112] and the case may be reopened.[113] A "standard" decision finding an infringement and awarding fines may be issued in such reopened proceedings. In the Office's experience, the commitments have always been fulfilled and no case has been so reopened yet.

6.4 Rights of Third Parties

In the Czech Republic, the parties to the proceedings concerning anticompetitive agreements or abuse of dominant position are only those allegedly involved in the conduct under review,[114] i. e. the parties to an agreement or the dominant. These parties enjoy all the procedural rights described above.

On the other hand, third parties such as complainants, competitors or those harmed by an anticompetitive conduct cannot become parties to the proceedings and do not enjoy any specific procedural rights; neither can they become parties to the court proceedings reviewing the Office's decisions.[115]

6.4.1 Right To Be Heard and Access to File

Third parties (i.e., other than the parties to the proceedings themselves) may be granted access to file only if they can substantiate their legal interest or other compelling reasons to do so and if the interests of the parties to the proceedings, other persons or public interest would not be jeopardised.[116] In the past, the courts have stated that such an interest may be, for example, the fact that a third party is involved in a private litigation

[111] Section 7 (2) and 11 (3) of the 2001 Competition Act.

[112] Section 22a (1) (e) of the 2001 Competition Act.

[113] Section 7 (4) and Sec. 11 (5) of the 2001 Competition Act.

[114] Section 21a of the 2001 Competition Act.

[115] E.g., SAC, judgment Ref. No. 1 Afs 76/2008-246 of 29 May 2008 (*Ústecký kraj*), where a party allegedly harmed by an abuse of dominance attempted to join the court proceedings. Similarly in merger review cases, parties raising complaints against the merger are not parties to the proceedings. The Regional Court, however, ruled that they may file an appeal against the Office's decision to its chairman. See Regional Court, judgment Ref. No. 62 Af 55/2011-174 of 2 July 2013 (*Litvínovská uhlená*). The SAC did not share this view and cancelled the regional court judgment (Ref. No. 9 Afs 72/2013-127 of 26 February 2015).

[116] Sec. 38 (2) of the Administrative Proceedings Code.

with the party to the proceedings or is intending to bring a damage claim.[117] The Office has granted access to its file to a third person under those circumstances only rarely and when the proceedings ended.

As far as the right to be heard is concerned, third parties do not enjoy any specific rights. They can freely submit their observations in writing, and they may be summoned to oral hearings. As has already been described, oral hearings are understood to be primarily a means of gathering evidence, and the third parties are thus invited not to discuss the case with the Office but only to answer its questions. The parties to the proceedings are allowed to be present to such a hearing.[118] The above rules apply in cases of transactional resolutions in the same way as in "standard" cases.

6.4.2 Right to Trial

Due to the fact that the third parties are not parties to the proceedings, they cannot challenge decisions of the Office.[119] A complainant cannot challenge the fact that the Office has not opened formal investigations.[120] This applies to cases concluded by a transactional resolution, as well as to "standard" cases. Therefore, as has already been described above, settlement and commitment decisions have never been appealed so far.

6.4.3 Right of Equal Treatment

Transactional procedures have only limited and (at maximum) indirect impact upon the rights and interests of the third parties. The authors are not aware of any relevant discussions in the Czech Republic that would deal with a right of the third parties to equal treatment in the context of transactional procedures. As mentioned above, the third parties are not parties to the proceedings before the Office.

6.4.4 Other Issues and Rights

The interests of third parties are taken into account only to a limited extent. The basis for this approach is to be found in the understanding that the 'public law' rights of third parties are not dealt with in the proceedings before the Office. Only

[117] SAC, judgment Ref. No. 1 Afs 86/2013-78 of 23 January 2014 (*RegioJet*). Similarly in a merger review, the undertaking raising objections against the merger usually has the legal interest to access the file; see SAC, judgment Ref. No. 9 Afs 29/2012-53 of 28 March 2013 (*Litvínovská uhelná*).

[118] Section 49 of the Administrative Proceedings Code.

[119] See, e.g., SAC, judgment Ref. No. 1 Afs 76/2008-246 of 29 May 2008 (*Ústecký kraj*).

[120] SAC, judgment Ref. No. 6 Ans 6/2013-27 of 7 June 2013 (*Mediaservis*).

the rights and duties of the parties to the proceedings are being determined in such proceedings.[121]

In commitment cases, third parties—if they can be identified—are sometimes invited to express their views on the commitments proposed.[122] They do not, however, enjoy any specific legal standing, and they cannot formally influence the contents of the commitments.

6.4.5 Principle of Legitimate Expectation and of Good Faith

No specific legal regime applies to communications of the Office's officials to companies during negotiations. It ought to be mentioned that the Office does not make any "proposals" in the course of transactional procedures; it merely states its viewpoint and invites parties to provide their proposals or opinions. In order to improve the transparency of its transactional procedures, the Office issued guidelines on leniency, settlement and commitment cases. Third parties are not involved in these procedures.

In leniency cases, after receiving the application, the Office confirms in writing that the application fulfils the criteria for awarding leniency, on condition that all other requirements of the leniency programme would be fulfilled.[123] Those statements are deemed to be binding on the Office, even though they are not provided for by the 2001 Competition Act and the final decision on awarding leniency is issued only in the decision on the merits.[124]

In settlement cases, the actual settlement is reached when, after receiving the statement of objections, the parties to the proceedings accept the factual and legal qualification presented by the Office. If this happens, the infringement described in the final decision and its legal qualification must fully correspond to the one in the statement of objections. Even though not provided for by the 2001 Competition Act, there may be negotiations among the Office and the individual parties to the proceedings; minutes of such negotiations would be drafted.[125]

The commitment procedure is described in the 2001 Competition Act only rudimentarily. The statute, however, does not provide for any negotiations; it only states that the Office shall terminate the proceedings if the parties proposed the commitments and the corresponding statutory conditions were complied with.[126] Similarly to the settlements procedure, if there were any preceding negotiations, minutes would be drafted.

[121] SAC, judgment Ref. No. 1 Ans 12/2013-82 of 16 January 2014 (*RegioJet*).

[122] E.g., in the Office's decision Ref. No. S-282/2008/DP-4232/2009/820 of 28 April 2009 (*ČEZ*), the commitments consisted in amendments to contractual relations between a company suspected of abuse of dominant position and a complainant.

[123] Para. 32 and 37 of the Leniency Notice.

[124] Para. 25 of the Leniency Notice.

[125] Para. 19 of the Settlement Notice.

[126] Section 7 (2), (3) and Sec. 11 (3), (4) of the 2001 Competition Act.

In the Office's experience, the parties to the proceedings have never challenged the procedure of transactional resolutions. On several occasions, the parties claimed that the case should have been resolved by commitments, not by an infringement decision; the courts, however, confirmed that the legal conditions for such a resolution were not met.[127]

6.4.6 Confidentiality and Publicity of the Transactional Solutions

The Office is obliged to publish its decisions.[128] Decisions in leniency, settlement and commitment cases are published on web pages of the Office as well, in the same way as all the other decisions.[129] Business secrets are concealed.

Concerning the final decisions, it ought to be mentioned that settlement decisions tend to be significantly shorter than "standard" ones.[130] They only contain the basic facts of the case and their legal qualification, with references to the file where the evidence is to be found.

Concerning other documents relating to transactional procedures, they are contained in the file and accessible under standard rules (see above).

6.5 Merger Control

Pursuant to Section 17 para. 4 of the 2001 Competition Act, the Office can approve concentrations (mergers or acquisitions) subject to fulfilment of commitments which were proposed by the merging entities (undertaking concerned) to the Office in order to preserve the effective competition.[131] The Office's decision-making practice operates with both structural as well as behavioural remedies. In fact, the Czech practice in this respect is much influenced and follows the practice of the European Commission as enshrined in its Remedies Notice.[132] The Czech Office is very reluctant to prohibit concentrations. It seems that it prefers that the cases in which significant competition concerns are identified are solved via a proposal of commitments and related conditional approval subject to fulfilment of the proposed commitments. The Office commences

[127] E.g., Regional Court in Brno, judgment Ref. No. 62 Ca 37/2009-680 of 21 April 2011 (*České dráhy*). The judgment was cancelled by the SAC but the respective issue was not overturned (SAC, judgment Ref. No. 7 Afs 57/2011-1255 of 28 August 2014).

[128] Section 20 (1) (a) of the 2001 Competition Act.

[129] All decisions are available (in Czech) at: http://www.uohs.cz/cs/hospodarska-soutez/sbirky-rozhodnuti.html (1 May 2014).

[130] Para. 27 of the Settlement Notice.

[131] For details regarding this procedure, see Jindřiška Munková, Jiří Kindl, Pavel Svoboda. Soutěžní právo [Competition Law] 2nd edn. C.H. Beck, Prague, 2012, pp. 514–516.

[132] Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22/10/2008, pp. 1–27.

approximately 40–50 merger approval proceedings a year.[133] Approximately 50–60 % of these proceedings are dealt with in a simplified procedure. Most of the rest are solved in the so-called phase one (i.e., within 30 days from the merger approval filing). Only a handful of cases are moved into the second phase.[134] Similarly, only a handful of cases are finally resolved by a conditional approval subject to commitments, but these cases usually involve the most contentious and interesting competition law questions.[135] Recent cases include, e.g., a concentration between Agrofert Holding and Euro Bakeries Holding when the commitments included divestment of several bakeries, a concentration between Agrofert Holding and Loredana Corporation when the commitments were to remove personal connections between Agrofert and its competitor AGRO Blatná and a concentration between Česká lékárna and Lloyds Holding when the commitments included divestment of three chemistry shops.[136]

6.5.1 Negotiation of Remedies

The proposal of commitments must be made by the merging entities prior to the commencement of the proceedings[137] or in its course but in any case not later than 15 days from receiving the statement of objections. If this deadline is not honoured by the merging entities but the proposal of commitments reaches the Office within additional 15 days, the Office may still take the commitments into account but only in cases worthy of special treatment.[138] Accordingly, the initiative as regards commitments has to always come from the merging entities. In other words, the Office cannot impose commitments upon them. Nonetheless, the Office may to a certain extent negotiate the commitments with the parties to the concentration and indicate whether the contemplated (or even offered) commitments are sufficient or not. In practice, this 'negotiation' usually takes place in the course of oral hearings

[133] In 2013, there were, however, only 35 such proceedings. For the relevant statistical data, see Office's annual reports available at http://www.uohs.cz/en/information-centre/annual-reports.html and Office's statistical data available at http://www.uohs.cz/cs/informacni-centrum/statistiky/statistiky-z-oblasti-hospodarske-souteze.html.

[134] For instance, in 2012 there were three such cases (Office's Annual Report for 2012, p. 18) and four such cases in 2013.

[135] Pursuant to Office's statistics available at http://www.uohs.cz/cs/informacni-centrum/statistiky/statistiky-z-oblasti-hospodarske-souteze.html (30 April 2014) and Office's annual reports, there were three such cases in 2012, one in 2011, one in 2010, one in 2009. There was no such case in 2013.

[136] See Office's Annual Report for 2012, pp. 19–22, or in detail Office's decisions in cases Ref. No. S472/2011; Ref.No. S396/2011 and Ref.No. S544/2012.

[137] Pursuant to Section 15(4) of the 2001 Competition Act, the merger approval proceedings are initiated when the Office receives a *complete* application for approval of concentration, including all the required particulars.

[138] Section 17(4) of the 2001 Competition Act.

or even at ‘informal’ meetings with case handlers. Finally, however, the outcome of the ‘negotiation’ has to be provided in writing, i.e., parties to a concentration must submit a written proposal of commitments. Parties to a concentration may submit modified proposals of commitments provided that the above period for lodging them is maintained. In addition, the Office is explicitly empowered to accompany the approved commitments with certain additional conditions and duties (such as information duties) which are meant to secure fulfilment of the commitments.

There is no particular role for third parties (including competitors) in defining remedies (or commitments). The right to propose commitments is the sole right of the merging entities. The Office may, however, take into account the view of third parties when it assesses whether the proposed commitments (remedies) are sufficient for preserving effective competition and removing competition concerns which the Office identified. There is no particular role for third parties in the merger approval procedure either. They may, however, lodge objections against the notified concentration, and the Office shall properly address such objections. Third parties are not parties to the proceedings, and they do not have any special right to inspect files. They may be granted such access to files only if they would prove a special legal interest or another serious reason that would mandate granting access. Pursuant to available sources, the Office has never granted such access, but this Office’s position is now subject to judicial review in one case.[139] The third parties cannot generally challenge the Office’s decisions, but the Regional Court in Brno held that the third party which lodged objections against a certain concentration can submit an appeal to the Office’s Chairman if it believes that its objections were not properly addressed by the Office in its decision.[140] The judgment of the Regional Court was however cancelled by the SAC. Hence, the third parties cannot ‘hijack’ the procedure regarding approval of concentration given their limited role in the proceedings and the current stance of the Office.

6.5.2 Enforcement of Remedies

When the Office issues a conditional approval of a concentration subject to commitments (remedies) which were offered by the parties to the concentration, the respective addressee(s) of the decision are then obliged to fulfil the respective

[139] In this regard, see SAC’s judgment Ref.No. 9 Afs 29/2012-53 of 28 March 2013 (*Litvínovská uhelná*), subsequent judgment of the Regional Court in Brno Ref.No. 62 Af 59/2010-117 of 2 July 2013 (*Litvínovská uhelná*) and the final SAC’s judgment Ref.No. 9 Afs 73/2013—43 of 9 April 2014. See also Jiří Kindl. The Czech Supreme Administrative Court renders two rulings dealing with access of complainants to files in competition proceedings (Asiana v Student Agency and Litvinovska uhelna cases), e-Competitions Bulletin, June 2013, Art. N° 52498.

[140] Regional Court in Brno, Ref.No. 62 Af 55/2011-174 of 2 July 2013 (*Litvínovská uhelná*).

commitments (implement the remedies). If they do not do so, the Office has several options on how to react to such incompliance. Firstly, the Office may impose a fine upon the respective undertaking(s) in the amount of up to 10 % of the turnover of the respective undertaking for the last accounting period.[141] Secondly, the Office has the so-called de-concentration power, and it may order the respective entity to undertake various measures in order to reinstate the effective competition on the relevant market (such as divest assets, sale shares, etc.).[142] In addition, the Office can also entirely cancel the previous decision approving the concentration.[143]

6.6 Impact on Transactional Outcome and on Market Intervention

In the Czech Republic, the antitrust-related jurisprudence is still rather limited. As transactional cases are as a matter of principle not appealed, they are not reviewed by courts and the case law cannot expand. It might be argued that in a long term, transactional mechanisms might be—due to limited jurisprudence—detrimental to predictability of competition law enforcement.

With regard to commitment decisions, the point can be made that since the Office does not authoritatively declare whether it considers the conduct under review to be lawful or illegal, longer term predictability of its interpretation of competition law may be compromised. As the infringement is not found, such decisions may also complicate the position of potential claimants in private litigation (see above in Sect. 6.2.1.3). The number of commitment decisions is quite low. The last one was issued in 2009. Overall, there have been fewer than 10 such decisions.

Similarly, with respect to settlement decisions, even though they do find an infringement, and thus facilitate the legal position of claimants, the facts contained in them are limited, which may at the same time complicate the claimants' position.

It is difficult to come to any conclusions concerning longer term effects of transactional procedures. Private enforcement is still very limited in the Czech Republic; therefore, it is not possible to assess properly whether it had been negatively affected or not. Despite limited impact assessment and some relevant concerns with respect to transactional procedures, the Office has so far taken the view that these instruments are very efficient and that their possible negative effects

[141] Section 22a (1) letter e) and 22a (2) of the 2001 Competition Act.

[142] Section 18(5) of the 2001 Competition Act.

[143] Section 19(1) of the 2001 Competition Act. For more details regarding sanctions for non-compliance with legal duties in mergers, see Jindřiška Munková, Jiří Kindl, Pavel Svoboda. Soutěžní právo [Competition Law] 2nd edn. C.H. Beck, Prague, 2012, pp. 523–525.

would therefore be outweighed. The Office is committed to using these instruments in the future.[144]

6.7 Conclusion and Recommendations

Transactional resolutions in competition cases and related procedures in the Czech Republic before the Office are largely similar to those available in proceedings before the European Commission. This applies to both proceedings regarding restrictive practices as well as mergers. There are, however, certain differences especially as regards the settlement procedure in restrictive practices. From a practical point of view, the current state of affairs seems satisfactory and the authors do not have any particular suggestions for an improvement. It may be, however, pointed out that the antitrust practice in the Czech Republic now deals with a relatively contentious issue of the extent of rights of the third parties in both proceedings regarding restrictive practices (esp. abuse of dominance) and in merger approval proceedings. The issues at stake are primarily their access to files and their possibility, if any, to challenge the outcome of the proceedings before the Office. These issues are currently pending before the SAC.

[144] See, e.g., the opening words of the Office's Chairman in the Information Paper No. 3/2013, available also in English at http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html (1 May 2014).

France

7

David Bosco

7.1 Introduction

Ending a case by an agreement is a very old idea in France. The French civil code states since 1804 that "Anyone can compromise as regards rights over which they have an unrestricted power of disposition" (art. 2059, civil code). This agreement is called "transaction."

Criminal Law Transactional resolutions of disputes are not unusual under French law, for instance, under criminal law.[1] The French Criminal Procedure Code[2] states that the public criminal proceeding can "end with a transaction where the law expressly states or with the execution of a criminal settlement."

Transactional procedures are quite rare in the French criminal law, but one can mention the criminal "settlement." The criminal settlement (art. 41-2, Criminal Procedure Code) is based on an agreement between the offender and public prosecutor that has to be validated by a judge. In the end, there is no judgement but a transaction that ends the case.

Competition Law In France, as regards competition law, one distinguishes between two sets of rules: (1) the so-called restrictive practices,[3] which are treated

[1] See J.-B. Perrier, La transaction en matière pénale, LGDJ 2014.

[2] "*Code de procédure pénale*", preliminary title, article 6 § 3.

[3] "Pratiques restrictives", Commercial code, 4th book, title IV.

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by the judicial judge, and (2) "anticompetitive practices" or "antitrust,"[4] *i.e.* agreements and abuses of dominant position rules.

As regards the "restrictive practices," the administrative authority responsible for competition and consumer laws is able to transact for offences for which imprisonment is not incurred and contraventions laid down in the book IV of the commercial code as long as any public action has not been implemented and with the agreement of the State prosecutor.[5] A comparable procedure exists in environmental law.[6]

As regards antitrust (or "anticompetitive practices") rule enforcement, there are several transactional institutions in the French commercial code, related to *antitrust* proceedings.

The first one to be mentioned is prescribed in article L. 464-9 of the French commercial code. Pursuant to this text, the French Minister for Economy can settle an antitrust case. But the scope of this procedure is narrow. The practices at stake must only affect a market of a "local dimension"; the practices do not concern matters under articles 101 and 102 of the TFEU, and the undertakings concerned have a turnover made in France that does not exceed € 50 million (their combined turnover does not exceed EUR 200 million).

The three main "transactional procedures" in France are, as regards the antitrust enforcement before the French Competition Authority:

(i) the Leniency Program ("le programme de clémence"[7])
(ii) the Commitment Procedure ("la procédure d'engagements"[8])
(iii) the Settlement Procedure ("la procédure de non-contestation des griefs"[9])

In antitrust cases, recent years have seen renewed interest for these "negotiated" procedures: 4 settlement procedures in 2012, 3 applications for leniency programs and 5 commitments procedures these last 2 years.

[4] "Pratiques anticoncurrentielles", Commercial code, 4th book, title II.

[5] Commercial code, art. L 470-4-1: *Pour les délits prévus au titre IV du présent livre pour lesquels une peine d'emprisonnement n'est pas encourue et pour les contraventions prévues au présent livre, l'autorité administrative chargée de la concurrence et de la consommation a droit, tant que l'action publique n'a pas été mise en mouvement, de transiger, après accord du procureur de la Ré publique, selon les modalités fixées par décret en Conseil d'Etat.*

[6] Environmental Code, Article L 173-12-1.

[7] Commercial code, Article L. 464-2 IV; see also the Procedural notice relating to the French Leniency Program issued on March 2, 2009 (hereafter "the Leniency Program Notice") http://www.autoritedelaconcurrence.fr/doc/cpro_clemence_uk_2_mars_2009.pdf.

[8] Commercial code, Articles L. 464-2 and R. 464-2; see also the Commitments Communication.

[9] Commercial code, Article L. 464, III; see also the French Competition Authority notice issued on 10 February 10th, 2012, http://www.autoritedelaconcurrence.fr/doc/communique_ncg_10fevrier2012.pdf.

In 2008, 18 applications for a leniency program, 7 commitments offers.[10]

The term "transaction" is quite inappropriate in France because these procedures are not "contracts" but rather "decisions" from an administrative body. Second, these procedures do not prevent the State prosecutor to bring an action before the criminal judge.

Merger Control As regards merger control, the French Conseil d'Etat states that the decision of the French Competition Authority, when the latter, deciding on a concentration which has been notified, does not impose a penalty or settles a dispute over the rights and obligations of a civil nature, is not a decision within the scope of the provisions of article 6.1 of the ECHR.[11]

In that case, the principle of impartiality was at stake. It is very important to underline the link between the fundamental rights and the imposition of a fine. As regards antitrust proceedings, when no fine is imposed (for instance, the commitment procedure), the fundamental rights will not be granted to the undertaking.

7.2 Overview of the French "Transactional" Procedures

7.2.1 Leniency Program (Procédure de clémence)[12]

The French code of commerce[13] states that a total or partial exemption from financial penalties may be granted to a company or a body, which along with others has implemented a practice prohibited by the antitrust law, if it has helped to establish the existence of the prohibited practice and to identify its perpetrators, by providing information which the French Competition Authority or the administration did not have access to beforehand.

To that end, the French Competition Authority, at the request of the General Rapporteur or the Minister for the Economy, adopts a leniency opinion which specifies the conditions the envisaged exemption is subject to after the government representative and the company or body concerned have submitted their observations.

The opinion is conveyed to the company or the body and the Minister.

[10] Activity Report by the French Competition Authority 2012, http://www.autoritedelaconcurrence.fr/doc/rapport_activite2012.pdf.

[11] Conseil d'Etat, Ass., 21 December 2012, n° 362347.

[12] Commercial code, Article L. 464-2 IV, see also the Leniency Program Notice http://www.autoritedelaconcurrence.fr/doc/cpro_clemence_uk_2_mars_2009.pdf.

[13] Commercial code, Article L. 464-2 IV.

If the conditions specified by the leniency opinion have been complied with, the French Competition Authority may grant an exemption.[14]

The French Competition Authority issued a Leniency Program Notice, which will soon be adapted.[15]

The French Leniency Program is inspired by and has been adopted in compliance with the Model Leniency Program of the European Competition Program.[16]

7.2.1.1 Scope

The French Leniency Program can only be implemented in article L. 420-1 of the commercial code cases or article 101 TFEU cases. In practice, cartel cases are exclusively concerned:

> The Leniency Program Notice states that: "In principle, the agreements concerned are cartels between undertakings consisting in the fixing of prices, the allocation of production or sales quotas or the sharing of markets, including bid-rigging, or any other similar anticompetitive behaviour between competitors."

7.2.1.2 Implementation

The French Leniency Program creates an incentive to end the participation of the undertaking in the illegal behavior and to denounce it to the agency. Indeed, the undertaking will not fear to have to pay a high fine if it fully cooperates with the French Competition Authority.

There is no "right to leniency." A set of conditions must be met. In accordance with the principle of an equal treatment, in the case of a plurality of applications, the importance of the exemption is determined by the place in which companies have issued their request:

(i) The French Competition Authority grants a full immunity from fine to any undertaking which is the first to apply for leniency and fulfils these conditions:

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[14] (Art. L. 464-2 IV): *Une exonération totale ou partielle des sanctions pécuniaires peut être accordée à une entreprise ou à un organisme qui a, avec d'autres, mis en œuvre une pratique prohibée par les dispositions de l'article L. 420-1 s'il a contribué à établir la réalité de la pratique prohibée et à identifier ses auteurs, en apportant des éléments d'information dont l'Autorité ou l'administration ne disposaient pas antérieurement. A la suite de la démarche de l'entreprise ou de l'organisme, l'Autorité de la concurrence, à la demande du rapporteur général ou du ministre chargé de l'économie, adopte à cette fin un avis de clémence, qui précise les conditions auxquelles est subordonnée l'exonération envisagée, après que le commissaire du Gouvernement et l'entreprise ou l'organisme concerné ont présenté leurs observations; cet avis est transmis à l'entreprise ou à l'organisme et au ministre, et n'est pas publié. Lors de la décision prise en application du I du présent article, l'Autorité peut, si les conditions précisées dans l'avis de clé mence ont été respectées, accorder une exonération de sanctions pécuniaires proportionnée à la contribution apportée à l'établissement de l'infraction.*

[15] See the French Leniency Program Notice http://www.autoritedelaconcurrence.fr/doc/cpro_clemence_uk_2_mars_2009.pdf.

[16] http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=418&id_article=2008.

CASE WHERE THE FRENCH COMPETITION AUTHORITY HAS NO INFORMATION ON THE AGREEMENT

- The French Competition Authority did not previously have sufficient information and evidence to be able to carry out targeted inspections, on their own initiative, and
- The information and evidence submitted by the undertaking applying for leniency are sufficient, in the French Competition Authority's point of view, to have such measures carried out. These informations, provided orally or in writing, are the name and address of the legal entity applying for full immunity; the name and address of the other members to the alleged agreement; a detailed description of the alleged agreement, including the nature and the use of the products involved, the territories on which the practices concerned may have an impact, the nature of these practices and an estimate of the duration of their implementation; and information about any leniency application relating to the alleged agreement which it has transmitted or intends to transmit to other competition authorities; and pieces of evidence (documentary or of any other nature) in its possession or that can be available at the time of the application. These elements may consist in information helping to identify locations, dates and the object of contacts or meetings between participants in the alleged agreement.[17]

CASE WHERE THE FRENCH COMPETITION AUTHORITY ALREADY HAS INFORMATION ON THE AGREEMENT

- The undertaking is the first to submit evidence which, in the French Competition Authority's view, are sufficient to establish the existence of an infringement of article L. 420-1 of the code de commerce and, where applicable, to article 81 of the EC Treaty defining the existence of an agreement;
- At the time of the application, the French Competition Authority did not have sufficient evidence to establish the existence of an infringement to article L. 420-1 of the code de commerce and, where applicable, of article 81 of the EC Treaty defining the existence of an agreement, and
- No undertaking has obtained a conditional opinion granting a full immunity for the alleged agreement.[18]

(ii) The French Competition Authority grants also a partial immunity from fine to any undertaking under these conditions:

[17] Leniency Program Notice, § 14.
[18] Leniency Program Notice, § 15.

- The undertaking must provide the French Competition Authority with evidence of the existence of the alleged agreement which represent significant added value with respect to the evidence already in its possession.
- The concept of added value refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the ability of the French Competition Authority to prove the existence of the alleged agreement.
- In order to assess the level of the reduction of the fine from which an undertaking may benefit, the French Competition Authority will take into account the ranking of the application, the time when the evidence was submitted, as well as the extent to which the elements submitted by the undertaking bring significant added value to the case.
- The partial immunity granted to an applicant shall not in principle exceed 50 % of the fine which would have otherwise been imposed, had it not been granted leniency.[19]

In addition, these cumulative conditions must be met:

1. The undertaking must end its involvement in the agreement without delay (at the latest as from the notification of the leniency opinion).
2. It must genuinely and fully co-operate on a continuous basis and expeditiously with the French Competition Authority: providing information and additional evidence, remaining at the disposal of the agency, abstaining from destroying, falsifying or concealing information or evidence, abstaining from disclosing the existence or the content of the Leniency Program.

7.2.1.3 Procedure

The first step is made by the applicant who approaches the General Rapporteur of the French Competition Authority. Anonymous contacts are accepted. A letter is sent by the undertaking or the application can be made orally, "in which case the General Rapporteur takes notice on a written document of the time and date of the statement."[20] The letter mentions the main information about the agreement and "marks" the application for the Leniency Program in the queue. The General Rapporteur grants the undertaking a period of time, during which the application's rank in the queue is maintained, so the undertaking can collect the information and pieces of evidence relating to the agreement. A written or oral statement is taken from the undertaking's representative.

Then the French Competition Authority examines the leniency application on the basis of the information and pieces of evidence supplied by the applicant. The Case Officer drafts a report in which he verifies that the conditions set by the

[19] Leniency Program Notice, § 16 s.

[20] Leniency Program Notice, § 26.

Authority to obtain the conditional benefit for full or partial immunity are fulfilled. Then the applicant is called to attend a hearing before the French Competition Authority. Following the hearing, the French Competition Authority adopts an "opinion." The opinion indicates whether the French Competition Authority grants the undertaking full or partial immunity from fines, as well as, in the latter case, the rate of reduction, and specifies the conditions attached thereto.

When the French Competition Authority considers that the conditions are not satisfied and issues a negative opinion, "the information and pieces of evidence are returned to the undertaking on its request."[21]

Something very specific about the French Leniency Program is the very tight link between the Instructions services and the decision-making body.

7.2.1.4 Fundamental and Procedural Rights of the Parties

The leniency applicant has the same fundamental and procedural rights that any party to a proceeding before the French Competition Authority has.

About ***confidentiality***, the French Competition Authority keeps the identity of the applicant confidential for the duration of the proceedings until the statement of objections is issued to the parties. The applicant's cooperation will be mentioned in the decision.

As regards the relationships between the national agencies within the ECN, the European rules include principles relating to the protection of applicants for leniency:[22] "information voluntarily submitted by a leniency applicant will only be transmitted to another member of the network pursuant to Article 12 of the Council Regulation with the consent of the applicant." The Leniency Program Notice states that the French Competition Authority committed itself to respect these rules. Besides, oral statements made under the present program will only be transmitted by the French Competition Authority to other competition authorities, pursuant to article 12 of Regulation No 1/2003, if the conditions set out in the Notice relating to cooperation are met and provided that the confidentiality guaranteed by the receiving competition authority is equivalent to the one guaranteed by the French Competition Authority.

7.2.1.5 Third Parties

Third parties cannot directly intervene in the Leniency Program. As an illustration, the reports prepared by the Rapporteur for and during the session on the review of the leniency opinion do not have to be disclosed to the undertakings involved.[23] A distinction must be made between the procedure prescribed by the Leniency Program and the procedure after the statement of objections has been sent. In this

[21] Leniency Program Notice, § 37.

[22] Commission Notice on cooperation within the Network of Competition Authorities of 27 April 2004, OJ C 101, p. 43, § 40.

[23] Conseil de la Concurrence, décis. n° 06-D-09, 11 avril 2006.

last situation, the third parties have the rights granted by the general procedural rules of the commercial code.

The French Competition Authority also guarantees the undertakings that reveal the existence of agreements that the documents disclosed to it for that purpose will not be disclosed to third parties to the proceedings that request it.[24]

The decisions of the French Competition Authority related to the Leniency Program are notified only "to persons addressee of the statement of objections or of the report and to undertakings and bodies that have made commitments and to the Minister for the Economy."[25]

Only the applicant and the Minister for the Economy can challenge the regularity of the leniency procedure.[26]

7.2.1.6 Risks for the Parties

The French Leniency Program does not immunize from the risk of being brought before a civil or a criminal judge. But as regards the civil consequences for the applicant, the French commercial code, since 2012 (art. L. 462-3[27]), states that

> The French Competition Authority may transmit any information it holds concerning the anticompetitive practices concerned, *excluding evidences produced or collected under IV of Article L. 464-2* (i.e. Leniency Program), to any court consulting it or asking it to produce documents that are not already available to a party to the proceeding.

As regards the criminal consequences, article L. 462-6 states: "When the facts appear to (the French Competition Authority) to justify the application of article L. 420-6, it sends the file to the State prosecutor." Pursuant to article L. 420-6, three additional cumulative conditions must be met: the individual must have fraudulently played a personal and decisive role in the creation, organization or implementation of the practices referred to in article L. 420-1 (about agreements).

The Notice states that "The [French Competition] Authority considers that leniency is one of the legitimate reasons which justifies not to pass on to the State Prosecutor a case file in which individuals, belonging to the undertaking which has been granted leniency, would be liable to such proceedings."[28]

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[24] Loi n° 2011-525, 17 mai 2011, J.O. 18 mai, de simplification et d'amélioration de la qualité du droit, article 50, modifiant l'article 6, I de la loi n°78-753, 17 juill. 1978.

[25] Article R. 464-8 4° du Code de commerce.

[26] Paris Court of Appeal, 24 avril 2007, RLDA 2007/18, n° 1104, obs. Anadon C.

[27] "L'Autorité de la concurrence peut transmettre tout élément qu'elle détient concernant les pratiques anticoncurrentielles concernées, à l'exclusion des pièces élaborées ou recueillies au titre du IV de l'article L. 464-2, à toute juridiction qui la consulte ou lui demande de produire des pièces qui ne sont pas déjà à la disposition d'une partie à l'instance. Elle peut le faire dans les mêmes limites lorsqu'elle produit des observations de sa propre initiative devant une juridiction."

[28] Leniency Program Notice, § 48.

7.2.2 Commitment Procedure (*Procédure d'engagements*)

Since 2005, the French Competition Authority (previously the Competition Counsel) has adopted 49 commitment decisions[29] (and 132 infringement decisions meanwhile). Most of the abuse of dominance and vertical restraint cases are treated today following this procedure.

This procedure is often implemented in France (except in cartel cases) because it brings the case to a close before any charges are brought. The decision accepting commitments makes them binding without any acknowledgment of liability.

The French commerce code states that

> The [French Competition] Authority has the power "to accept commitments proposed by undertakings or bodies liable to put an end to its competition concerns that may constitute practices prohibited by articles L. 420-1, L. 420-2 and L. 420-5."[30]
>
> "When the French Competition Authority intends to apply the Commitments Procedure, the Rapporteur shall inform the undertakings or bodies involved of his preliminary assessment of the practices in question.
>
> The time limit for the undertakings or bodies to put their commitments in writing after the preliminary assessment is determined either by the Rapporteur if the assessment findings are notified by mail or in a report or by the Competition Authority if the assessment findings are presented orally during a hearing.
>
> The length of time may not be less than 1 month, unless agreed to by the undertakings or bodies concerned.
>
> Once the commitments given by the undertakings or bodies involved have been received the General Rapporteur shall notify the applicant as well as the Government Official of their content. He shall also issue a summary of the case and the commitments by all means in order to give any interested parties an opportunity to provide comments. He shall also set the deadline within which the parties, the Government Official and any interested third parties must provide their comments and the deadline may not be less than 1 month after the notification and public issue of the content of the commitments.

[29] 2005: 5; 2006: 7; 2007: 8; 2008: 7; 2009: 3; 2010: 6; 2011: 4; 2012: 6; 2013: 3.

[30] Article L. 464-2: "L'Autorité de la concurrence (. . .) peut aussi accepter des engagements proposés par les entreprises ou organismes et de nature à mettre un terme à ses préoccupations de concurrence susceptibles de constituer des pratiques prohibées visées aux articles L. 420-1, L. 420-2, L. 420-2-1 et L. 420-5 ou contraires aux mesures prises en application de l'article L. 410-3."

> The parties and the Government Official shall be invited to the hearing by the General Rapporteur along with the proposed commitments in order to make oral observations during the hearing."[31]

The French Competition Authority has also adopted a Notice on Competition Commitments on March 2, 2009.[32]

7.2.2.1 Scope

Generally, the French Competition Authority does not use this procedure in cases where "harm to economic public order calls for the imposition of a fine, which precludes *a priori* particularly serious forms of collusion such as cartels and certain types of abuse of dominant position having already caused significant damage to the economy."[33]

It is important to emphasize that cartels will not be subject to this procedure.

7.2.2.2 Implementation

The preliminary steps of the procedure are quite informal. The initiative to implement the procedure comes from the undertakings. At the time of an interview or in reply to requests for information from investigation services, the undertaking may contact the Rapporteur to explore the possibility of proposing commitments. These commitments must be given prior to any statement of objections and pursuant to a

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[31] Article R. 464-2: "Lorsque l'Autorité de la concurrence envisage de faire application du I de l'article L. 464-2 relatif à l'acceptation d'engagements proposés par les entreprises, le rapporteur fait connaître aux entreprises ou organismes concernés son évaluation préliminaire des pratiques en cause. Cette évaluation peut être faite par courrier, par procès-verbal ou, lorsque l'Autorité est saisie d'une demande de mesures conservatoires, par la présentation d'un rapport oral en séance. Une copie de l'évaluation est adressée à l'auteur de la saisine et au commissaire du Gouvernement, sauf lorsqu'elle est présentée oralement lors d'une séance en présence des parties.

Le délai imparti aux entreprises ou organismes pour formaliser leurs engagements à l'issue de l'évaluation préliminaire est fixé, soit par le rapporteur dans le cas où l'évaluation a été faite par courrier ou par procès-verbal, soit par l'Autorité de la concurrence dans le cas où cette évaluation a été présentée oralement en séance. Ce délai ne peut, sauf accord des entreprises ou organismes concernés, être inférieur à un mois.

A réception des engagements proposés par les entreprises ou organismes concernés à l'issue du délai mentionné au deuxième alinéa, le rapporteur général communique leur contenu à l'auteur ou aux auteurs de la saisine ainsi qu'au commissaire du Gouvernement. Il publie également, par tout moyen, un résumé de l'affaire et des engagements pour permettre aux tiers intéressés de présenter leurs observations. Il fixe un délai, qui ne peut être inférieur à un mois à compter de la date de communication ou de publication du contenu des engagements, pour la production des observations des parties, du commissaire du Gouvernement et, le cas échéant, des tiers intéressés. Ces observations sont versées au dossier.

Les parties et le commissaire du Gouvernement sont convoqués à la séance par l'envoi d'une lettre du rapporteur général accompagnée de la proposition d'engagements trois semaines au moins avant le jour de la séance. Ils peuvent présenter des observations orales lors de la séance."

[32] Notice on Competition Commitments Issued on March 2nd, 2009, hereafter "Notice on Competition Commitments", http://www.autoritedelaconcurrence.fr/doc/cpro_enga_2mars09_uk.pdf.

[33] Notice on Competition Commitments, § 11.

"preliminary assessment of the practices in question."[34] The French system is different from the European Union's, where that kind of procedure is also available after the statement of objections has been sent.

The Rapporteur is free to refuse to address a "preliminary assessment" (and to prepare instead a statement of objections) if he considers that a commitment procedure is not appropriate to treat the case. The parties have no "right to negotiate" the case. But he can also undertake a preliminary assessment if he considers that the undertaking shows a serious motivation. "At its sole discretion, the French Competition Authority determines the appropriateness of allowing the procedure."[35]

The French *Cour de cassation* ruled that the "preliminary assessment" is not "an indictment within the meaning of article 6.1 ECHR" because "it does not intend to prove the reality and accountability for breaches of competition law in order to impose sanctions, but to identify competition concerns that may constitute a prohibited practice."[36] As a consequence of the negotiated nature of the commitment procedure, the principle of impartiality does not preclude the French Competition Authority from taking an active role in the discussions of the commitments that take place after the preliminary assessment before the French Competition Authority assesses their relevance and make them enforceable.

7.2.2.3 Procedure, Negotiation Process

Within the French Competition Authority, the functions of prosecution and judgement are separated. That is why the negotiation process is a two-tier system.

First, the undertaking negotiates the commitment offer with the Investigation Services of the French Competition Authority (namely the Rapporteur of the case).

The commitments must be able to address the competition concerns identified in the preliminary assessment. The Rapporteur evaluates whether they are "relevant, credible and verifiable."[37] He must receive the commitment offer before the deadline he has determined in the preliminary assessment (which shall not be lesser

[34] Art. R. 464-2 préc.

[35] Notice on Competition Commitments, § 20.

[36] C. cass., com., 4 nov. 2008, case n° 07-21275, *Canal 9*: "Mais attendu qu'après avoir relevé que l'évaluation préliminaire à laquelle procède le rapporteur, qui n'a pas pour objet de prouver la réalité et l'imputabilité d'infractions au droit de la concurrence en vue de les sanctionner, mais d'identifier des préoccupations de concurrence, susceptibles de constituer une pratique prohibée, afin qu'il y soit, le cas échéant, remédié, l'arrêt retient à juste titre que cette évaluation ne constitue pas un acte d'accusation au sens de l'article 6 § 1 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, et que le fait pour le Conseil, d'avoir, avant d'apprécier la pertinence des engagements pris par le GIE et de leur donner force exécutoire, pris une part active aux discussions ayant eu lieu après l'évaluation préliminaire dans les conditions de l'article R. 464-2 du code de commerce, tient au caractère négocié de cette phase de la procédure et ne caractérise pas une immixtion du Conseil dans l'instruction de l'affaire" (available on www.legifrance.gouv.fr).

[37] Notice on Competition Commitments, § 21.

than 1 month[38]). Practically speaking, the commitments are negotiated with the Rapporteur within this period.

Once the commitment offer has been received and notified to the persons referred to in article R. 464-2, the Rapporteur will issue, on the French Competition Authority website,[39] a market test containing a summary of the case and the commitments offer, so any interested parties may provide comments.

Second, the negotiation process continues before the "decision making" body of the French Competition Authority—the Authority's Board[40]—although the Board has been working closely with the Rapporteur since the very beginning of the negotiation process. Legally speaking, the results of the negotiation between the undertaking and the Rapporteur are not binding upon the Board. But, in practice, this issue does not arise because of the involvement of the Board at an early stage of the process.

After the market test, the parties are invited to attend a hearing before the Board. The proposal negotiated with the Rapporteur is accepted by the Board "as a basis for discussion" at the hearing.[41] The Board examines the relevance, the credibility and the verifiable nature of the commitments and makes sure that they are proportionate to bring the competition concerns to an end.[42] The negotiations may go on during the hearing, this time with the Board, which can require amendments to the offer, to take the outcome of the market test into consideration. The negotiation process may be adjourned if needed.

The undertaking may always stop the negotiation process. In such case, any commitment offer and observations of the interest parties are removed from the case file.

If the proposed commitments address the competition concerns, the French Competition Authority issues a decision making the commitments binding.

7.2.2.4 Effects

The commitments are binding on the undertaking (not on third parties because of the relative effect of the decision).

When the commitments exceed the "competition concerns" expressed by the preliminary assessment, the French Competition Authority "acknowledges"[43] these voluntary commitments. The Notice on Competition Commitments explains that "The French Competition Authority does not accept binding commitments going beyond the resolution of competition concerns even though it may, when necessary, acknowledge additional remedies proposed by the undertaking concerned, for

[38] Art. R. 464-2.

[39] www.autoritedelaconcurrence.fr.

[40] (*le Collège de la concurrence,* hereafter "the Board").

[41] Notice on Competition Commitments, § 31.

[42] The Authority does not accept commitments that go beyond the resolution of its competition concerns.

[43] *Donne acte*.

example, in order to facilitate the implementation of commitments that have been accepted."[44]

The French Competition Authority issued a decision[45] whether no position has been taken on the liability of the undertaking. The French Competition Authority only concluded that there were no longer grounds for action because of the commitments taken on by the undertaking. In such cases, as the French Competition Authority does not declare the guilt of the undertaking, the decision cannot be used as the first term of the recidivism, in accordance with the principle *ne bis in idem*.

The legal nature of the agreement is to be a unilateral "decision" adopted by the French Competition Authority. The decision makes the commitments binding on the undertaking concerned. The decision is referring in its motives to the offer made by the undertaking.

The decision imposes a modification of the future conduct of the firm (in practice, behavioral remedies). In the case of noncompliance with the commitments made, the undertaking is subject to administrative penalties (art. L. 464-3 Commercial code, which refers to art. L. 464-2). Noncompliance is considered to be a very serious infringement.[46]

The Notice on Competition Commitments states that "[The Decision] may not be used to prevent one of the parties to the procedure from bringing action in a court of law."[47] In France, a follow-on action before the civil judge is not unusual. For instance, in the *Ma liste de courses* case, the claimant asked for damages after the French Competition Authority's commitment decision.[48] In that case, the French judge of the *Tribunal de commerce de Paris* stated that he is "not bound by an administrative decision adopted by the French Competition Authority."[49]

7.2.2.5 Fundamental and Procedural Rights of the Parties

The Court of Appeal of Paris recently stated that "the rights of defence of the parties concerned must be fully insured in the course of the commitments procedure."[50] However, the exercise of rights of defense of the parties depends on the specificities of this procedure, which is characterized by its nonincriminating and negotiated character. Thus, the Hearing Officer of the French Competition Authority, involved in cases leading to a statement of objections, is not required to exercise his functions under the commitment procedure.

[44] Notice on Competition Commitments, § 39.

[45] Aut. conc., décision n° 13-D-07 du 28 février 2013.

[46] For instance: Aut. conc., décision n° 11-D-10 du 6 juillet 2011.

[47] § 43.

[48] See Paris Court of appeal, 20.11.2013, https://groupes.renater.fr/sympa/d_read/creda-concurrence/CaP/20nov2013/Malistedecourses.PDF.

[49] The Judge"n'est pas lié par une décision administrative prise par l'Autorité de la concurrence": T. com. Paris, 15e ch., 24 août 2011, RG 2011014911, *SAS Ma liste de courses c/Sté Highco 3.0, Sté Highco data, Sté Sogec Gestion, Sté Sogec Marketing*: JurisData n° 2011-018245.

[50] CA Paris, 19 décembre 2013 *Cogent communications*.

Access to the Case File

This issue had been controversial in France. Today, the undertaking concerned has access to the documents used by the Rapporteur to establish the preliminary assessment and to those used by the French Competition Authority to decide on the commitments.[51] This includes the preliminary assessment and the third parties' comments resulting from the market test. The *Cour de cassation* has decided that the "Court of appeal, asked by a party to request the annulment of a decision [of commitments], whenever that party has not had access to the entire file, to check if the lack of communication of certain elements has not hindered its interests."[52] The Notice on Competition Commitments also states that the "access is provided subject to the undertakings' legitimate interests in their business secrets not being disclosed. The various communications may therefore, if appropriate, give rise to action to protect business secrets as provided for under articles L. 463-4 and R. 463-13 of the code de commerce."[53]

Right To Be Heard

According to the Notice on Competition Commitments, "After the market test, the parties to the procedure[54] and the Government Official are invited to attend a hearing during which they will be given another opportunity to present observations on the proposed commitments which the Rapporteur notified them of at least three weeks before the hearing."

Presumption of Innocence

The decision issued by the French Competition Authority does not take any position on the liability of the undertaking.

Right to an Impartial Judge

Within the French Competition Authority, the functions of prosecution and judgement are separated (see above).

Ne Bis In Idem

The commitment decision cannot be used as the first term of the reiteration of the facts or as regards the principle *ne bis in idem* (see above).

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[51] *Communiqué* §27. See *Cour de cassation, com.,* 4.11.2008, n° 07-21275: *la procédure d'engagements est mise en œuvre, les parties à la procédure doivent, sous réserve des dispositions de l'article L. 463-4 du code de commerce, avoir accès à l'intégralité des documents sur lesquels s'est fondé le rapporteur pour établir l'évaluation préliminaire et à l'intégralité de ceux soumis au Conseil pour statuer sur les engagements.*

[52] C. Cass., com., 4.11.2008, préc. See, for example, about the refusal to communicate an investigations' administrative report: Cass., com., 2.2.2010, n° 08-70449, 08-70450, 08-70451.

[53] Notice on Competition Commitments § 29.

[54] That is to say, the applicant and the undertaking concerned.

7.2.2.6 Third Parties

The applicant has access to the case file under the same conditions as the undertaking concerned and the right to present observations on the commitments proposed after the market test.[55]

Other third parties can express their views by answering to the market test. But the market test is not mandatory for the French Competition Authority. They don't have access to case file.

The applicant can challenge the commitment decision: article R-464-8 commercial code.[56]

7.2.2.7 Risks for the Parties

The main risk for the parties is to "negotiate" the case and offer commitments in situations where the French Competition Authority does not "have a case." At that stage of the procedure, the analysis of the preliminary assessment is superficial. The access to the file is a way to overcome this first problem. Furthermore, if the parties and the agency cannot reach an agreement, the prohibition procedure will be resumed from that point on.

Another problem is that the agency has a large discretion to accept or not the commitments offered. So this procedure has an uncertain result.

Another risk is where the problem identified by the preliminary assessment raises new problems on which one doesn't have any earlier cases. The undertaking may offer commitments while the existence of a real infringement is uncertain.

7.2.3 Settlement Procedure (*Procédure de non-contestation des griefs*)

The French *code de commerce* states:

> When a body or an undertaking does not contest the reality of the objections notified to it, the General Rapporteur may recommend that French Competition Authority, which hears the parties and the Government official without a report being drawn up in advance, impose the financial penalty referred to in Paragraph I above taking into account the absence of challenge. In this case, the maximum amount of the penalty incurred is reduced by half. Besides, when the undertaking or the body undertakes to alter its conduct in the future, the General Rapporteur may recommend that the French Competition Authority takes it into account also when setting the amount of the penalty.[57]

[55] Notice on Competition Commitments § 27.

[56] See *Cour de cassation, com.*, 4.11.2008, n° 07-21275.

[57] Article L. 464-2 III: "Lorsqu'un organisme ou une entreprise ne conteste pas la réalité des griefs qui lui sont notifiés, le rapporteur général peut proposer à l'Autorité de la concurrence, qui entend les parties et le commissaire du Gouvernement sans établissement préalable d'un rapport, de prononcer la sanction pécuniaire prévue au I en tenant compte de l'absence de contestation. Dans ce cas, le montant maximum de la sanction encourue est réduit de moitié. Lorsque l'entreprise ou l'organisme s'engage en outre à modifier son comportement pour l'avenir, le rapporteur général peut proposer à l'Autorité de la concurrence d'en tenir compte également dans la fixation du montant de la sanction."

The French Competition Authority has issued a notice on this procedure[58]

With the Settlement Procedure, the undertaking involved in a prohibition procedure before the French Competition Authority obtains a reduction of the fine in exchange for a waiver to contest the objections which have been notified by the agency. As to the French Competition Authority, the Settlement Procedure allows it to obtain a resolution of the case faster and easier; the Rapporteur doesn't have to write the report. Optionally, the undertaking can get an additional discount if it proposes commitments. The rules applied to these commitments are comparable to those applied to the commitment procedure mentioned above.

7.2.3.1 Scope

All anticompetitive practices are concerned by this procedure, whether vertical or horizontal agreements or abuse of dominant position, and this procedure is applicable even when the Treaty on the Functioning of the European Union is applied.

7.2.3.2 Implementation

The undertaking has not a right to a settlement,[59] but it can ask for the initiation of the procedure. The request shall be made within 2 months after the statement of objections has been issued. The Rapporteur makes the decision to launch the procedure, and his appraisal is controlled by the Board, checking that there is no manifest error of assessment. The parties to it (that is to say the investigations services and the undertaking) are free to end the negotiation at any time. The documents will be removed from the case file. But if the negotiation is successful, a report (*procès-verbal*) is signed by the parties, containing the waiver, the commitments proposed and the proposition of reduction of the fine of the General Rapporteur.

7.2.3.3 Procedure

Pursuant to the Notice relating to the French Settlement Procedure,[60] the waiver must take the form of "a statement from the body or the undertaking concerned." This statement "states in clear, comprehensive terms, void of any ambiguity and unconditional" that the body or undertaking concerned "does not deny the reality of all the practices in question or the legal qualification given to them by the Investigations Services under the relevant provisions of the Commercial Code and the TFEU or their accountability."

The waiver to challenge the reality of the practices in question must be on the facts constituting these practices, their object and their anticompetitive effects, their

[58] Procedural Notice relating to the French Settlement Procedure issued on February 10th, 2012 (hereafter "the Notice relating to the French Settlement Procedure") § 19.

[59] CA Paris, 23 février 2012, n° 2010/20555. The implementation of the settlement procedure is at the discretion of the Rapporteur. See Notice relating to the French Settlement Procedure § 27.

[60] Notice relating to the French Settlement Procedure. §15.

characteristics, their duration and modalities of participation of the body or the undertaking concerned by these practices.

However, despite the waiver, the undertaking still has the right to discuss the elements determining the penalty, that is to say, the seriousness of the importance of the damage to the economy, the individual situation of the undertaking in question or the group to which the company belongs (including its ability to pay) and the existence of repeated infringements (récidive).

7.2.3.4 Effects

This procedure has several effects on the final amount of the fine. The code states that the maximum amount of the penalty incurred is reduced by half, and the French Competition Authority takes into account the absence of challenge when determining the amount of the fine. The mere absence of challenge, in practice, has the consequence of a reduction of 10 % of the fine. An additional reduction can be obtained, from 5 to 15 % of the amount of the fine, if the undertaking makes commitments.

The Settlement Procedure is a sufficient basis to prove the violation of the law.[61]

The Court of Paris has ruled that this procedure is an integral part of the proceedings before the competition authority and constitutes neither a confession nor an admission of liability.[62] The Supreme Court subsequently confirmed this solution.[63] This solution is important with regard to civil actions.

7.2.3.5 Third Parties

In the *Manpower* case,[64] the Court finds that the settlement procedure is sufficient to prove the agreement in respect of those who do not challenge the objections, and also against other parties to the proceedings. This approach raises serious concerns for third parties all the more so the fact that the Rapporteur is not obliged to inform third parties of the implementation of a settlement procedure for another party.

[61] See Cass., ch. com., 29 mars 2011, n^{os} 10-12913 et 10-13686, See also Aut. conc., décision n^{o} 12-D-25 du 18 décembre 2012, pt 143: *le fait que l'entreprise à laquelle les griefs ont été notifiées ne les conteste pas suffit, conformément à la jurisprudence [. . .] à fonder un constat d'infraction dans tous ses aspects (constatation des faits, qualification juridique de ces faits au regard du droit interne et de l'Union, et responsabilité de l'entreprise en cause).*

[62] CA Paris, 29 janvier 2008, *Le Goff Confort SA*, reviewing *Conseil de la concurrence's* decision n^{o} 06-D-03.

[63] Cass., ch. com., 29 mars 2011, n^{o} 10-12.913, *Manpower France e.a.* In this case, the Court rules that the settlement procedure establishes the existence of the alleged cartel for the party which does not contest the reality of the objections and for the other parties to the proceedings.

[64] Cass., ch. com., 29 mars 2011 (cf above). For an example: Aut. conc., décision n^{o} 12-D-09 du 14 mars 2012.

7.2.3.6 Fundamental Rights

The Notice relating to the French Settlement Procedure states that "the body or the undertaking that wishes to move towards a settlement procedure has, to that end, a framework to ensure a full respect of its rights."[65]

1. Pursuant articles L.463-1 et seq of the Commercial Code, the adversarial principle is provided throughout the investigation procedure and at the hearing before the Board
2. Access to the file is granted in the manner prescribed by the general rules applicable to the procedure before the French Competition Authority
3. The right to an impartial judge is guaranteed by the separation of the functions of investigations conducted under the authority of the General Rapporteur, on the one hand, and the decision making by the Board, on the other hand, as well as when the Authority imposes a financial penalty on a body or an undertaking who has not renounced to challenge the objections notified.

7.2.3.7 Risks for the Parties

The separation of the functions of investigations (conducted by the services of the General Rapporteur) has its disadvantages: the reduction of the fine is negotiated by the undertaking with the Investigation Services, but the final setting of the fine falls within the remit of the Board. The proposition of a reduction of the Rapporteur is not binding for the Board.[66] This implies a lack of predictability of the final reduction granted in the end to the undertaking.

7.2.3.8 Combination of Procedures

Different transactional procedures are complementary or alternative because they take place at different steps of the procedure:

1. Leniency Program: launched before any procedure (even before investigations);
2. Commitment Procedure: before the statement of objections;
3. Settlement Procedure: after the statement of objections.

The French Competition Authority admits that one can implement the Leniency Program and the Settlement Procedure.[67] The French Competition Authority nevertheless admits such cumulating only in the case of "procedural gains (. . .) sufficient," especially in the event that *the scope of the objections notified to the body or undertaking concerned differs in one or more major point of the agreement as described by the applicant in its application for leniency, given all the information and evidence available to him.*

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[65] § 7.

[66] Cass., ch. com., 22 novembre 2005, n° 04-19102.

[67] Aut. conc., décision n° 13-D-12 du 29 mai 2013, §1039-1055. See also the French Competition Authority notice issued on 10 February 10th, 2012, §6.

Germany

8

Eckart Bueren

8.1 Introduction

The main competition law provisions in Germany, that is, the prohibition of cartels and abusive practices as well as merger control, can be found in the *Gesetz gegen Wettbewerbsbeschränkungen* (Act against Restraints of Competition, the "GWB").[1] Since its entry into force in 1958, the GWB has undergone several reforms; its main substantive provisions are now largely in line with Articles 101 and 102 TFEU.

The *Bundeskartellamt* (Federal Cartel Office, the "FCO") is the competent authority to enforce the GWB and prosecute infringements if the anticompetitive effects extend beyond the territory of one German federal state (*Bundesland*) (sec. 48(1), (2) of the GWB).[2] In addition, the FCO applies Articles 101 TFEU and Article 102 TFEU in the prosecution of cartels and abusive practices that are likely to affect trade between the EU Member States (Article 3(1) Regulation 1/2003[3]).

The FCO is an independent higher federal authority assigned to the Federal Ministry of Economics and Technology (sec. 51(1) of the GWB). This status

[1] Act Against Restraints of Competition in the version published on 26 July 2013 (Bundesgesetzblatt (Federal Law Gazette) I, page 1750, 3245), as last amended by Article 2(78) of the Act of 7 August 2013 (Federal Law Gazette I, page 3154).

[2] H.-J. Bunte, Kartellrecht, 2nd ed. 2008, p. 400f.; J. Hoffmann and M.E. Orth et al., § 12 Bundesrepublik Deutschland, in: Terhechte, Internationales Kartell- und Fusionskontrollverfahrensrecht, 2008, § 12, paras 33, 40 et seq.

[3] 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 2003, L 1, p. 1.

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basically implies that the FCO is organizationally and functionally independent.[4] Within the FCO, several Decision Divisions which are largely independent[5] and organised as quasi-judicial collegiate bodies (cf. sec. 51(2), (4) of the GWB) adopt decisions in a process modelled on judicial principles.[6]

It is at the FCO's discretion whether to initiate proceedings[7] and whether to prosecute and sanction a particular competition law infringement[8] (opportunity principle, Opportunitätsprinzip).[9] If it decides to take action, the FCO has two options.[10]

Administrative proceedings, governed by sec. 54 et seqq. of the GWB in conjunction with the German Code of Administrative Procedure (Verwaltungsverfahrensgesetz, the "VwVfG"[11]) can lead to the adoption of commitment decisions without a finding of infringement (sec. 32b of the GWB) or to an order to discontinue a certain infringement (in the following: "cease and desist" or "prohibition order"). The parties have the rights of defence that generally apply in administrative proceedings, most notably the right to be heard (sec. 56 of the

[4] Briefly C. Becker, in: Löwenheim, Meessen and Riesenkampff, Kartellrecht, 2nd ed. 2009, § 51 GWB, para 1; generally M. Ibler, in: Maunz and Dürig, Grundgesetz-Kommentar, 69th supplement 2013, Article 87 GG, paras 249–255.

[5] M. Kling and S. Thomas, Kartellrecht, 2007, pp. 809 et seq.; S. Klaue, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, § 51 GWB, para 5. It is in dispute to what extent individual instructions by the superordinate German Ministry of Economics are admissible. The majority view answers the question at least partially in the affirmative; see, e.g., R. Bechtold, in: Kartellgesetz: GWB, 7th ed. 2013, § 52 GWB, para 3; differentiating S. Klaue, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, § 51 GWB, paras 11 et seq., both with further references; against such instructions arguably V. Emmerich, Kartellrecht, 12th ed. 2012, pp. 591 et seq.

[6] J, Hoffmann and M.E. Orth et al., § 12 Bundesrepublik Deutschland, in: Terhechte, Internationales Kartell- und Fusionskontrollverfahrensrecht, 2008, § 51, para 34; H.-J. Bunte, Kartellrecht, 2nd ed. 2008, p. 399f.

[7] Administrative offence proceedings are initiated by the first measure of the competition authority whose evident intention is to take legal actions against somebody because of an administrative offence, G. Dannecker and J. Biermann, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, Vor § 81 GWB, para 202.

[8] See sec. 47(1) of the OWiG.

[9] G. Dannecker and J. Biermann, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, Vor § 81 GWB, paras 195 et seqq.

[10] Sections 54 et seqq., 81 et seqq. of the GWB. The two types of procedures are regulated separately in German law, unlike in European competition procedure. For a short overview, see H.-J. Bunte, Kartellrecht, 2nd ed. 2008, pp. 413–419; for a detailed comprehensive description of German competition procedure, see J. Hoffmann and M.E. Orth et al., § 12 Bundesrepublik Deutschland, in: Terhechte, Internationales Kartell- und Fusionskontrollverfahrensrecht, 2008, § 12, paras 1–257.

[11] German Code of Administrative Procedure in the version published on 23 January 2003 (federal law gazette BGBl. I, p. 102), as last amended by Article 2(1) 1 of the law of 14. August 2009 (Federal Law Gazette BGBl. I, p. 2827).

GWB) and a right to access to file which is subject to certain exceptions (sec. 29 of the VwVfG).[12]

Administrative offence proceedings, governed by the Act on Regulatory Offences (Gesetz über Ordnungswidrigkeiten, the "OWiG"[13]), can lead to fines against legal entities and/or natural persons and are necessarily associated with finding an infringement. Due to a referral in sec. 46(1) of the OWiG to the German Code of Criminal Procedure (Strafprozessordnung, the "StPO"[14]), the FCO must, as a rule, respect the principles of procedural law that apply in the criminal process. These include the duty to examine the facts of its own motion (Amtsermittlungsgrundsatz, principle of ex proprio motu investigation), the principle of in dubio pro reo, the prohibition of analogy (nullum crimen, nulla poena sine lege stricta) and important rights of defence (e.g., right to be heard, access to file).

The companies concerned may appeal an FCO order before the Higher Regional Court of Düsseldorf who conducts a de novo hearing of the case. In court, the FCO order imposing a fine basically serves as an indictment. Further appeals on points of law can be lodged with the Federal Court of Justice (the "BGH") in Karlsruhe.[15]

Competition law infringements can amount to criminal offences by natural persons, most importantly where competition is restricted through agreements in the context of public tenders (section 298 German Criminal Code, Strafgesetzbuch, the "StGB"[16]) or where an anticompetitive conspiracy fulfils the conditions of fraud (section 263 StGB).[17] If an act is at the same time a criminal and a regulatory offence, in principle only criminal law shall be applied.[18] Its enforcement is at the sole responsibility of the public prosecution.[19] Hence, as soon as the FCO has indications to the effect that an anticompetitive act constitutes a criminal offence, it

[12] Exceptions apply insofar as it would impede the FCO properly discharging its duties and insofar it is required by legitimate interests of other parties or affected persons in confidentiality, see further K. Schmidt and A. Bach, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, § 56 GWB, para 10.

[13] Act on Regulatory Offences in the version published on 19 February 1987 (Federal Law Gazette [BGBl.] I, p. 602), as last amended by Article 4(58) of the Act of 7 August 2013 (Federal Law Gazette I, p. 3154).

[14] Code of Criminal Procedure in the version published on 7 April 1987 (Federal Law Gazette [Bundesgesetzblatt] Part I, pp. 1074, 1319), as last amended by Article 3 of the Act of 23 April 2014 (Federal Law Gazette Part I, p. 410).

[15] For a short English description of the procedure, see Bundeskartellamt, The Bundeskartellamt in Bonn, Organisation, Tasks and Activities, Sept. 2011, p. 26.

[16] Criminal Code in the version promulgated on 13 November 1998 (Federal Law Gazette [Bundesgesetzblatt] I, p. 3322), as last amended by Article 1 of the Law of 22 December 2010 (Federal Law Gazette I, p. 2300).

[17] For an in-depth treatment, see G. Dannecker and J. Biermann, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, Vor § 81 GWB, paras 136 et seqq.

[18] Sec. 21(1)1 of the OWiG; see further G. Dannecker and J. Biermann, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, Vor § 81 GWB, paras 175 et seqq.

[19] See sec. 40 of the OWiG.

must transfer the case to the public prosecution office (sec. 41(1) of the OWiG).[20] However, the FCO remains competent to adopt an order imposing fines against the implicated legal persons (sec. 82 sentence 1 of the GWB), which is a consequence of the fact that German law does not provide for the criminal prosecution of companies.

8.2 Transactional Elements in Administrative Offence Proceedings

8.2.1 Leniency Policy

8.2.1.1 Legal Basis

The FCO has been operating a Leniency Programme, called *Bonusregelung*, for almost 15 years. The first version, *Notice no. 68/2000*,[21] was published in April 2000. The current version, *Notice no. 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases—Leniency Programme—* dates from 7 March 2006. The main goal of the revision was to improve legal certainty and transparency for prospective leniency applicants, thereby enhancing the programme's attractiveness.[22]

The *Bonusregelung* essentially is a guideline in which the FCO sets out how it will exercise its discretion in setting the fine if a cartel member reports an infringement or supports the investigation. In this way, the programme creates legitimate expectations. These, as well as the principle of equal treatment, have the effect that the FCO is bound by the Leniency Programme to grant the benefits promised. By contrast, the courts are not bound and review the FCO's decisions according to the general statutory rules.[23]

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[20] If the public prosecution office should later discontinue the proceedings only in respect of the criminal offence, but there are indications to the effect that the offence may be prosecuted as a regulatory offence, it shall transfer the case back to the administrative authority; sec. 43(1) of the OWiG.

[21] Bekanntmachung Nr. 68/2000 über Richtlinien des Bundeskartellamtes für die Festsetzung von Geldbußen (Bonusregelung), published by the FCO on 17th April 2000, and afterwards in the German Federal Gazette (Bundesanzeiger) of May 4th, 2000, No. 84, p. 8336.

[22] See further G. Dannecker and J. Biermann, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, § 81, paras 418, 425, 428; for a detailed comparison of the old and the new version of the German leniency programme, see M.M. Ohle and S. Albrecht, Die neue Bonusregelung des Bundeskartellamtes in Kartellsachen, WRP 7/2006, 866 et seqq.

[23] Cf. G. Dannecker and J. Biermann, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, Vor § 81, para 206 and § 81, para 422. This implies that, if a leniency applicant appeals the FCA's decision granting him immunity or a reduction of the fine, the court might come to the conclusion that the reward granted by the FCA was in whole or in part unjustified and therefore increase the fine inflicted by the FCA.

Since the seventh amendment of the GWB in July 2005, the German leniency programme has a clear legal basis in sec. 81(7) of the GWB stipulating that the FCO may lay down general administrative principles on the exercise of its discretionary powers in assessing the fine.[24] Before July 2005, the leniency policy could be based on sec. 53(1)3 of the GWB, which states that the FCO shall regularly publish its administrative principles.

The FCO's Leniency Programme has no clear equivalent in German general criminal law. However, since 2009, sec. 46b StGB provides that the court can mitigate a sentence or even decide not to impose one if a perpetrator contributes to the discovery or prevention of serious offences; previously, there was a limited leniency policy in the context of terrorist offences.[25]

8.2.2 Content and Practical Application

The first version of the FCO's leniency programme was closely in line with the *Commission Notice on the non-imposition or reduction of fines in cartel cases* from 1996.[26] The current version largely corresponds with the ECN Model Leniency Programme of 2006 and, hence, also with the Commission Notice on Immunity from fines and reduction of fines in cartel cases from 2006.[27] There are, however, three notable exceptions: first, whereas the Commission and the ECN Model Programme only exclude coercers from immunity from fines, the German programme also excludes the sole ringleader[28]; second, whereas the ECN Model Leniency Programme and the Commission Notice refer only to corporate leniency,[29] the German leniency notice also applies to natural persons as far as the FCO's competence is concerned. Third, the Commission's Leniency Programme explicitly provides for the option to present information and evidence in hypothetical terms before filing an application.[30] In contrast, the FCO's

[24] The legislator understood this to be a clarification that the FCO may adopt a leniency policy, which had previously been disputed by scholars; see Gesetzentwurf der Bundesregierung, Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, BT-Drucks. 15/3640, p. 67. A further amendment in December 2007 (Gesetz zur Bekämpfung von Preismissbrauch im Bereich der Energieversorgung und des Lebensmittelhandels, BGBl. I 2966) clarified that sec. 81(7) of the GWB applies in particular to setting the amount of the fine.

[25] See C. Roxin and B. Schünemann, Strafverfahrensrecht, 27th ed. 2012, § 14, paras 19 et seq., who are very critical of sec. 46b StGB.

[26] OJ 1996 C 207, pp. 4–6. See Bundeskartellamt, Activity Report 1999–2000 (Bericht des Bundeskartellamts über seine Tätigkeit in den Jahren 1999/2000 sowie über die Lage und Entwicklung auf seinem Aufgabengebiet), BT-Drucks. 14/6300 of June 22nd 2001, p. 43.

[27] OJ 2006 C 298, pp. 17–22.

[28] Bundeskartellamt, Activity Report 2005–2006 (English version), pp. 11, 14–16.

[29] See ECN Model Leniency Programme 2006, para 15; ECN Model Leniency Programme 2012, para 15.

[30] Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ 2006 C 298, p. 17, paras 16, 19.

programme does not mention such a possibility. A further important difference, though not mentioned in the programmes, is that the FCO as a rule does not issue a decision against an applicant who receives immunity from fines, which is an additional important benefit providing protection from follow-on claims.[31] The main content of the German programme can be summarised as follows:

1. Part B lists the requirements for obtaining immunity from fines. This benefit is open for the first cartel member who comes forward before the FCO has sufficient evidence either to obtain a search warrant or at least to prove the offence. The cartel member must provide information that allows accomplishing these tasks. Ringleaders of coercers are excluded.
2. Part C promises reductions of up to 50 % for other cartel members (i.e., subsequent applicants or the ringleader/coercer) who provide information and, where available, evidence which makes a significant contribution to proving the offence.
3. In any case, a fine reduction based on the leniency programme requires that the applicant cooperates fully and continuously with the FCO as set out in part D.
4. Part E mainly explains how a leniency applicant may obtain a marker by the FCO, i.e. how he can provisionally secure a certain priority position with a short-form request. Furthermore, the FCO states that it will rate an application filed by a person authorised to represent an undertaking also as one made on behalf of the natural persons participating in the cartel as employees of that undertaking, unless otherwise indicated.
5. In the final part, part F, the FCO inter alia assures leniency applicants to use its discretionary powers to refuse applications by private third parties who seek information from the FCO concerning the leniency application and the evidence provided therein. Besides, the FCO stresses that it cannot grant leniency to individuals with respect to criminal offences.

Over the years, the FCO's Leniency Programme has turned out to be a very effective tool in eliciting applications by participants of previously unknown cartels. The FCO publishes statistics every 2 years in its Activity Reports. At the time of writing, the latest statistics show that, under the old leniency programme, applications had remained at a rather low level, with an exceptional peak of 69 applications in the year before the reform. Under the current programme, the number of applications broadly follows an upward trend, rising from 7 in the year of its adoption (2006) to 41 in 2011 and 51 in 2012; the vast majority of applications are filed on behalf of legal entities.[32]

[31] See J. Burrichter and E. Ahlenstiel, Integrating Public and Private Enforcement in Europe: Legal and Jurisdictional Issues – The German Perspective, in: Lowe and Marquis, European competition law annual 2011, 2014, pp. 95, 100.

[32] Bundeskartellamt, Tätigkeitsbericht 2011–2012, BT-Drucks. 17/13675, p. 28.

8.2.3 Compatibility with the Rule of Law

8.2.3.1 Scholarly Controversies

The FCO's leniency policy has met considerable criticism by several legal scholars and lawyers, especially at the beginning. Not all issues are settled yet. Due to limitations of space, this report can sketch only the main issues. Broadly speaking, the criticism refers to three main areas[33]:

Competence of the FCO to Adopt and Operate a Leniency Programme

First, it has been called into question whether the FCO may state in general guidelines that it will refrain from sanctioning a cartel participant if the conditions of a leniency programme are fulfilled, thereby forgoing its discretion completely *ex ante*.[34]

In particular, it is still doubted whether the adoption of a leniency policy is an essential matter to be regulated directly by the legislator pursuant to the theory of "legislative reservation" (*Wesentlichkeitstheorie*) developed by the German Constitutional Court (*Bundesverfassungsgericht*).[35] Furthermore, scholars have questioned whether principles of criminal law allow the FCO to refrain from sanctioning cartel members without having regard to the circumstances of the particular case.

Both lines of critique were put forward in particular before July 2005 as long as the leniency programme could be based on sec. 53(1)3 of the GWB only. It was controversial among scholars whether this was sufficient, given that the issuance of a fine and thereby its setting severely interfere with fundamental rights. Today, the criticism has lost a considerable part of its force due to the introduction of sec. 81 (7) of the GWB.[36]

Rights of Defence and Procedural Rights

A second line of critique relates to the question whether the leniency programme is compatible with the rights of defence of (alleged) cartel participants. Especially, the following rights are at issue:

[33] For a detailed discussion, see, e.g., R. Zagrosek, Kronzeugenregelungen im U.S.-amerikanischen, europäischen und deutschen Recht der Wettbewerbsbeschränkungen, 2006, pp. 117 et seqq., 166 et seqq., 213 et seqq.

[34] Doubting G. Dannecker and J. Biermann, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, § 81, para 425.

[35] R. Zagrosek, Kronzeugenregelungen im U.S.-amerikanischen, europäischen und deutschen Recht der Wettbewerbsbeschränkungen, 2006, pp. 119 et seqq.; G. Dannecker and J. Biermann, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, § 81, para 440.

[36] See M.M. Ohle and S. Albrecht, Die neue Bonusregelung des Bundeskartellamtes in Kartellsachen, WRP 7/2006, 866, 870; G. Dannecker and J. Biermann, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, § 81, para 440.

1. *Nemo tenetur se ipsum accusare*:

   Via sec. 46 of the OWiG, as well as due to the rule of law guaranteed by the German constitution (Rechtsstaatsprinzip), the principle of *nemo tenetur se ipsum accusare* (privilege against self-incrimination) applies in administrative offence proceedings, meaning that no one is bound to incriminate himself. As a consequence, the person concerned in an administrative offence proceeding has the right to remain silent (*Aussageverweigerungsrecht*), and any witness may refuse to answer any questions if replying would subject him to the risk of being prosecuted for a criminal offence or an administrative (regulatory) offence (*Auskunftsverweigerungsrecht*, sec. 55(1) of the StPO). It has yet not been resolved if these rights apply only to natural persons or if they also extend to legal entities. The answer depends on whether one sees these rights as being rooted exclusively in the general right of personality derived from Article 2 (1) and Article 1(1) of the German constitution (Grundgesetz, GG), which does not fully extend to legal entities (Article 19(3) GG),[37] or whether these rights are also required by the constitutional rule of law (Rechtsstaatsprinzip). A widespread view among scholars is in favour of the latter and argues that legal entities are included.[38] The German Constitutional Court (Bundesverfassungsgericht) had first shared this opinion[39] but denied legal entities the right to remain silent in a judgment of 1997.[40]
2. *Right to a fair trial:*

   The right to a fair trial does not, as such, entail detailed requirements and prohibitions. Rather, it is a generic term for several specific rights that must be spelled out by the legislator and that altogether constitute a system based on the idea of justice and the rule of law.[41] In administrative offence proceedings, these rights include in particular the right to be heard (Article 103 GG), the right to effective counsel (sec. 46 of the OWiG, sec. 137 of the StPO), access to file (sec. 46 of the OWiG, sec. 147 of the StPO) and the right to present exculpatory evidence and arguments.

[37] See further U. Di Fabio, in: Maunz and Dürig, Grundgesetz-Kommentar, 69th supplement 2013, Article 2, paras 224 et seq.

[38] With respect to the right to remain silent (Aussageverweigerungsrecht), see, e.g., H. Wrage-Molkenthin and W. Bauer, in: Frankfurter Kommentar zum Kartellrecht, Vorbem. § 81–86 GWB 2005 (Lfg. 71 May 2010), paras 50 et seq.; C. Vollmer, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 81, para 157; Rogall, in: Karlsruher Kommentar zum OWiG, 3rd ed. 2006, § 30, para 188; P. Schuler, Zur Diskussion um ein Aussageverweigerungsrecht juristischer Personen, JR 2003, 265. With respect to the right as a witness to refuse to answer self-incriminating questions, M. Klusmann, in: Wiedemann, Kartellrecht, 2nd ed. 2008, § 57, para 37; G. Dannecker and J. Biermann, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, Vor § 81, paras 215 et seqq.

[39] BVerfG BB 1975, 1315.

[40] BVerfGE 95, 220.

[41] Cf. BVerfGE 57, 250=NJW 1981, 1719, 1722; P. Hetzel, Kronzeugenregelungen im Kartellrecht, 2004, p. 266.

The core concern is that the FCO's Leniency Programme could undermine the above-mentioned rights by pressuring (alleged) cartel members not to make use of them.[42] This is of growing importance due to the rising level of cartel fines in Germany and the EU. In particular, it follows from the right to remain silent, as well as from the other rights of defence, that a lack of cooperation must not be considered as an aggravating factor. Technically, the Leniency Programme does of course not do this—rather, the FCO would first determine the fine and then deduct reductions for cooperation. However, a high overall level of cooperation might indirectly affect the basic amount of fines: if a competition authority makes extensive use of fine reductions to elicit cooperation, it may be tempted to increase the basic amount of fines to prevent a decrease of the (average) expected fine, thereby assuring a constant level of deterrence. Indeed, competition law fines have increased dramatically in the last years. If the procedural practice should thereby leave companies no other reasonable option but to cooperate, the inherent waiver of rights of defence might be considered involuntary and thereby the right to fair trial might be infringed.[43] Currently, however, there is agreement that at least the FCO's cartel fines are below such a level. Besides, competition authorities are obliged to consider mitigating circumstances, including cooperation. This should not prevent them from taking other measures to fight competition law infringements (more) effectively.

Principle of Equal Treatment and Proportionality

The leniency programme privileges cooperating cartel members compared to non-cooperating cartel members and to offenders in other fields of law where no leniency policy exists, so that no complete exemption of fines is attainable. To be compatible with the principle of equal treatment (Article 3 GG), there must be an objective reason for the unequal treatment between cooperating parties and other offenders that serves a legitimate purpose, and leniency must be suitable and proportionate to fulfil that purpose.[44] By now, however, it appears to be widely accepted that the economic harm caused by cartels, their secret character and the ensuing value of cooperation by cartel members in the investigation justifies the FCO's leniency policy, in particular in view of the fact that ringleaders and coercers cannot fully escape a fine.[45]

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[42] On the following, see R. Zagrosek, Kronzeugenregelungen im U.S.-amerikanischen, europäischen und deutschen Recht der Wettbewerbsbeschränkungen, 2006, pp. 168 et seqq.; P. Hetzel, Kronzeugenregelungen im Kartellrecht, 2004, pp. 266 et seqq.

[43] R. Zagrosek, Kronzeugenregelungen im U.S.-amerikanischen, europäischen und deutschen Recht der Wettbewerbsbeschränkungen, 2006, p. 179; P. Hetzel, Kronzeugenregelungen im Kartellrecht, 2004, p. 270.

[44] P. Hetzel, Kronzeugenregelungen im Kartellrecht, 2004, p. 260.

[45] See H. Wrage-Molkenthin and W. Bauer, in: Frankfurter Kommentar zum Kartellrecht, Vorbem. § 81–86 GWB 2005 (Lfg. 71 May 2010), paras 5 et seqq., 18 seqq. (however partly still critical); T. Wiesner, Der Kronzeuge im Kartellrecht, 2004, pp. 118 et seqq.; R. Zagrosek, Kronzeugenregelungen im U.S.-amerikanischen, europäischen und deutschen Recht der Wettbewerbsbeschränkungen, 2006, pp. 213 et seqq.; P. Hetzel, Kronzeugenregelungen im Kartellrecht, 2004, pp. 259 et seqq.

8.2.3.2 Existing Case Law

Over the years, the FCO's Leniency Programme has gained more and more acceptance and is rather firmly established in practice today. So far, the courts have consistently accepted the FCO's approach: in 2007, the Higher Regional Court of Düsseldorf held that the FCO's leniency policy promising full or partial exemption from a fine is within the limits of the FCO's discretion to prosecute and sanction cartels. It therefore does not amount to holding out the prospect of an advantage not envisaged by statute, which would be prohibited by sec. 136a(1)3 of the German Code of Criminal Procedure.[46] The Court confirmed this holding in a further judgment of 2009.[47] About 3 months later, the same Court, in a judgment that mainly centred on how to define the upper limit of the fine in German law, again broadly accepted the FCO's leniency policy. The Court acknowledged that the cooperation of suspected cartel members is a mitigating circumstance to be considered in setting the fine but stressed that the judge conducts an independent assessment in this regard.[48]

8.2.4 Settlements (*einvernehmlicher Bußgeldbescheid*)

In administrative offence proceedings, transactional (consensual) resolutions with the competent Decision Division are possible with respect to the termination of proceedings, as well as with respect to the amount of the fine.[49] Both have been widespread for a long time.[50]

Where the Decision Division imposes a fine, a consensual resolution is commonly referred to as *einvernehmlicher Bußgeldbescheid* or *Settlement*,[51] the former German term being the traditional one, the latter the more recent. Practitioners

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[46] OLG Düsseldorf, judgment of March 23rd 2006—VI-2 Kart 3/05 OWi=WuW/E DE-R 1733–1749, partly reversed on other grounds by BGH NJW 2007, 3792.

[47] OLG Düsseldorf, judgment of March 30th 2009—VI-2 Kart 10/08 OWi, 2 Kart 10/08.

[48] OLG Düsseldorf, judgment of June 26th 2009—2a Kart 2–6/08, reversed on other grounds by BGH, decision of February 26th, 2013, KRB 20/12=NJW 2013, 1972.

[49] G. Dannecker and J. Biermann, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, Vor § 81 GWB, paras 248, 250.

[50] According to J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, p. 471, the practice of settling administrative offence proceedings began already shortly after the entry into force of the GWB in 1958. K.E.T. De Maiziere, Die Praxis der informellen Verfahren beim Bundeskartellamt, 1986, p. 9, already explains that negotiating the fine had been commonplace for many years. He reports that in the beginning of the 80s, there was, however, an internal order not to make the amount of the fine a subject matter of negotiation any more, though this could occur nevertheless on a case-by-case basis. More recent publications on the matter do not mention such an internal order. Now, the general requirements for settlements set by the courts arguably leave no room for such an order (any more) because the FCO president has no authority to give instructions to the Decision Divisions (on the latter, see S. Klaue, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, § 51 GWB, para 5).

[51] J. Burrichter and D. Zimmer, Reflections on the Implementation of a 'Plea Bargaining'/'Direct Settlement' System in EC Competition Law, in: Ehlermann and Atanasiu, European Competition Law Annual 2007, 2007, pp. 611, 612.

estimate that they usually occur in at least 50 % of the proceedings.[52] Looking only at the proceedings between 2007 and 2011, the rate even amounts to more than 80 %, which includes numerous hard-core cartels and some vertical restraints.[53]

8.2.5 Legal Requirements

Conventionally, the normative guidelines for a settlement with the FCO have been derived from the standards developed in the case law on negotiated agreements in German criminal procedure.[54] These include in particular the following: a waiver of the right to appeal is excluded as part of a settlement; an admission must be backed by sufficient other evidence; all parties must receive equal treatment and be granted a certain level of transparency with respect to the course of the settlement, the latter, however, with due account of the fact that Decision Divisions do not conduct public hearings.[55] In mid-2009, the German legislator regulated negotiated agreements in criminal procedure with the *Gesetz zur Regelung der Verständigung im Strafverfahren*[56]*(Act on negotiated agreements in criminal proceedings)*. That being said, the reform has not changed the validity of the aforementioned principles with respect to administrative offence proceedings before the FCO. According to the government's statement of reasons concerning the act (*Regierungsbegründung*), the legislator made a deliberate choice not to regulate settlements in administrative (offence) proceedings, inter alia because, in the words of the government's statement, this would unduly formalise the summary procedure of administrative authorities and because no significant practical need for such regulation was

[52] S. Prange and M.C. Schneider, Um jeden Preis, Handelsblatt No. 37 of February 23rd 2010, p. 8, 9.

[53] A. Mundt (FCO president), Alternative Instrumente der Kartellbehörden, 44. Innsbrucker Symposium des FIW, 10. März 2011 in Innsbruck, pp. 13 et seq.; see further C. Vollmer, Settlements in German Competition Law, E.C.L.R. 2011, 32(7), 350, 350 et seq.

[54] See Bundeskartellamt, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22.01.2008), pp. 103, 103 et seq.; G. Dannecker and J. Biermann, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, Vor § 81 GWB, paras 205 et seqq., both with further references and an overview about important requirements; for an in-depth treatment, see G. Pfeiffer and R. Hannich, in: Karlsruher Kommentar zum OWiG, 3rd ed. 2006, Einleitung, paras 29d-29g. Applying these requirements by analogy is justified by the fact that proceedings in which the GWB is enforced by way of fines are to be classified as administrative offence proceedings (Ordnungswidrigkeitenverfahren).

[55] Bundeskartellamt, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22 January 2008), pp. 103, 104 et seq.; C. Vollmer, Settlements in German Competition Law, E.C.L.R. 2011, 32(7), 350, 351 et seq.; on the prohibition of a waiver of legal remedy, see also ICN Cartel Working Group, Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008, p. 29; for a general overview about the case law, Meyer-Goßner, Strafprozessordnung, 56th ed. 2013, Einl. paras 119f et seq.

[56] Federal Law Gazette (BGBl) 2009 part I No. 49 of 03 August 2009, pp. 2353 et seq. See further below: 3. (Negotiated) Agreements on the Further Course and Outcome in Criminal.

considered to exist.[57] The government's statement of reasons concerning the Act on negotiated agreements in criminal proceedings further explains that the act should not prevent "informal" settlements in exceptional cases in the future. In doing this, the principle of fair trial demanded to comply with the key requirements of the rule of law now regulated in detail with respect to criminal procedure.[58] The previous case law aimed at safeguarding exactly these requirements.[59]

8.2.6 Course of the Procedure

Apart from the aforementioned guidelines, there are no specific statutory provisions governing settlements with the FCO in administrative offence proceedings. The details may therefore vary depending on the competent Decision Division.[60] In early 2010, the FCO explained in a case report[61] that it had modified its conventional practice, apparently bringing it more in line with the European Commission's new settlement procedure. All in all, the changes appear to be mostly minor in

[57] Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Regelung der Verständigung im Strafverfahren, BT-Drucks. 16/12310 of 18 March 2009, p. 16.

[58] Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Regelung der Verständigung im Strafverfahren, BT-Drucks. 16/12310 of 18 March 2009, p. 16.

[59] However, a change seems possible with respect to whether an admission/confession is allowed as evidence in proceedings after a settlement has failed. According to the case law of the German Federal Court (BGH) (though not completely uniform) before the statutory regulation of the matter in criminal procedure, the confession/admission could still be used; see H.-H. Kühne, in: Löwe and Rosenberg, Die Strafprozeßordnung und das Gerichtsverfassungsgesetz, 26th ed. 2006, Einleitung G, para 63; R. Kölbel, Geständnisverwertung bei missglückter Absprache, NStZ 2003, 232, 233, both with further references. By contrast, sec. 257c(4)3 of the StPO new version now stipulates that the defendant's confession may not be used in such cases. The government's statement of reasons concerning the Act justifies this with the defendant's fundamental right to a fair trial (Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Regelung der Verständigung im Strafverfahren, BT-Drucks. 16/12310 of 18.03.2009, p. 14; likewise Meyer-Goßner, in: Meyer-Goßner, Strafprozessordnung, 56th ed. 2013, § 257c StPO, para 28). Accepting this reasoning, the same should apply in administrative offence proceedings before authorities as one of the aforementioned key requirements of the rule of law or via sec. 46 of the OWiG, C. Vollmer, Settlements in German Competition Law, E.C.L.R. 2011, 32(7), 350 and fn. 67; B. Brenner, "Settlements" in Kartellverfahren des Bundeskartellamtes – Perspektiven und Grenzen, WuW 2011, 590, 594. In any case, however, the FCO seems to have held the opinion already before the reform that a confession cannot be used as evidence after a settlement failed; see ICN Cartel Working Group, Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008, p. 30. For a further change, see below text accompanying fn. 129.

[60] J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 473.

[61] Bundeskartellamt, Case summary from 8 March 2010, Fine proceedings against coffee roasters on account of price fixing (B11–18/08), pp. 3 et seq.

nature and seem to have evolved since 2008.[62] The FCO now calls "consensual" orders imposing a fine "settlement," thereby adopting the terminology used by the - European Commission.[63] It has described the modified approach in three documents:

1. in an explanatory document of 23 December 2013 about the settlement procedure[64];
2. in a case summary from March 8 2010[65] on the decision in the "Fines proceedings against coffee roasters" (B11–18/08), p. 3 et seq.; and
3. in the Activity Report 2007/2008, p. 35.[66]

Most seems familiar from conventional practice. At present, it is difficult to assess to what extent the new guidelines are actually associated with a marked permanent modification of the practice of the independent Decision Divisions[67]; reports by officials tend to suggest that this may be the case.[68]

8.2.6.1 Scope of Application

As such, all kinds of infringements may qualify for a settlement (i.e., horizontal and vertical agreements, abuse of dominance and violation of the prohibition to implement a concentration before clearance).[69] Settlement discussions are initiated predominantly in cases that are considered to be straightforward.[70] However, they are not excluded in complex cases or if the evidence is (still) insufficient to adopt a fully reasoned decision.[71]

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[62] Cf. the description of the FCOs settlement practice in the authority's Activity Report 2007/2008, p. 35.

[63] Bundeskartellamt, Case summary from 8 March 2010, Fine proceedings against coffee roasters on account of price fixing (B11–18/08), p. 3.

[64] Bundeskartellamt, Merkblatt: Das Settlement-Verfahren des Bundeskartellamtes in Bußgeldsachen.

[65] The German version of this case summary was published on 14 January 2010.

[66] The explanatory notes to the Guidelines for the setting of fines in cartel administrative offence proceedings of 25 June 2013, p. 4 (Re: para 18, Note 2), mention only the latter two documents as the FCO's guidelines on settlement agreements; this is, however, explained by the fact that the fining guidelines predate the FCOs' explanatory leaflet on the settlement procedure.

[67] The Bundeskartellamt does not mention details on the course and content of settlements in its case reports.

[68] See in particular C. Vollmer, Settlements in German Competition Law, E.C.L.R. 2011, 32(7), 350 et seqq.

[69] J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 473; on the more recent practice see C. Vollmer, Settlements in German Competition Law, E.C.L.R. 2011, 32(7), 350, 350.

[70] J. Burrichter and D. Zimmer, Reflections on the Implementation of a 'Plea Bargaining'/'Direct Settlement' System in EC Competition Law, in: Ehlermann and Atanasiu, European Competition Law Annual 2007, 2007, pp. 611, 612 et seq.

[71] Cf. Bundeskartellamt, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22.01.2008), pp. 103, 105.

There is no fixed time for settling during the proceedings. Corresponding initiatives may, and do, occur already during the investigative stage.[72] However, the Decision Division will, as a rule, start settlement discussions only after it has gained an overview about the infringement and the evidence.[73] Furthermore, it is crucial that the Decision Division considers the settlement interest of the party representative to be credible, i.e. not only purely tactical in nature.[74] It is not necessary that all parties are prepared to settle.[75]

8.2.6.2 Settlement Discussions

The goal of the settlement discussions is to reach a mutual understanding about the infringement and its adequate sanctioning in a streamlined procedure, with benefits for or, in other words, concessions from both sides. During the discussions, the Decision Division informally discloses the main documents and pieces of evidence that it is prepared to use to establish an infringement.[76] That holds (at least) insofar as the parties do not otherwise know the objections or cannot sufficiently deduce them, for instance from the documents secured at their premises.[77] According to the current guidelines, the Decision Division shall disclose the essential elements of the infringement, including the main evidence, orally or in writing; announce an upper limit of the fine; and hear the parties on these issues. The parties may put forward mitigating circumstances.[78] They are regularly expected to waive their right to full

[72] In particular already shortly after a dawn raid, cf. ICN Cartel Working Group, Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008, p. 29; J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 473; generally. Bundeskartellamt, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22 January 2008), pp. 103, 105.

[73] Bundeskartellamt, Tätigkeitsbericht 2007/2008, p. 35; C. Vollmer, Settlements in German Competition Law, E.C.L.R. 2011, 32(7), 350, 353.

[74] Bundeskartellamt, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22.01.2008), pp. 103, 105 et seq.; J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 477.

[75] C. Vollmer, Settlements in German Competition Law, E.C.L.R. 2011, 32(7), 350, 350 et seq., reports that since the end of 2007 almost one third of all settlements have been hybrid cases; J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 476 et seq.

[76] J. Burrichter and D. Zimmer, Reflections on the Implementation of a 'Plea Bargaining'/'Direct Settlement' System in EC Competition Law, in: Ehlermann and Atanasiu, European Competition Law Annual 2007, 2007, pp. 611, 613; Bundeskartellamt, Case summary from 8.3.2010, Fine proceedings against coffee roasters on account of price fixing, (B11–18/08), p. 3.

[77] ICN Cartel Working Group, Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008, p. 30; arguably also J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 473.

[78] J. Burrichter and D. Zimmer, Reflections on the Implementation of a 'Plea Bargaining'/'Direct Settlement' System in EC Competition Law, in: Ehlermann and Atanasiu, European Competition Law Annual 2007, 2007, pp. 611, 613.

access to file,[79] but they are able to see the main evidence at a much earlier stage than in the standard procedure.[80] Where appropriate, the Decision Division will make a so-called settlement proposal in the form of a draft settlement declaration which includes a summary of the result of the investigation, thereby fulfilling the parties' right to be heard, and set a time limit for acceptance.[81] A party that wants to settle must admit to the objections in the settlement declaration, which means that it has to acknowledge the facts, including the circumstances that are relevant for determining the fine. Furthermore, a settling party is expected to accept a fine up to the previously announced limit.[82] According to the modified approach, the particulars of the settlement proposal, as well as its acceptance or rejection by the affected parties and third parties, shall be mentioned in the file.[83]

8.2.6.3 Settlement Contents

An admission by the company arguably is an essential element of a settlement. The same applies, if need be, also to admissions by the natural persons involved. This enables the Decision Division to reduce the investigation effort and the effort in motivating the final order, which shortens the procedure.[84]

By contrast, it is more open which concessions from the part of the authority will become the content of a settlement. In practical terms, the options are conventionally very comprehensive.[85] First, settlement discussions usually centre around the

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[79] Bundeskartellamt, Case summary from 8.3.2010, Fine proceedings against coffee roasters on account of price fixing, (B11–18/08), p. 3; C. Vollmer, Settlements in German Competition Law, E.C.L.R. 2011, 32(7), 350, 354; J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 473; very critical S. Prange and M.C. Schneider, Um jeden Preis, Handelsblatt No. 37 of February 23rd 2010, pp. 8, 9 ("Blindflug-Verfahren").

[80] A. Mundt (FCO president), Alternative Instrumente der Kartellbehörden, 44. Innsbrucker Symposium des FIW, 10. März 2011 in Innsbruck, p. 17.

[81] Bundeskartellamt, Case summary from 8.3.2010, Fine proceedings against coffee roasters on account of price fixing, (B11–18/08), p. 3; C. Vollmer, Settlements in German Competition Law, E.C.L.R. 2011, 32(7), 350, 353 et seq.; critical S. Prange and M.C. Schneider, Um jeden Preis, Handelsblatt No. 37 of February 23rd 2010, pp. 8, 9.

[82] Bundeskartellamt, Case summary from 8.3.2010, Fine proceedings against coffee roasters on account of price fixing, (B11–18/08), p. 3; C. Vollmer, Settlements in German Competition Law, E.C.L.R. 2011, 32(7), 350, 354.

[83] Bundeskartellamt, Case summary from 8 March 2010, Fine proceedings against coffee roasters on account of price fixing, (B11–18/08), p. 4; C. Vollmer, Settlements in German Competition Law, E.C.L.R. 2011, 32(7), 350, 354.

[84] Bundeskartellamt, Tätigkeitsbericht 2007/2008, p. 35, Bundeskartellamt, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22 January 2008), pp. 103, 105; J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 476.

[85] For an overview, see J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 474–477.

impending fine and its addressees. Issues for negotiation include the adequate amount; reductions for positive post-offence conduct[86]; an upper limit of the expected fine[87]; if necessary, payment facilities[88]; and the closure of or limitations on proceedings against other parties, in particular natural persons involved.[89] Second, conventionally numerous aspects of the infringement as such and its legal assessment are “discussed”, e.g. its scope or whether it was committed intentionally or negligently.[90] Third, certain aspects of the subsequent administrative offence proceedings may be included, in particular elements of the reasons stated in the order and the authority’s case-related communication towards the public.[91]

Interestingly, in exceptional cases, the FCO also seems to be prepared to combine leniency, settlements and restorative measures that directly benefit victims, in an innovative and far-reaching resolution. The FCO has applied such an approach at least once in a case originating from a leniency application by a pharmaceutical company, Grünenthal GmbH, that had operated a price cartel with its competitor Infectopharm. As a result of the proceedings, the price agreements were abandoned; the FCO achieved price reductions for the drugs concerned, Grünenthal bringing its prices even to pre-infringement levels; and both companies reimbursed the health insurance funds for the extra costs incurred or made concrete offers. Grünenthal apparently did so on its own initiative, Infectopharm on the initiative of the FCO. In return, the FCO refrained from imposing a fine also against Infectopharm, pointing to this company’s low market share and the low financial

[86] Bundeskartellamt, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22 January 2008), pp. 103, 104, 106; J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 475.

[87] J. Burrichter and D. Zimmer, Reflections on the Implementation of a ‘Plea Bargaining’/‘Direct Settlement’ System in EC Competition Law, in: Ehlermann and Atanasiu, European Competition Law Annual 2007, 2007, pp. 611, 613.

[88] Bundeskartellamt, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22 January 2008), pp. 103, 104, 106; ICN Cartel Working Group, Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008, p. 30; J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 477.

[89] ICN Cartel Working Group, Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008, p. 30; Bundeskartellamt, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22 January 2008), pp. 103, 104. The FCO stresses, however, that it is prepared to close or limit proceedings against other parties as part of a settlement only if there are further reasons supporting this.

[90] See ICN Cartel Working Group, Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008, p. 30; J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 474; Bundeskartellamt, Tätigkeitsbericht 2005/2006, p. 35.

[91] J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 474, 476.

importance of the price cartel.[92] Compensation payments to victims may indeed motivate discontinuation of administrative offence proceedings. Sec. 47(3) of the OWiG prohibits making discontinuation depend on, or relate to, payments to a charitable institution or other agency but does not apply to compensation payments.[93]

8.2.6.4 Conclusion and Rewards

If settlement discussions lead to a provisional understanding, the Decision Division sends each party an agreed draft order imposing a fine on which the parties may give their views.[94] This step replaces the hearing following a statement of objections (*Beschuldigungsssschreiben*) in the contentious standard procedure.[95] The order, if accepted by the parties, contains only the information that is strictly mandatory pursuant to sec. 66 of the OWiG, i.e. a substantially reduced summary of the facts and a shortened legal analysis (so-called *Kurzbescheid*).[96] This largely corresponds to the European Commission's approach and reflects the expectation that the addressee will not appeal the order (sec. 67 of the OWiG).[97] If the addressee does so nevertheless, the Decision Division will replace the short order (*Kurzbescheid*) with a fully detailed one, called *Zweitbescheid*.[98]

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[92] See Bundeskartellamt, Case Summary, Retraction of Price Agreement for Colistin Antibiotics, B 3—144/08, available at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2009/B3-144-08.pdf?__blob=publicationFile&v=4. With respect to Grünenthal, the FCO also pointed to the extensive cooperation with the investigations.

[93] G. Dannecker and J. Biermann, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, Vor § 81 GWB, para 210.

[94] J. Burrichter and D. Zimmer, Reflections on the Implementation of a 'Plea Bargaining'/'Direct Settlement' System in EC Competition Law, in: Ehlermann and Atanasiu, European Competition Law Annual 2007, 2007, pp. 611, 613.

[95] Bundeskartellamt, Case summary from 8.3.2010, Fine proceedings against coffee roasters on account of price fixing, (B11–18/08), p. 3; J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 473 et seq. A statement of objections is not required by law as such because sec. § 55 (1) of the OWiG does not clearly specify how the person concerned shall be heard; cf. C. Vollmer, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 81 GWB, para 158.

[96] Bundeskartellamt, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22 January 2008), pp. 103, 105; J. Burrichter and D. Zimmer, Reflections on the Implementation of a 'Plea Bargaining'/'Direct Settlement' System in EC Competition Law, in: Ehlermann and Atanasiu, European Competition Law Annual 2007, 2007, pp. 611, 613.

[97] J. Burrichter and D. Zimmer, Reflections on the Implementation of a 'Plea Bargaining'/'Direct Settlement' System in EC Competition Law, in: Ehlermann and Atanasiu, European Competition Law Annual 2007, 2007, pp. 611, 613.

[98] J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 472; J. Burrichter and D. Zimmer, Reflections on the Implementation of a 'Plea Bargaining'/'Direct Settlement' System in EC Competition Law, in: Ehlermann and Atanasiu, European Competition Law Annual 2007, 2007, pp. 611, 613; ICN Cartel Working Group, Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008, p. 30.

The settlement, more precisely the inherent cooperation that facilitates prosecution and spares public resources, is considered to be a mitigating circumstance in the form of positive post-offence conduct justifying a discount on the fine. The size of the discount and/or the scope of other settlement benefits are larger the earlier the settlement is concluded, given that the procedural economies of the Decision Division are also larger at that time.[99] In cartel cases, benefits are, however, limited in order to preserve the attractiveness of the leniency programme and to account for the greater value of cooperation by successful leniency applicants.[100]

Conventionally, according to practitioners, given the wide range of topics, settlement discussions have not often led into a formal reduction of the fine so far. Instead, cooperation is said to have influenced the upstream calculation of the basic amount of the fine.[101] Apart from that, discounts of up to 15 % have reportedly been available.[102]

According to the recent explanatory document and the case summary, the fine in horizontal cartel cases can be reduced by up to 10 % in return for settling, depending on the timeliness of the settlement.[103] This appears to be slightly more restrictive than conventional practice and corresponds to the European Commission's approach. Conversely, when other forms of collusion or anticompetitive conduct justifying a fine are at stake, the FCO arguably does not exclude discounts greater than 10 %.

However, while the FCO's explanatory document on the settlement procedure from December 2013 deals only with a settlement discount on the fine, not mentioning other kinds of concessions, the authority's fining guidelines as well as the case summary in the Coffee Roasters case both still refer to the Activity Report 2007/2008, p. 35, where it is said that the Decision Division will examine,

[99] Bundeskartellamt, Tätigkeitsbericht 2007/2008, p. 35, where it is indicated that the Decision Division will examine, depending on the timing of the settlement, to what extent it grants further reductions on account of procedural economies, for instance by not prosecuting minor parts of the infringement within the scope of its discretion in taking up a case.

[100] Bundeskartellamt, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22 January 2008), pp. 103, 106.

[101] J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 474–477, in particular p. 475.

[102] J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 475.

[103] Bundeskartellamt, Case summary from 8.3.2010, Fine proceedings against coffee roasters on account of price fixing, (B11–18/08), p. 3; J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 475; likewise already Bundeskartellamt, Tätigkeitsbericht 2005/2006, p. 35. At the same time, however, it still seems to be possible to make the scope of the (prosecuted) infringement a subject of settlement discussions; see suggestive of this C. Vollmer, Settlements in German Competition Law, E.C.L.R. 2011, 32(7), 350, 352. As this practice (as far as can be seen) has not been abandoned, it seems doubtful whether the decrease of the upper limit for fine reductions from 15 % to 10 % is effectively associated with lower overall benefits.

depending on the time of a settlement, to what extent it will grant further reductions for spared administrative burden, e.g. by not further prosecuting minor parts of the infringement, in exercising its discretion in taking up a case. It should be noted that (even) this arguably does not conflict with the European Commission's approach to settling cartel cases. While the European Commission does not explicitly mention "non-prosecution at the margins of an infringement" as a settlement benefit, it stresses the advantage of "discussing" aspects of the infringement early in a constructive atmosphere.[104] The delineation between "negotiating" and considering defence arguments or considerations of practical expediency is a key factor of every settlement procedure.[105] Both the Bundeskartellamt's settlement procedure and the one of the European Commission establish a setting that allows for discussions about administrative measures that are conventionally taken unilaterally, in particular the calculation of the fine.[106] According to practitioners, in the first cartel settlements with the Commission, this has opened up previously unimaginable opportunities of dialogue.[107] Insofar as the defendant can better "convince" the case team to abandon certain aspects of the objections in settlement discussions (negotiations) than in the standard procedure, this comes close to charge or fact bargaining and will translate into a lower fine based on the calculation method of the Commission's fining guidelines.[108] Furthermore, the first settlements by the European Commission created the impression that the Commission applied several fining variables unusually generously, in particular discounts pursuant to the Leniency Notice, for mitigating circumstances and because of

[104] See, e.g., N. Kroes, Assessment of and perspectives for competition policy in Europe, Celebration of the 50th anniversary of the Treaty of Rome, Barcelona, 19th November 2007, SPEECH/07/722, p. 5. ("By introducing a settlement phase, the Commission increases companies' options to be informed earlier of potential objections and of the evidence supporting them. It is a unique opportunity to be informed of the likely range of fines prior to the adoption of the final decision. On the basis of these facts and documents, the parties will have the opportunity to express their views to the Commission, in line with the case-law of the Court of Justice as mentioned in particular in article 16 of the Commission's notice. This will allow companies to influence even the contents of the statement of objections and, thereby, of the decision itself.")

[105] With respect to the European settlement procedure, J. Joshua and K. Hugmark et al., What's the Deal? Navigating the European Commission's Settlement Notice, Eur. Antitrust Rev. 2009, 23, 24 et seq.; J. Lawrence and M. O'Kane u. a., Hardcore Bargains: What Could Plea Bargaining Offer in UK Criminal Cartel Cases?, Comp Law 2008, 17, 35.

[106] See with respect to the European settlement procedure J.-F. Bellis, in: Gheur, Alternative enforcement techniques in EC competition law, 2009, pp. 3, 5; Y. van Bael and J.-F. Bellis, Competition law of the European Community, 5th ed 2010, p. 1173; M. Siragusa and E. Guerri, Antitrust Settlements under EC Competition Law: The Point of View of the Defendants, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 185, 198 et seq.

[107] S. Hirsbrunner, Settlements in EU-Kartellverfahren – Kritische Anmerkungen nach den ersten Anwendungsfällen, EuZW 2011, 12, 15.

[108] See in detail E. Bueren, Verständigungen – Settlements in Kartellbußgeldverfahren, 2011, pp. 297–301.

inability to pay.[109] Summing up, there do not seem to be marked practical differences between German and European cartel settlements with regard to the scope of possible benefits.

8.2.7 Control and Transparency

Judicial control of a settlement occurs only if one affected party appeals the agreed order. As the settlement does not comprise a waiver, the settling party is not prevented from bringing an appeal. Usually, however, it should be rather unattractive from the settling party's perspective: First, in case of an appeal, the Decision Division will replace the short-form "agreed" order (*Kurzbescheid*) with a fully-fledged order (*Zweitbescheid*). This means that the appealing party would forego the de facto benefit flowing from the conciseness of the first order which provides a certain de facto protection against follow-on damage claims and reputational damage. Second, by filing an appeal, the undertaking and its lawyer might jeopardise their reputation as reliable partners for a settlement in any subsequent administrative offence proceedings. Third, the validity of the party's admission is not affected by the appeal, which will therefore seem worthwhile only if the party believes that the FCO committed material procedural errors or that its cooperation has not been sufficiently rewarded. At least until 2007, appeals of settling parties had not occurred.[110]

On the other hand, a consensual resolution is not excluded after an appeal either. If the Decision Division upholds the order in view of an appeal, it refers the procedure to the public prosecutor (sec. 69(3), (4) of the OWiG).[111] The ensuing court proceedings which are governed by the German Act on Regulatory Offences (OWiG) involve a complete de novo hearing of the case. The FCO participates only in the role of a support body to the court.[112] Due to the cross-references in sections 46(1), 71(1) of the OWiG to the German Code of Criminal Procedure

[109] See C. Stanbrook and J.F. Winterscheid, First Antitrust Settlements Reached with European Commission, International Securitization & Finance Report, Vol 13, No. 14, July 31st, 2010, p. 5; S.-P. Brankin, The First Cases under the Commission's Cartel Settlement Procedure: Problems Solved?, E.C.L.R. 2011, 32(4), 165, 168 et seq.; A. Ortega González, The Cartel Settlement Procedure in Practice, E.C.L.R. 2011, 32(4), 170, 173; cf. also European Commission, IP/10/586—DRAM; European Commission, IP/10/985—animal feed phosphates; European Commission, IP/11/473—washing powder, p. 2.

[110] A. Mundt (FCO president), Alternative Instrumente der Kartellbehörden, 44. Innsbrucker Symposium des FIW, 10. März 2011 in Innsbruck, p. 16.

[111] For more details, see J. Hoffmann and M.E. Orth et al., § 12 Bundesrepublik Deutschland, in: Terhechte, Internationales Kartell- und Fusionskontrollverfahrensrecht, 2008, § 12, para 235; G. Dannecker and J. Biermann, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, Vor § 81 GWB, para 249.

[112] C. Vollmer, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 82a GWB, para 3; see further C. Barth and S. Budde, Die Stellung des Bundeskartellamtes im gerichtlichen Verfahren, WuW 2010, 377.

(Strafprozessordnung, the "stop"), the court, the public prosecutor and the appellant may reach an agreement on the further course and outcome of the proceedings pursuant to sec. 257c of the StPO,[113] i.e. in accordance with the statutory rules governing negotiated agreements in criminal proceedings. The legislator has explicitly recognised this option for (judicial) administrative offence proceedings in competition law cases.[114] As far as can be seen, no peculiarities apply in this regard.[115]

8.2.8 Overall Assessment

All in all, it seems more or less accepted that settlements in FCO administrative offence proceedings are in principle necessary to cope with the caseload in a reasonable time frame. The fundamental doubts whether settlements in FCO administrative offence proceedings are permissible at all[116] have largely lost their force since the legislator has created a statutory framework for negotiated agreements in criminal procedure.[117]

FCO president *Mundt* has even argued that settlements involve a win-win situation[118]: the companies benefit from a considerably shortened procedure, lower legal expenses and a lower fine; the FCO reduces its procedural effort and obtains concessions that can be used as evidence, as well as further witnesses in hybrid cases.[119] Even though victims may, compared to the standard procedure, be disadvantaged by the short order describing only essential elements of the infringement, the FCO argues that this is a price to be paid for effective public enforcement.[120]

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[113] J. Burrichter, Settlements in Cartel Cases: Practical Experience in Germany, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 471, 477.

[114] Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Regelung der Verständigung im Strafverfahren, BT-Drucks. 16/12310 of 18 March 2009, pp. 15 et seq.

[115] At least before the statutory regulation of negotiated agreements in criminal procedure, such settlements before the Higher Regional Court of Düsseldorf seem to have been frequent and quite welcome from the part of the court; see Bundeskartellamt, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22 January 2008), pp. 103, 107.

[116] See R. Zagrosek, Kronzeugenregelungen im U.S.-amerikanischen, europäischen und deutschen Recht der Wettbewerbsbeschränkungen, 2006, pp. 180 et seqq.

[117] See below 3. (Negotiated) Agreements on the Further Course and Outcome in Criminal.

[118] A. Mundt (FCO president), Alternative Instrumente der Kartellbehörden, 44. Innsbrucker Symposium des FIW, 10. März 2011 in Innsbruck, p. 15.

[119] This is due to the fact that as soon as the settlement decision against a potential witness has become final, the witness loses his right to refuse to answer any questions the reply to which would subject him to the risk of being prosecuted for a criminal offence or a regulatory offence (sec. 55 of the StPO).

[120] A. Mundt (FCO president), Alternative Instrumente der Kartellbehörden, 44. Innsbrucker Symposium des FIW, 10. März 2011 in Innsbruck, p. 16.

The FCO's argumentation is in line with the one put forward by officials of the European Commission, other European competition authorities and some scholars, who argue that settlement procedures improve the efficiency and thereby ultimately the effectiveness of public enforcement to the benefit of society[121]: Settlements preserve the authority's resources, enabling the prosecution of more cases, and thereby prevent restraints of competition to a larger extent. The economic standard model of optimal enforcement behind this reasoning is, however, simplistic and would need significant extensions. Based on the current state of research, a stronger deterrent effect and better enforcement of competition law through settlement procedures cannot be verified.[122] Further, the argument that settlements improve the effectiveness of enforcement presupposes that outcomes in settled cases do not differ from outcomes in adversary cases except for the fine reductions, i.e. that settlements are not associated with more type I/II errors, agency costs, information asymmetries or (significant) negative external effects on private enforcement.[123] In order to work towards this result, settlement procedures should tightly limit all available benefits, including explicit (fine reductions) and implicit ones (scope of prosecution, publicity/reputational effects, etc.), thereby also preserving the attractiveness of leniency, and should be sufficiently transparent to allow for external control.

It appears that the FCO's settlement practice up to now is rather opaque, which has led to doubts concerning the rule of law,[124] and does not really allow to assess whether the aforementioned conditions for more effective enforcement through settlements are fulfilled. As explained above, neither the way to a settlement nor possible settlement contents are regulated through administrative guidelines. Both depend on the specific circumstances of the case at hand and on the practice of the competent Decision Division. While the general approach is described in a case report and the Activity Report, these publications arguably do not bind the Decision

[121] See Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions, MEMO/08/458, p. 1; N. Kroes, Settlements in cartel cases, 12th Annual Competition Conference, Fiesole, 19th September 2008, SPEECH/08/445, S. 4; J. Almunia, First cartel decision under settlement procedure – Introductory remarks, Press conference – Berlaymont press room, Brussels, 19 May 2010, SPEECH/10/247, pp. 2 et seq.; K. Mehta and M.L.T. Centella, Settlement Procedure in EU Cartel Cases, Comp. L. Int. 2008, 11; K. Mehta and M.L.T. Centella, EU Settlement Procedure: Public Enforcement Perspective, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 391, 394 et seq., 421; OFT, in: OECD, Policy Roundtables: Plea Bargaining/Settlement of Cartel Cases 2006 (22 January 2008), pp. 137, 139; A. Nikpay and D. Waters, The Emerging Settlements Regime in the UK: The Use of "Settlements" in Competition Act Cases, in: Ehlermann and Marquis, European competition law annual 2008, 2010, pp. 499, 499, 501; M. Motta, On Cartel Deterrence and Fines in the European Union, E.C.L.R. 2008, 29(4), 209, 215.

[122] For an in-depth treatment, see E. Bueren, Verständigungen – Settlements in Kartellbußgeldverfahren, 2011, pp. 354 et seqq.

[123] For possible safeguards on how to achieve this, see E. Bueren, Verständigungen – Settlements in Kartellbußgeldverfahren, 2011, pp. 391 et seqq., in conjunction with pp. 323 et seqq.

[124] B. Brenner, "Settlements" in Kartellverfahren des Bundeskartellamtes – Perspektiven und Grenzen, WuW 2011, 590, 600.

Divisions. Admittedly, the practical difference to, e. g., the European Commission's settlement guidelines is not as large as it might seem at first, given that the latter contain many vague terms and flexible elements. In particular, neither procedure requires the objections to be set forth in writing before settlement discussions start, so that the true size of benefits, including possible fact and charge bargaining, cannot be verified. Likewise, both procedures allow at best for very limited access to file. The US approach to plea bargaining in antitrust cases, in comparison, seems quite transparent with respect to the abstract policy but is arguably even less transparent as far as outcomes of concrete cases are concerned.[125]

It should be noted, however, that the FCO's new policy advocated since end 2009/early 2010 has brought about two important improvements.

First, originally there were no formal minutes about a settlement agreement in a concrete case.[126] Nowadays, the particulars of the settlement proposal, as well as its acceptance or rejection, shall be mentioned in the file. This may allow for a certain degree of control by the judge and the parties affected. It remains, however, to be seen whether this turns out to be a sufficient safeguard in practice.

Second, originally the final order imposing a fine often did not even mention whether the case involved a settlement.[127] Nowadays, the decisions and case reports published on the FCO's homepage generally seem to mention if a case has been concluded via a settlement, including a rough sketch of the settlement terms. This change is arguably required by the Act on negotiated agreements in criminal proceedings. It follows from sec. 78(2) of the OWiG new version that a judicial decision in administrative offence proceedings must mention if a settlement has been concluded. There are good reasons to consider this as being one of the key requirements of the rule of law that also apply to settlements with an authority in administrative offence proceedings.[128]

8.3 (Negotiated) Agreements on the Further Course and Outcome in Criminal Proceedings

Cartels that involve collusive tendering (bid rigging) are criminal acts pursuant to sec. 263, 298 of the German Criminal Code[129] and punishable with a fine or imprisonment not exceeding 5 years, in especially serious cases up to 10 years.

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[125] See E. Bueren, Verständigungen – Settlements in Kartellbußgeldverfahren, 2011, pp. 61 et seqq. with further references.

[126] ICN Cartel Working Group, Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008, p. 30.

[127] J. Faruga, Concurrences 2008, pp. 210, 211 fn. 13; F. Carlin and L. Martin Alegi et al., Cartels & Settlements, http://competition.practicallaw.com/2-243-6952, pp. 3 et seq.

[128] B. Brenner, "Settlements" in Kartellverfahren des Bundeskartellamtes – Perspektiven und Grenzen, WuW 2011, 590, 598 et seq.

[129] For details, G. Dannecker and N. Müller, in: Wabnitz and Janovsky, Handbuch des Wirtschafts- und Steuerstrafrechts, 4th ed. 2014, chapter 18, B.III.2. pp. 1026 et seqq., B.IV. pp. 1031 et seqq., with further references also on the scholarly critique on the case law concerning sec. 263 StGB.

Unlike in the USA, German law provides only for the criminal prosecution of natural persons, not of legal persons. The enforcement of sec. 263, 298 StGB in the context of anticompetitive conspiracies is the task of the public prosecutor. In terms of case numbers, it is quite important, but it apparently concerns mostly local infringements.[130]

With a view to minor offences (principle of proportionality), procedural economies and practicability, several provisions in the StPO allow for exceptions from two basic principles of German criminal procedure, i.e. mandatory prosecution (sec. 152 of the StPO) and the inquisitorial principle (sec. 244(2) of the StPO). These standard options apply to cartels as well.

Sec. 153–153b of the StPO (facultative prosecution)[131] allow the public prosecution (if required with the consent of the accused and/or the competent court) to dispense with prosecution or court action in cases of minor misdemeanours either without any measures (sec. 153 of the StPO), if the accused follows certain conditions and instructions (sec. 153a of the StPO),[132] or when the conditions under which the court may terminate the proceedings apply (sec. 153b of the StPO).[133]

Sec. 257c of the StPO permits negotiated agreements[134] with the parties on the further course and outcome of criminal proceedings at any stage of the trial. The provision has been incorporated in 2009 as part of the Act on negotiated agreements in criminal proceedings (*Gesetz zur Regelung der Verständigung im Strafverfahren*).[135] It codifies a long-standing informal practice of negotiated agreements[136] and builds on the related case law. The provision is highly controversial.[137] Critics argue that it transgresses the structure of German criminal

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[130] The police crime statistics 2012, p. 60, provided by the German Federal Ministry of the Interior (Bundesinnenministerium) (available at http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2013/PKS2012.html), list 115 cases for 2012 and 53 cases for 2011; on previous data, see also F. Wagner-von Papp, Kartellstrafrecht in den USA, dem Vereinigten Königreich und Deutschland,WuW 2009, 1236, 1243–1245, 1248.

[131] S. Beukelmann, BeckOK StPO (28 January 2013), § 153, para 1.

[132] Critical on a widespread application of sec. 153a of the StPO to white collar crime even in case of large damage, C. Roxin and B. Schünemann, Strafverfahrensrecht, 27th ed. 2012, § 14, paras 14.

[133] For overviews, see M. Bohlander, Principles of German criminal procedure, Oxford 2012, p. 108 et seq.; C. Roxin and B. Schünemann, Strafverfahrensrecht, 27th ed. 2012, § 14, paras 5 et seqq.

[134] In general public discourse, such resolutions are sometimes also derogatory referred to as "deal".

[135] The Gesetz zur Regelung der Verständigung im Strafverfahren of July 29 2009 (BGBl 2009 Teil I No. 49 of 03 August 2009, pp. 2353 et seq.) has regulated negotiated agreements in criminal proceedings statutorily in sections §§ 35a, 44, 160b, 202a, 212, 243, 257b, 257c, 267, 273, 302 of the StPO new version, sec. 78(2) of the OWiG new version. For an overview about the new rules, see E. Nistler, Der Deal – Das Gesetz zur Regelung der Verständigung im Strafverfahren, JuS 2009, 916; M. Jahn and M. Müller, Gesetz zur Regelung der Verständigung m Strafverfahren, NJW 2009, 2625.

[136] On the stages of its development, see Meyer-Goßner, Strafprozessordnung, 56th ed. 2013, Einl. paras 119b et seqq.

[137] Very critical, e.g., C. Roxin and B. Schünemann, Strafverfahrensrecht, 27th ed. 2012, § 14, paras 19–32.

procedure which generally aims at ascertaining the material truth.[138] The duty to the best possible exploration of the material truth, a result of the principle of personal guilt (*Schuldprinzip*), the right to a fair trial, the presumption of innocence and the court's legal duty of neutrality are constitutionally guaranteed.[139] Therefore, it is essential to accurately respect the statutory limitations of agreements under sec. 257c of the StPO.

They may only comprise the legal consequences that could be the content of the judgment, procedural measures and the participants' conduct during trial. Regarding the legal consequences, however, only a range, not a distinct sentence, may be agreed.[140] The accused's confession usually shall be an integral part (sec. 257c(2) 2 of the StPO). By contrast, the guilty verdict, measures of rehabilitation or incapacitation (sec. 257c(2)2 of the StPO) and a waiver of the right to file an appellate remedy (sec. 302(1)2 of the StPO) are prohibited as part of a negotiated agreement.[141] In addition, sec. 257c(1)2 of the StPO clarifies that a negotiated agreement does not exempt the court from the duty to extend the taking of evidence to all facts and means of proof relevant to the decision (sec. 244(2) of the StPO). In practice, however, this provision is often reduced to a mere plausibility check of the confession, given that the goal of negotiated agreements is to streamline the procedure.[142]

The court shall cease to be bound by a negotiated agreement if significant circumstances have been overlooked or have newly arisen and if the court therefore becomes convinced that the prospective sentencing range is no longer appropriate (sec. 257c(4)1 of the StPO). The same holds if the defendant shows a different conduct from what was originally expected from the court (sec. 257c(4)2 of the StPO).

In 2013, the Federal Constitutional Court has endorsed the new statutory framework as such but expressed severe criticism of the deficient practical application and required the legislator to monitor whether the current safeguards are sufficient.[143]

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[138] Meyer-Goßner, Strafprozessordnung, 56th ed. 2013, § 257c, para 3; M. Bohlander, Principles of German criminal procedure, Oxford 2012, p. 120.

[139] BVerfG judgment of 19 March 2013, 2 BvR 2628/10, BVerfGE 133, 168=NJW 2013, 1058, paras 56–62, 104.

[140] See further Meyer-Goßner, Strafprozessordnung, 56th ed. 2013, § 257c, paras 8–14, 16–17b, 19–22.

[141] M. Bohlander, Principles of German criminal procedure, Oxford 2012, p. 120; R. Eschelbach, BeckOK StPO, Stand: 30 September 2013, § 257c, paras 11 et seqq.

[142] R. Eschelbach, BeckOK StPO (30 September 2013), § 257c, para 25; BVerfG judgment of 19 March 2013, 2 BvR 2628/10, BVerfGE 133, 168=NJW 2013, 1058, para 49, summarises the results of an empirical study, commissioned by the Federal Constitutional Court, which found that 38.3 % of the judges surveyed admitted to examine the credibility of a confession made as part of a negotiated agreement either (only) often, sometimes, rarely or never, though the law requires the judge always to do so.

[143] BVerfG judgment of 19 March 2013, 2 BvR 2628/10, BVerfGE 133, 168=NJW 2013, 1058; on this judgment, see C.-F. Stuckenberg, Zur Verfassungsmäßigkeit der Verständigung im Strafverfahren, ZIS 2013, 212; C. Globke, Die Verständigung im Strafprozess nach der Entscheidung des Bundesverfassungsgerichts oder "Da stelle mer uns mal janz dumm. . .", JR 2014, 9.

8.4 Settlements in Administrative Proceedings

8.4.1 Settlements as Part of Administrative Proceedings in General

In (cartel) administrative proceedings, i.e. administrative proceedings in which ("only") a prohibition (cease and desist) order (without a fine) is at issue, settlements are just as possible as in administrative offence proceedings. However, a comparably specific practice has not evolved yet. Nevertheless, several aspects should apply mutatis mutandis, especially if the administrative proceedings end with a cease and desist order finding an infringement. The scope of possible settlement items is arguably larger and therefore more case specific. In particular, administrative matters will regularly concern competition law infringements that are less severe or of a minor nature and that allow for discretionary termination of proceedings without a formal decision. This makes it possible to reach innovative agreements in return for closure, e.g. restitutionary measures for victims.[144]

8.4.2 Commitments

8.4.2.1 Purpose and Scope of Application

Since the entering into force of the seventh amendment of the GWB on July 1, 2005, the FCO has had the power to accept legally binding commitments, as is provided for in sec. 32b of the GWB. The provision is modelled after Article 9 Reg. 1/2003[145] and pursues similar goals: it is designed to bring an apparent ongoing infringement to an end, and to restore competition in the market in a quick and cost-effective way while at the same time providing for more transparency and legal certainty than informal understandings.[146]

Similar to its EU equivalent, sec. 32b of the GWB allows for commitments only in administrative proceedings (fines not at issue), in particular if the FCO would otherwise envisage a prohibition order based on sec. 32 of the GWB to stop an infringement.[147] Commitment decisions are, in other words, a special way to close such proceedings.

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[144] These are not excluded as part of administrative offence proceedings; see above Sect. 8.2.6.3.

[145] Gesetzentwurf der Bundesregierung, Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, Bundestags-Drucks. 15/3640, pp. 34, 51 et seq.

[146] E. Rehbinder, in: Löwenheim, Meessen and Riesenkampff, Kartellrecht, 2nd ed. 2009, § 32b GWB, para 1 et seq.

[147] Cf. Gesetzentwurf der Bundesregierung, Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen.

Wettbewerbsbeschränkungen, Bundestags-Drucks. 15/3640, p. 34. Originally, this was the only application. With the eighth amendment of the GWB in 2013, the legislator has extended the scope to abuse proceedings in the field of resale price maintenance for newspapers and magazines and to abuse proceedings against water companies, both of which are dealt with in special provisions of the GWB (sec. 30 to sec. 31b of the GWB).

8.4.2.2 Procedure and Content

After the FCO has formally initiated proceedings and come to the preliminary conclusion that competition law enforcement is warranted, it must communicate the concerns based upon preliminary assessment to the concerned undertaking or undertakings. In doing so, the FCO may, but need not, propose to address the possibility of commitments instead of a prohibition order. It is then mainly up to the undertakings to offer commitments, behavioural or structural in nature, that are capable of dispelling the concerns. The FCO must hear the undertaking(s) on the suitability of the proposed commitments and on the possible continuation of proceedings (sec. 56(1) of the GWB). The undertakings have a limited right to access to file (sec. 29 of the VwVfG).[148]

The proposed commitments may dispel competition law concerns in two ways[149]: first, being the usual solution, proposed commitments can address the legal concerns regarding the underlying behaviour, e.g., by discontinuing it in whole or in part or by promising to change certain parameters. Second, the proposed commitments may also try to influence how the FCO exercises its enforcement discretion. So far, this has been of particular importance if the undertaking(s) concerned had collected excessive prices from their customers, especially end consumers. In this respect, the eighth amendment of the GWB has clarified that the FCO may, as part of a cease and desist order pursuant to sec. 32 of the GWB, order the restitution of the economic advantages that the undertaking(s) obtained from the illegal conduct. Before the amendment, this has already been the view of the German Federal Court[150] but disputed in the literature.[151] Given that the FCO may order restitution as part of a "standard" cease and desist order, the restitution may also be part of a commitment decision. One high profile case in which the FCO made use of this option concerned proceedings against 35 gas suppliers on the suspicion of excessive gas prices initiated in 2008. Thirty of these proceedings were discontinued on account of commitments made by the companies in which the companies pledged to reimburse their customers with a total of almost EUR 130 million in the form of credits or price reductions.[152] Subsequently, the FCO adopted a similar approach in a case concerning the market for heating current,

[148] E. Rehbinder, in: Löwenheim, Meessen and Riesenkampff, Kartellrecht, 2nd ed. 2009, § 32b GWB, para 9; on the limitations, see above fn. 13.

[149] See J. Bornkamm, in: Langen and Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12th ed. 2014, § 32b GWB, paras 7 et seq.

[150] BGH, decision of 10 december 2008, KVR 2/08, Stadtwerke Uelzen, para 16=BGH NJW 2009, 1212 (1213), in an obiter dictum.

[151] See T. Reher and C. Haellmigk, Die kartellrechtliche Rückzahlungsverpflichtung nach § 32 Abs. 2 GWB, WuW 2010, 513; A. Fuchs, Die Anordnung von Wiedergutmachungszahlungen als Inhalt kartellbehördlicher Abstellungsverfügungen nach § 32 GWB?, ZWeR 2009, 176.

[152] See further Bundeskartellamt, Case Summary, Abuse proceedings from 2008 against gas suppliers ("2008 gas price proceedings")—examination by the Bundeskartellamt of commitments offered by suppliers and gas price developments, available at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2009/B10-16-08.html.

where several proceedings were concluded with commitments that involved compensatory price measures—the companies pledged not to raise prices despite of increasing costs for a certain time—and sometimes additionally a direct restitution to customers.[153]

The FCO may declare the proposed commitments to be binding on the undertaking(s) in question where it considers that the commitments proposed would fulfil the purpose of bringing the suspected infringement to an end or make further action dispensable and that the commitments are not (clearly) disproportionate to that purpose.[154] The decision may be limited in time (sec. 32b(1)3 of the GWB) and shall state that, subject to the exceptions stipulated in sec. 32b(2) of the GWB, the cartel authority will not make use of its powers under sections 30(3), 31b(3), 32 and 32a of the GWB. This means that, following the example of Article 9 Reg. 01/2003, the FCO simply declares to have no reasons to act on the case; it does not make any substantive findings as to the existence of an infringement. The decision thereby does not preclude claims for damages by private parties that consider the undertaking to have infringed competition law. However, such plaintiffs cannot rely upon the commitment decision to prove an infringement.

8.4.2.3 Enforcement

The binding character of the commitments refers to the FCO and the undertaking in question. If the undertaking implements the commitments, the FCO is in principle prevented from imposing fines or measures bringing the suspected infringement to an end.

The FCO can enforce commitments by way of administrative compulsory execution *(Verwaltungszwang)*. In addition, if the company contravenes the enforceable order issued pursuant to sec. 32b of the GWB, it commits an administrative offence that can be sanctioned, with respect to natural persons with a fine of up to EUR 1 million and concerning an undertaking or an association of undertakings with a fine of up to 10 % of the total turnover achieved in the business year preceding the decision of the authority (see sec. 81(2)lit. a, sec. 81(4)1 to 3 of the GWB). Furthermore, the FCO may rescind the decision and reopen the proceedings (sec. 32b(2) No. 2 of the GWB). Third parties that are negatively

[153] See, e.g., Bundeskartellamt Decision of 29th October 2010, B 10–26/09, WEMAG AG; Bundeskartellamt Decision of 26th September 2011, B 10–31/10, Städtische Werke Aktiengesellschaft; Bundeskartellamt Decision of 11th November 2010, B 10–15/09, E.ON Westfalen Weser AG & E.ON Westfalen Weser Vertrieb GmbH.

[154] While the FCO has a margin of discretion whether to accept certain commitments, it must respect the principle of proportionality in making its decision; see E. Rehbinder, in: Löwenheim, Meessen and Riesenkampff, Kartellrecht, 2nd ed. 2009, § 32b GWB, para 7. This means that the FCO must in principle not accept commitments that are excessive. However, the decision whether or not to accept certain commitments is based on a preliminary assessment; this applies also to the assessment of proportionality so that the test will arguably rather be that commitments are not clearly excessive.

affected by the non-implementation of the commitments may claim damages pursuant to sec. 33(1)1 of the GWB.[155]

8.4.2.4 Possibilities to Rescind

The FCO may always rescind the decision and reopen the proceedings for the benefit of the company concerned, or with its consent.[156] By contrast, it may do so for the disadvantage of the company only in three scenarios (sec. 32b(2) of the GWB): (1) the factual circumstances have materially changed following the decision, (2) the undertakings concerned do not meet their commitments or (3) the decision was based on incomplete, incorrect or misleading information provided by the parties.

If an undertaking making commitments considers the first scenario to be fulfilled, it may want the commitment to be altered and may ask the FCO to reopen proceedings. The FCO must then adopt a decision within its margin of discretion. In case that the FCO refuses and the undertaking considers this to be an abuse of discretion, it may appeal the decision pursuant to sec. 63(3) of the GWB.[157] Apart from this, it is open and disputed in literature whether, and subject to what conditions, the undertaking concerned may walk away from commitments on its own. While some maintain that this is impossible,[158] others favour an analogy to the provision in the Federal Act on Administrative Procedure (Verwaltungsverfahrensgesetz—VwVfG) regarding the adaption of and withdrawal from contracts governed by public law (sec. 60 of the VwVfG).

8.4.2.5 Appeal

It is largely open in the case law and disputed in literature to what extent the company offering the commitments can appeal the decision that declared the commitments binding. The majority view arguably is that it can successfully do so only in exceptional circumstances, in particular if there is disagreement about the correct interpretation of the commitment or if the concerned undertaking was induced to propose commitments by force or deceit.[159] By contrast, the concerned

[155] See J. Bornkamm, in: Langen and Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12th ed. 2014, § 32b GWB, para 19.

[156] See J. Bornkamm, in: Langen and Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12th ed. 2014, § 32b GWB, para 28, 33; A. Bach, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, § 32b, para 27.

[157] E. Rehbinder, in: Löwenheim, Meessen and Riesenkampff, Kartellrecht, 2nd ed. 2009, § 32b GWB, para 20.

[158] E. Rehbinder, in: Löwenheim, Meessen and Riesenkampff, Kartellrecht, 2nd ed. 2009, § 32b GWB, para 20.

[159] See J. Bornkamm, in: Langen and Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12th ed. 2014, § 32b GWB, paras 35 et seq., with further references; J. Keßler, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 32b, para 24; A. Bach, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, § 32b, para 33.

undertaking is thought to be unable to reopen the question whether the behaviour in question was illegal or not, as this would jeopardise the transactional character of commitments. This restriction is, however, in dispute. A rather generous opinion contends that the concerned undertaking may appeal the decision declaring the commitments binding based on the argument that the behaviour in question did not violate competition law or that the commitments are more far-reaching than necessary and therefore disproportionate to remove competition-law-related concerns.[160] A probably convincing intermediate position is that the concerned undertaking is not prevented from advancing these arguments but will be successful only insofar as the FCO's assessment of the alleged competition law concerns and/or the adequate commitment was clearly unjustifiable.[161]

Third parties are usually considered to be unable to appeal a commitment decision by arguing that the FCO should issue a prohibition or at least seek harsher commitments, due the FCO's broad discretion whether to act on suspected competition law infringements and, if so, in what way.[162] Third parties may, however, appeal a commitment decision if it significantly affects their rights so that therefore they were or should have been admitted to the proceedings.[163]

8.4.2.6 Overall Assessment

The FCO argues that commitments enable the authority to react in a flexible and quick way to different circumstances in markets. They allow for solutions with a widespread effect and direct benefits for victims, making it possible to open encrusted markets and to back up merger control decisions.[164]

Though the German provision has been modelled after Article 9 Reg. 1/2003, the FCO's practice has not been subject to similar critique as has been the Commission's practice. In particular, the Commission has demanded very intrusive structural commitments on the energy markets after it was not able push through corresponding legislation, giving rise to criticism that it implemented regulatory measures via competition law.[165] Furthermore, it is doubted whether the Commission's practice respects the parties' rights of defence or rather threatens

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[160] T. Klose, in: Wiedemann, Kartellrecht, 2nd. ed. 2008, § 51, para 46.

[161] E. Rehbinder, in: Löwenheim, Meessen and Riesenkampff, Kartellrecht, 2nd ed. 2009, § 32b GWB, para 16.

[162] J. Keßler, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 32b, para 24; more generous Klose, in: Wiedemann, Kartellrecht, 2nd. ed. 2008, § 51, para 46.

[163] E. Rehbinder, in: Löwenheim, Meessen and Riesenkampff, Kartellrecht, 2nd ed. 2009, § 32b GWB, para 17.

[164] A. Mundt (FCO president), Alternative Instrumente der Kartellbehörden, 44. Innsbrucker Symposium des FIW, 10. März 2011 in Innsbruck, p. 11.

[165] See in detail E. Bueren, Verständigungen – Settlements in Kartellbußgeldverfahren, 2011, pp. 473 et seqq.

high fines to obtain far-reaching commitments.[166] It appears that there are no such reservations with regard to the German practice, though the danger of regulatory measures is acknowledged as such.[167] FCO president *Mundt* has indeed indicated that he understands the concerns against the Commission's practice and advocates a more cautious approach.[168]

The FCO's occasional practice to use commitments and settlements to assure restitution for victims of competition law infringements is a rather innovative approach in Europe which has previously already been put in practice in Australia, in the US and occasionally in the UK (*independent schools* case[169]), as well as in the Netherlands.[170] That approach can be linked to the idea of *Restorative Justice*, i.e. the goal of restoration and compensation for the victim. A flexible settlement procedure makes it possible to implement both concepts to quite a large extent. In this respect, according to the theory of Responsive Regulation & Restorative Justice, the option to settle, being a consensual element in the enforcement pyramid, should have priority over contentious repressive procedures.

On the one hand, this may be an attractive solution to assure swift compensation even where victims are unlikely to sue, thus obviating a need for class action mechanisms. In the gas price case described above, restitutionary commitments were an effective and efficient way to provide redress for consumers without numerous costly civil claims.

On the other hand, it might seem questionable to accept restitutionary commitments that presuppose an infringement without making a respective finding. Furthermore, intricate legal questions could arise if a victim is not satisfied with this solution or the amount of compensation. Finally, one should bear in mind that restitutionary commitments or settlements imply a further increase of administrative discretion, which is already extraordinarily broad in competition law.

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[166] A, Mundt (FCO president), Alternative Instrumente der Kartellbehörden, 44. Innsbrucker Symposium des FIW, 10. März 2011 in Innsbruck, pp. 11 et seq.; E. Bueren, Verständigungen – Settlements in Kartellbußgeldverfahren, 2011, pp. 467 et seqq.

[167] See briefly B. J. Georgii, Formen der Kooperation im öffentlichen Kartellrechtsvollzug im europäischen, deutschen und englischen Recht, p. 186.

[168] A. Mundt (FCO president), Alternative Instrumente der Kartellbehörden, 44. Innsbrucker Symposium des FIW, 10. März 2011 in Innsbruck, pp. 11 et seq.

[169] Decision of the Office of Fair Trading v. 20.11.2006, No. CA98/05/2006, Exchange of information on future fees by certain independent fee-paying schools, (Case CE/2890-03), paras 36–38, and the press release OFT, 166/06—final decision. See further on this case J. Lawrence and M. Sansom, The Increasing Use of Administrative Settlement Procedures in UK and EC Competition Investigations, Comp Law 2007, 163, 168 et seq.; J. Lawrence and M. O'Kane et al., Hardcore Bargains: What Could Plea Bargaining Offer in UK Criminal Cartel Cases, Comp Law 2008, 17, 34; E. Bueren, Verständigungen – Settlements in Kartellbußgeldverfahren, 2011, pp. 95 et seq.

[170] See in detail E. Bueren, Verständigungen – Settlements in Kartellbußgeldverfahren, 2011, pp. 408 et seqq., 425 et seqq.

8.5 Transactional Resolutions vs Private Enforcement: Access to File by Third Parties

8.5.1 The Tension Between Transactional Resolutions and Private Enforcement in the Current Legal Framework

Private actions for damages from competition law infringements are on the rise worldwide.[171] In Europe, having remained in the shadows for long,[172] they are at the heart of the legal and policy debate since the Court of Justice (ECJ) held in the ground-breaking[173] *Courage* judgment that[174]

> The full effectiveness (...) and, in particular, the practical effect of (...) Article [101(1) TFEU[175]] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.[176]

Currently, in the absence of community rules governing the matter, such claims are regulated by the Member States, subject to guiding principles of European law. In particular, according to the ECJ, it is for the domestic legal system of each Member State, subject to the principles of equivalence[177] and effectiveness,[178] to designate the courts and tribunals having jurisdiction, and to lay down the detailed procedural rules governing actions for safeguarding EU law rights[179] and to prescribe the detailed rules governing the exercise of those.[180]

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[171] D. Rubinfeld, Antitrust Damage, in: Elhauge, Research Handbook on the Economics of Antitrust Law, 2012, p. 378.

[172] R. Whish and D. Bailey, Competition Law, 7th ed. 2012, p. 319; D. Romain and I. Gubbay, The European Antitrust Review 2011, 47, 51. This is not to say that private enforcement had been negligible or even inexistent. However, many actions did and do relate to other remedies than damages (for Germany, see S. Peyer, Private Antitrust Litigation in Germany from 2005 to 2007: Empirical Evidence, 8 J Comp L & Ec 331, esp. 348 et seqq.; concerning the UK B. Rodger, Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 29 E.C.L.R. 96–116).

[173] ECJ case C-453/99, *Courage*, ECR 2001, I-6297.

[174] On the ground-breaking character of this judgment, see A. Italianer, Public and private enforcement of competition law, 5th International Competition Conference 17 February 2012, Brussels.

[175] At the time of the judgment Article 85(1) EC.

[176] ECJ, Case C-453/99, *Courage*, ECR 2001 I-6297, para 26.

[177] The national rules must not be less favourable than those governing similar domestic actions.

[178] The rules must not render practically impossible or excessively difficult the exercise of rights conferred by Community law.

[179] ECJ, case C-453/99, *Courage*, ECR 2001 I-6297, para 29; Case C-295/04 to C-298/04, *Manfredi*, ECR 2006 I-6619, paras 62, 71.

[180] ECJ, Case C-295/04 to C-298/04, *Manfredi*, ECR 2006 I-6619, para 64.

This case law has spurred reform initiatives by the European Commission[181] and several Member States[182] to facilitate actions for damages. In Germany, important changes to foster private enforcement were implemented with the seventh amendment of the GWB in 2005.[183] In particular, since 2005 the GWB provides for a right to damages for every person affected, defined as everybody who, as a competitor or other market participant, is adversely affected by the infringement.[184] Moreover, the GWB foresees that final decisions by European competition authorities and courts finding an infringement are binding.[185] The eighth amendment, in force since July 30, 2013, has expanded private enforcement by consumer associations (sec. 33(2) of the GWB new version). As a result, the number of follow-on actions for damages in Germany has been steadily increasing over the last 4 years.[186]

Transactional resolutions of competition law proceedings are in tension with private enforcement, especially if they involve the finding of an infringement such as leniency and settlements.[187] Leniency applications entail confessions, admissions of all facts of the infringement and supporting evidence. By consequence, they are treasure troves for cartel victims to back up their damage claims. Those who contemplate applying for leniency will, however, consider the consequences. The FCO as well as the German government take the view that damage claims play an important role in this respect and are therefore wary of the risk that cartel members cooperating with the FCO might be put in a worse position vis à vis damage claimants, as compared to non-cooperating cartel members. Two aspects are especially important in this regard.

First, the FCO does not issue a decision against companies qualifying for full leniency.[188] This is due to the fact that a company having obtained full leniency

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[181] The latest reform package at European level comprises, i.a., a Commission proposal for a directive of the European Parliament and 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 EU, COM(2013) 404 final. For a critical review of earlier Commission's initiatives J. Kloub, White Paper on Damages Actions for Breach of the EC Antitrust Rules: Plea for a More Holistic Approach to Antitrust Enforcement, 5 ECJ 515, especially 516–518, 532–545 (2009).

[182] C. A. Jones, Editorial, After the Green Paper: The Third Devolution in European Competition Law and Private Enforcement, 3 CompLRev 1, 2 (2006).

[183] See further W. Wurmnest, A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernised Law Against Restraints of Competition, 6 German L.J. 1173–1190 (2005).

[184] Sec. 33(3)1, in conjunction with (1)3 of the GWB.

[185] Section 33(4) of the GWB.

[186] Bundeskartellamt, Tätigkeitsbericht 2011–2012, BT-Drucks. 17/13675, p. 42; T. Mäger, D. J. Zimmer and S. Milde, Konflikt zwischen öffentlicher und privater Kartellrechtsdurchsetzung – Zum Schutz der Vertraulichkeit von Kronzeugenanträgen, WuW 2009, 885, 886.

[187] German Federal Government, statement about the FCO's activity report 2011–2012, BT-Drucks. 17/13675, p. VII, para 49.

[188] J. Burrichter and E. Ahlenstiel, Integrating Public and Private Enforcement in Europe: Legal and Jurisdictional Issues – The German Perspective, in: Lowe and Marquis, European competition law annual 2011, 2014, pp. 95, 100.

would not appeal so that the decision against it would become final earlier than the decisions against non-cooperating cartel members. The cooperating company would thereby be the first target for damages claims because claimants can rely (only) on a final decision.[189]

Second, the FCO has consistently tried to exclude access of third parties to leniency applications to ensure that the attractiveness of the Leniency Programme is not impaired.[190] In particular, the FCO, as part of its Leniency Programme, promises applicants to use the statutory limits of its discretionary powers to refuse applications by private third parties for file inspection or the supply of information, insofar as the leniency application and the evidence provided by the applicant are concerned.[191]

Nevertheless, damage claimants have repeatedly tried to obtain access. In current German law, so far mainly[192] two potential avenues have gained practical importance: The first concerns access to file by the victim in the run-up to a damage claim, the second access to file by civil courts ruling on a pending damage claim at the instigation of (at least) one party.[193]

8.5.2 Access to Leniency Applications and Settlement Declarations in Current German Law

8.5.2.1 Direct Access to File by the Cartel Victim Pursuant to Sec. 406e of the StPO, 46(1) of the OWiG

Pursuant to sec. 46(1), (3)4 of the OWiG, in conjunction with sec. 406e(1) of the StPO, a cartel victim's lawyer can inspect the FCO's case file if the victim can show a legitimate interest. The same possibility exists when the FCO has transferred a

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[189] This issue remains important for companies that obtain "only" second or third order leniency (substantial discount). In at least one case, such a company has indeed been sued for damages before all other cartel members; see J. Burrichter and E. Ahlenstiel, Integrating Public and Private Enforcement in Europe: Legal and Jurisdictional Issues – The German Perspective, in: Lowe and Marquis, European competition law annual 2011, 2014, pp. 95, 99.

[190] German Federal Government, statement about the FCO's activity report 2011–2012, BT-Drucks. 17/13675, p. VII, para 50.

[191] Bundeskartellamt, Notice no. 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases—Leniency Programme—of 7 March 2006, para 22.

[192] Apart from the two avenues explained in the following, it is at least theoretically possible for cartel victims to obtain evidence directly from a cartel member via a right to information based on sec. 242 BGB; see further M. Dreher, Der Zugang zu Entscheidungen mit Bindungswirkung für den kartellrechtlichen Schadensersatzprozess, ZWeR 2008, 325, 332 et seqq. Furthermore, the court may direct the defendant in an action for damages to produce records or documents, as well as any other material, that are in its possession and to which one of the parties has made reference, sec. 142(1) of the ZPO. However, as far as can be seen, both options have played no significant practical role so far. In particular, the cartel victim cannot obtain access via these avenues if the defendant has not retained a copy of the leniency submission or made it orally at the FCO's premises.

[193] For a comprehensive overview also on the relevant EU case law, see C. Heinichen, Akteneinsicht durch Zivilgerichte in Kartellschadensersatzverfahren, NZKart 2014, 83.

cartel case, including the file to the public prosecutor, (e.g.) after an FCO order imposing fines has been appealed in court.[194] The victim may then seek access from these authorities. However, pursuant to sec. 406e(2) of the StPO, inspection of the files shall be refused insofar as there are overriding interests worthy of protection, either of the accused or of other persons. It may be refused insofar as the purpose of the investigation, also in another criminal proceeding, appears to be jeopardised and if the proceedings could be considerably delayed. So far, the courts have interpreted this provision to exclude access to leniency applications and the accompanying evidence.

The *Pfleiderer* case before the Lower District Court of Bonn concerned an appeal (sec. 62 of the OWiG) by a cartel victim against an FCO decision granting only partial access to a non-confidential version of the file, excluding in particular leniency applications and the evidence provided by the leniency applicants. The Lower District Court of Bonn, after an initial decision that generous access to file should be granted, asked the ECJ for a preliminary ruling whether the provisions of European Union competition law, and in particular Regulation No 1/2003, must be interpreted as precluding damage claimants from getting access to leniency applications and evidence provided therein.[195] The ECJ denied, adding, however, that it is for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law on a case-by-case basis.[196] Subsequently, the Lower District Court of Bonn granted access excluding information provided voluntarily by leniency applicants, business secrets and FCO internal documents. Within these limits, the claimants could inspect the FCO orders, many of which were however short-form orders after a settlement (*Kurzbescheid*),[197] a list of evidence secured during dawn raids and access to file.[198] The court mainly argued in an abstract way that access to leniency applications would detract from the attractiveness of the programme and thereby possibly deter future applications and for this reason interfere with future investigations in the sense of sec. 406e(2)2 of the StPO.[199]

[194] See OLG Düsseldorf, judgment of 22 August 2012, V-4 Kart 5/11 (OWi) and others, coffee rosters, para II.1=WRP 2012, 1596, 1597 et seq.

[195] OJ 2009 C 297, p. 18.

[196] ECJ, case C-360/09, *Pfleiderer AG v Bundeskartellamt*, ECR 2011 I-5161.

[197] See Kapp, Das Akteneinsichtsrecht kartellgeschädigter Unternehmen: Bonn locuta, causa finita?, WuW 2012, 474, 480.

[198] AG Bonn, judgment of 18 January 2012, 51 Gs 53/09, Pfleiderer II, NJW 2012, 947.

[199] AG Bonn, judgment of 18 January 2012, 51 Gs 53/09, Pfleiderer II, para II.3.a., NJW 2012, 947; for a very critical view on this line of reasoning, T. Kapp, Das Akteneinsichtsrecht kartellgeschädigter Unternehmen: Bonn locuta, causa finita?, WuW 2012, 474, 477 et seqq.; also doubting whether the abstract reasoning conform with the requirement of the ECJ L. Fiedler and A. B. Huttenlauch, Der Schutz von Kronzeugen- und Settlementerklärungen vor der Einsichtnahme durch Dritte nach dem Richtlinien-Vorschlag der Kommission, NZKart 2013, 350, 352.

In a similar vein, the Higher Regional Court of Düsseldorf decided in the *Coffee Roasters case*, which involved several leniency applications and one settlement. The Court granted cartel customers access to non-confidential versions of the FCO orders and a list of exhibits but refused access to leniency applications and the information in the case file provided voluntarily by leniency applicants. The Court argued that para 22 of the FCO's Leniency Programme gave rise to legitimate expectations of the leniency applicants that the information provided voluntarily will not be disclosed to third parties. The FCO's assurance, according to the Court, is justified by the public interest in safeguarding the attractiveness and thereby the effectiveness of the Leniency Programme as an investigative tool. The interest of the victims in further backing up their damage claims were considered to be less important, given that a civil court is bound by a final decision finding an infringement anyway (sec. 33(4) of the GWB) and given that leniency applications do not contain statements on the size of overcharges.[200] The Court further denied access to a non-confidential version of the remaining case file arguing that eliminating all confidential information from the voluminous file, including an additional hearing of all parties affected, would considerably delay the proceedings.[201]

While the Court's decision seems defendable as such, the reasoning which accords the FCO's guidelines a quasi-binding character for the judge has rightly been criticised.[202] Besides, it seems hard to deny that leniency and settlement statements, though not dealing with the size of overcharges, might nevertheless contain helpful information for claimants to determine their damages.

8.5.2.2 Access to File by a Civil Court (Sec. 142(1), 273(2) No. 2 or 432 of the ZPO in Conjunction with Sec. 474(1) of the StPO)

Instead of seeking access to file based on sec. 406e of the StPO before instituting civil proceedings, cartel victims can also first file a claim and then try to take advantage of means available within the framework of civil procedure to access contents of the FCO case file via the civil court.[203] In this respect, German law has adopted a so-called model of double doors (*Doppeltürenmodell*), meaning that access to file by civil courts into investigation files of the public prosecution or an

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[200] OLG Düsseldorf, judgment of 22 August 2012, V-4 Kart 5/11 (OWi) and others, coffee rosters, para II.2.c.bb.(2) and para II.2.c.cc.(2)(a)=WRP 2012, 1596, 1599–1601.

[201] OLG Düsseldorf, judgment of 22 August 2012, V-4 Kart 5/11 (OWi) and others, coffee rosters, para II.2.c.cc.(2)(b)=WRP 2012, 1596, 1601.

[202] See e. g. D. Dohrn and S. Liebich, Anmerkung zum Beschluss des OLG Düsseldorf vom 22.08.2012 (V-4 Kart 5/11 (OWi); WRP 1596)—Zur Frage der Akteneinsicht in Bonusanträge, WRP 2012, 1601–1603; with respect to a similar additional argument advanced by the Lower District Court of Bonn in Pfeiderer II T. Kapp, Das Akteneinsichtsrecht kartellgeschädigter Unternehmen: Bonn locuta, causa finita?, WuW 2012, 474, 480. For a more positive overall view of the judgment A. Yomere, Die Entscheidung im Verfahren EnBW zum Recht von Schadensersatzklägern auf Akteneinsicht in Verfahrensakten der Kommission, WuW 2013, 34, 38.

[203] C. Heinichen, Akteneinsicht durch Zivilgerichte in Kartellschadensersatzverfahren, NZKart 2014, 83, 85.

authority conducting administrative offence proceedings such as the FCO requires on each side a specific legal basis for the corresponding encroachments upon (fundamental) rights.[204]

On the side of the civil court, three possibilities are particularly important:

1. Sec. 142(1) of the Code of Civil Procedure (Zivilprozessordnung, ZPO) enables the court to order that one of the parties or a third party produce records or documents, as well as any other material, that are in its possession and to which one of the parties has made reference.
2. Sec. 432 of the ZPO stipulates that where, according to the allegation made by the party tendering evidence, the record or document is in the hands of a public authority, evidence shall be offered by filing a petition with the court that the public authority or the civil servant be requested to provide the record or document.[205]
3. Sec. 273(2) No. 2 of the ZPO states that by way of preparing for the hearing, the judge may request that public authorities or public officials communicate records or provide official information; this requires that a party has referred to the respective records or information.[206]

The corresponding legal basis for the authority providing the records is sec. 474 (1) of the StPO,[207] which provides that courts, public prosecution offices and other judicial authorities shall be able to inspect the files if this is necessary for the purposes of the administration of justice. In this respect, according to sec. 477(6)1 of the StPO, the recipient, if being a public agency or attorney, is responsible for the transmission being admissible. The transmitting agency shall in principle only review whether the transmission request is within the parameters of the recipient’s tasks. The transmitting agency must, however, examine whether information from files and inspection of the file has (exceptionally) to be denied pursuant to sec. 477 (2)1 of the StPO, i.e. when the transmission is contrary to the purposes of the criminal proceedings or also would endanger the purpose of an investigation in another criminal proceeding.

These provisions were the subject of a thoughtful judgment by the Higher Regional Court of Hamm in late 2013.[208] The case originated out of a claim for

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[204] Federal Constitutional Court (BVerfG), decision of 06 March 2014, case 1 BvR 3541/13 et al., para II.1. a) and II.1.b)bb)(1), juris version, paras 18, 25.

[205] The relationship of sec. 142(1) of the ZPO and sec. 432 of the ZPO is in dispute. Some argue that if the third party in the sense of sec. 142(1) of the ZPO is an authority, only sec. 432 of the ZPO applies; see M. Dreher, Der Zugang zu Entscheidungen mit Bindungswirkung für den kartellrechtlichen Schadensersatzprozess, ZWeR 2008, 325, 337; R. Greger, in: Zöller, 30th ed. 2014, § 142, para 11.

[206] C. Heinichen, Akteneinsicht durch Zivilgerichte in Kartellschadensersatzverfahren, NZKart 2014, 83, 86.

[207] Concerning administrative offence proceedings, in conjunction with sec. 49b of the OWiG.

[208] OLG Hamm, decision of 26 November 2013, III-1 VAs 116/13 and others, NZKart 2014, 107.

damages pending before the District Court of Berlin against members of the elevator and escalator cartel, which had been fined by the European Commission in 2007. Some cartel members had filed leniency applications not only with the Commission but also with the FCO, which was barred from prosecuting the case against the companies (Article 11(6) Reg. 01/2003). Due to the suspicion of criminal offences by natural persons involved, the FCO transferred the case to the public prosecutor who subsequently terminated the criminal proceedings. The District Court of Berlin, based on sec. 273 of the ZPO, requested the public prosecutor to provide the case file. When the public prosecutor announced to meet the demand, the cartel members requested a judicial decision (sec. 23(1)1 EGGVG).

The Higher Regional Court of Hamm upheld the prosecutor's decision. The court emphasised that access to file by a court pursuant to sec. 474 of the StPO is subject to less strict rules than access to file by private parties. As a rule, only the recipient examines whether access is necessary for the purposes of the administration of justice, whereas the transmitting agency examines the recipient's competence only in abstract terms. The court held that, in the case at hand, no exception applied because the leniency statements were as such not different from other "ordinary" confessions by the persons concerned in administrative offence proceedings.[209] Furthermore, the court denied the exception of the transmission being contrary to the purposes of the criminal proceedings or endangering the purpose of an investigation in another criminal proceeding. According to the court, the abstract possibility that the transmission of a leniency application might lower other cartel members' propensity to cooperate does not suffice; there must rather be a concrete case whose investigation may be endangered.[210] On a constitutional complaint against the decision by the cartel members, the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) recently confirmed the decision of the Higher Regional Court of Hamm.[211]

Importantly, however, the fact that the file, including the leniency applications, is submitted to the civil court does not necessarily mean that the parties of the civil action will get (complete) access. Rather, the district court will have to examine on its own, weighing all legitimate interests at stake, to what extent the data can be used as evidence in the civil proceedings. The parties in the civil proceedings will be able to demand information about the content of the file submitted only insofar as it is actually used as evidence.[212]

[209] OLG Hagen, decision of 26 November 2013, III-1 VAs 116/13 and others, NZKart 2014, 107, 109.

[210] OLG Hagen, decision of 26 November 2013, III-1 VAs 116/13 and others, NZKart 2014, 107, 110.

[211] Bundesverfassungsgericht, decision of 6 March 2014, cases 1 BvR 3541/13 and others.

[212] OLG Hagen, decision of 26 November 2013, III-1 VAs 116/13 and others, NZKart 2014, 107, 108.

Moreover, the Federal Constitutional Court has stressed that the file cannot be used as evidence insofar as the transmitting agency restricts access to file by the parties of the civil proceedings.[213] The recipient court cannot override such a restriction but can only submit a remonstration or a disciplinary complaint.[214] In this way, the FCO can exempt leniency documents and will arguably be required to do so to keep the promise in para 22 of its Leniency Programme. If the claimant had submitted an application to take evidence pursuant to sec. 432 of the ZPO and if that taking of evidence is thwarted by the restriction, the claimant is, however, able to request a judicial decision (sec. 23(1)1 EGGVG).[215] It remains to be seen to what extent an FCO restriction will be accepted at this stage.

8.5.3 Changes due to the Damages Directive

The preceding overview shows that the emerging German case law arguably leaves some room for cartel victims to obtain (limited) access to case files. Access to leniency applications is not generally excluded, though there are many obstacles, with several aspects still unsettled.

It is important to note that the latest private enforcement reform package at European level will decisively alter the picture. At the time of writing, the *Commission proposal for a directive of the European Parliament and 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 EU*[216] has just been adopted by the European Parliament.[217] The proposal still needs final approval from the Council of the European Union, which is, however, a mere formality given that the final compromise text of the proposed Directive was agreed between the

[213] Bundesverfassungsgericht, decision of 6 March 2014, cases 1 BvR 3541/13 and others, juris version, para 29; see also BGH NJW 1952, 305 et seq.

[214] BGH NJW 1952, 305 et seq.; C. Heinichen, Akteneinsicht durch Zivilgerichte in Kartellschadensersatzverfahren, NZKart 2014, 83, 91 with further references.

[215] See OLG Hamm, NJW-RR 2009, 420; Mayer, in: Karlsruher Kommentar zur Strafprozessordnung, 7th ed. 2013, § 24 EGGVG, para 4; C. Heinichen, Akteneinsicht durch Zivilgerichte in Kartellschadensersatzverfahren, NZKart 2014, 83, 92.

[216] COM(2013) 404 final.

[217] European Parliament legislative resolution of 17 April 2014 on the 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 (COM(2013)0404—C7-0170/2013–2013/0185(COD)) (Ordinary legislative procedure: first reading), Provisional edition P7_TA-PROV(2014)0451; see also the Report by the European Parliament's Committee on Economic and Monetary Affairs (rapporteur: Andreas Schwab) from February 2014 (Report on the 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, COM(2013)0404—C7-0170/2013–2013/0185(COD)).

European Parliament and the Council during the ordinary legislative procedure.[218] The directive will entail a transposition period of 2 years (Article 21(1) Damages Directive, in the form of the European Parliament's legislative resolution of 17th April 2014). The European legislator is inter alia going to prescribe a form of discovery ("disclosure of evidence", Article 5 et seqq. Damages Directive) which could entail a paradigm shift in German civil procedure.[219] On the other hand, the Damages Directive will require absolute protection of leniency and settlement submissions: As a general rule, national courts shall not order a party or a third party to disclose in any form leniency statements or settlement submissions (Article 6(6) Damages Directive). The Damages Directive will thereby prohibit access to leniency and settlement submissions as such, while leaving room for access to other evidence, i.e. pre-existing documents and exhibits not specifically produced for the sake of a leniency-application or a settlement submission (see Article 4(16) and (17) in conjunction with Article 6(6) Damages Directive). Cartel victims will moreover still be able to obtain access to exhibits that are not part of leniency applications and to non-confidential versions of decisions imposing fines.

Compared to current German law, the damages directive will enhance the protection of leniency and settlement submissions while facilitating access to evidence against non-cooperating cartel members.

8.6 Commitments (Remedies) in Merger Control

8.6.1 Background and Current Legal Basis

Sec. 36(1)1 of the GWB provides that a concentration shall be prohibited if it would significantly impede effective competition, in particular by creating or strengthening a dominant position. Pursuant to sec. 36(1)2 No. 1 of the GWB, an exception applies if the undertakings concerned prove that the concentration will also lead to improvements of the conditions of competition and that these improvements will outweigh the impeding effect. According to the prevailing opinion, sec. 36(1)1 of the GWB does not, in principle, allow for the partial prohibition of a concentration, so that the FCO must prohibit a proposed concentration completely if it significantly impedes effective competition in only one affected market, even if other affected markets do not give rise to competition concerns.[220] Sometimes it is possible for the

[218] Cf. Council of the European Union, New rule to facilitate damages claims for antitrust law violations, 26/3/2014 (English)—Press: 182 Nr: 8136/14, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/141926.pdf.

[219] L. Fiedler and A. B. Huttenlauch, Der Schutz von Kronzeugen- und Settlementerklärungen vor der Einsichtnahme durch Dritte nach dem Richtlinien-Vorschlag der Kommission, NZKart 2013, 350, 353.

[220] BGHZ 155, 214=NJW 2003, 3776, 3797—HABET/Lekkerland; G. Kallfaß, in: Langen and Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12th ed. 2014, § 40 GWB, paras 7, 23; C. Becker and J. Knebel, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 36, paras 114 et seqq.

parties to modify the proposed concentration before the final decision of the FCO is adopted ("Vorfristzusagen", commitments fulfilled before the statutory decision time limit expires),[221] but the economic circumstances often do not allow for such a swift solution.[222]

Against this background, the FCO has, for proportionality reasons, developed since 1975 the practice to clear mergers subject to the condition that the undertakings concerned had, in a contract governed by public law, promised remedies whose implementation would remove the criteria for a prohibition.[223] It was in dispute and has never been clarified in court whether this practice was admissible and whether the contracts were (completely) valid and enforceable.[224] For this reason, the sixth amendment of the GWB, in force since January 1, 1999, introduced an explicit legal basis. In mid-2013, the eighth amendment of the GWB has brought the provisions more in line with the EU Merger Regulation, though some differences remain.[225] Sec. 40(3) of the GWB now provides that clearance may be granted subject to conditions and obligations in order to make sure that the companies concerned fulfil the commitments given to the Bundeskartellamt to avoid a prohibition. Conditions and obligations shall not aim at subjecting the conduct of the companies concerned to a continued control.

8.6.2 Procedure in Case of Commitments

German merger control requires companies to notify concentrations exceeding certain turnover thresholds[226] to the FCO before implementation. The procedure before the FCO is administrative (sec. 54 et seqq. of the GWB), the authority's

[221] To gain additional time, the parties may withdraw their notification and resubmit it with changes later; see BGH WRP 2010, 937, 939 et seq.—Phonak/GN Store.

[222] C. Becker and J. Knebel, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 36, para 114.

[223] For a detailed report with short descriptions of all cases with commitments from 1975 until the reform in 1998, see Zwölftes Hauptgutachten der Monopolkommission 1996/1997, Bundestags-Drucks. 13/11291 of 17.07.1998, paras 373–390, pp. 238–255; for a brief overview C. Becker and J. Knebel, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 36, para 118.

[224] See J. L. Schulte, in Schulte, Handbuch Fusionskontrolle, 2nd ed. 2010, paras 656–659; C. Becker and J. Knebel, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 36, para 117 et seq., 120; Zwölftes Hauptgutachten der Monopolkommission 1996/1997, Bundestags-Drucks. 13/11291 of 17.07.1998, para 374 et seq., p. 238. The Federal Court had, however, held that the FCO is generally precluded from prohibiting a concentration after the statutory time limit has expired, even if the contract governed by public law was illegal, except for deliberate deceit by the company concerned, see BGH NJW 1979, 2563, 2564.

[225] See further Monopolkommission, Sondergutachten 63, Die 8. GWB-Novelle aus wettbewerbspolitischer Sicht, 2012, paras 64–69, pp. 28–31.

[226] Defined in sec. 35, 38 of the GWB.

obligations and powers being the same as in other administrative proceedings.[227] The procedure involves up to two phases with short time limits: after the FCO has received the complete notification documents, the competent Decision Division has 1 month to examine the project ("pre-examination proceedings" or "first phase", sec. 40(1)1 of the GWB). If the merger proves unproblematic, it is cleared informally. If the Decision Division considers further examination to be necessary, it must notify the companies (so-called 1-month letter), thereby instituting the "main examination proceedings" (second phase).[228] The Decision Division must then take a formal decision in principle within 4 months from the notification; otherwise, the concentration is deemed to be cleared (sec. 40(2)2 of the GWB). The adoption of obligations or conditions requires a formal decision and thus comes into consideration only in the second phase.[229]

Before the FCO may prohibit a merger or clear it only subject to obligations or conditions, it must inform the participating companies of the main grounds for the decision, giving them an opportunity to comment (sec. 56(1) of the GWB).[230] If a prohibition is impending, this is done by way of a statement of objections (Abmahnschreiben).[231] The companies have the opportunity to put forward counterarguments. In practice, the undertakings concerned take the initiative to propose commitments if the FCO puts forward competition concerns that prevent clearing the merger.[232] Pursuant to sec. 40(2)7 of the GWB, the 4-month time limit is extended by 1 month if a notifying company proposes conditions or obligations for the first time. Further extensions of the time limit are possible with the notifying undertaking's consent, sec. 40(2)4 No. 1 of the GWB. According to practitioners, commitments indeed usually require additional time[233] because they involve a careful crafting of the conditions the details of which may be controversial.[234] The undertakings concerned actively participate in this process.[235]

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[227] G. Kallfaß, in: Langen and Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12th ed. 2014, § 40 GWB, para 2.

[228] Bundeskartellamt, The Bundeskartellamt in Bonn, Organisation, Tasks and Activities, Sept. 2011, p. 24.

[229] G. Kallfaß, in: Langen and Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12th ed. 2014, § 40 GWB, para 32.

[230] Bundeskartellamt, The Bundeskartellamt in Bonn, Organisation, Tasks and Activities, Sept. 2011, p. 24.

[231] G. Kallfaß, in: Langen and Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12th ed. 2014, § 40 GWB, para 2.

[232] C. Becker and J. Knebel, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 36, para 122.

[233] G. Kallfaß, in: Langen and Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12th ed. 2014, § 40 GWB, para 15, 18; in a similar vein, Gesetzentwurf der Bundesregierung, Entwurf eines Achten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen (8. GWB-ÄndG), BT-Drucks. 17/9852, p. 19.

[234] For an instructive example from the FCO's recent practice in this respect, see Krueger, Zusagen in Zusammenschlussfällen und Überwachung ihrer Umsetzung, NZKart 2013, 130, 134.

[235] C. Becker and J. Knebel, in: Münchener Kommentar Deutsches und Europäisches Wettbewerbsrecht, Vol. 2, 2008, § 36, para 122.

It is in dispute whether the FCO is obliged to remove obstacles to clearance (also) on its own initiative by encouraging the undertakings concerned to offer remedies or even by developing and imposing suitable conditions and obligations on its own. The FCO rejects this view at least where the undertakings concerned refuse conditions and obligations from the beginning. It points out that, from a practical perspective, conditions or obligations cannot be imposed without the parties' cooperation. The FCO therefore considers that it can be obliged to suggest remedies, if at all, only in exceptional cases.[236] Many scholars share this view, saying that it is at the FCO's due discretion whether to suggest commitments.[237] Since the eighth amendment, the new wording of sec. 40(3)1 of the GWB can be interpreted as explicitly backing the FCO's position: the law states that conditions and obligations are to make sure that companies fulfil the commitments given to the FCO. This shows that clearance subject to conditions or obligations requires some element of support by the companies, in the sense that they must be prepared to give certain commitments if this is the only way to obtain clearance.[238]

On the other hand, if the parties offer commitments which would exclude a prohibition of the transaction, the FCO has no discretion to refuse. It must then clear the merger with obligations or conditions following the commitments.[239]

8.6.3 Possible Content

Obligations and conditions to a clearance decision are admissible only insofar as the concentration would have to be prohibited otherwise.[240] This is a likely outcome if the merger affects several markets, whereas competition concerns relate only to some of them. Commitments must be suitable and necessary either to prevent a significant impediment of competition, in particular a dominant position, or to improve the conditions of competition in another market, and those improvements must outweigh the impeding effect on competition (see sec. 36(1)2 of the GWB).[241]

[236] Bundeskartellamt, Bericht des Bundeskartellamtes über seine Tätigkeit in den Jahren 2001/2002, BT-Drucks. 15/1226 of 27.06.2013, p. 22.

[237] V. Emmerich, Kartellrecht, 12th ed. 2012, p. 542; E.-J. Mestmäcker and W. Veelken, in: Immenga and Mestmäcker, Wettbewerbsrecht: GWB, 4th ed. 2007, § 40 GWB, para 61; more strict H. Bergmann and C. Burholt, in: Kölner Kommentar zum Kartellrecht Vol. 2, 2014, § 40 GWB, para 82 and J. L. Schulte, in Schulte, Handbuch Fusionskontrolle, 2nd ed. 2010, para 667, who argue that while the FCO has a certain discretion, it must not prohibit a concentration if it is certain that prohibition criteria can be removed via conditions or obligations.

[238] Similarly G. Kallfaß, in: Langen and Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12th ed. 2014, § 40 GWB, para 34.

[239] BGH WRP 2010, 937, 948 et seq.—Phonak/GN Store; G. Kallfaß, in: Langen and Bunte, Kartellrecht Vol. 1, Deutsches Kartellrecht, 12th ed. 2014, § 40 GWB, para 33.

[240] BGHZ 166, 165=NJW-RR 2006, 836, 842—DB Regio/üstra.

[241] BGHZ 166, 165=NJW-RR 2006, 836, 842—DB Regio/üstra.

In principle, only structural measures that affect the conditions of competition may come into consideration, not the behaviour of the undertakings concerned. However, as changes of market structure usually require certain behaviour by the undertakings concerned, there is no clear dividing line between influencing the conditions of competition and influencing competitive behaviour. Rather, it is central whether the measures achieve a structural effect that is sufficiently effective and sustainable to prevent or compensate a deterioration of the conditions of competition ensuing from the concentration.[242] Insofar as commitments contain behavioural elements, the FCO can adopt them only if it is able to control their implementation effectively; commitments that would necessitate a continued control are inadmissible.[243]

Commitments with a behavioural character may include, e.g., a grant of special rights of termination in large contracts, the abandonment of exclusivity clauses or the relinquishment of certain ownership rights. Structural commitments usually centre on the sale of an undertaking, parts of an undertaking, of holdings or of assets to a certain category of eligible buyers within a specified time frame.[244]

In the decision, commitments can figure as follows:

1. *suspensory conditions*,[245] meaning that the merger is cleared and may be implemented only as soon as the conditions are fulfilled;
2. *resolutive conditions*,[246] meaning the clearance becomes invalid if the commitments are not implemented in due time, with the consequence that the merger must be dissolved;
3. *obligations*,[247] which are, from a technical point of view, independent administrative acts that impose a certain duty on the addressee.

The FCO offers templates for these options on its homepage.[248] The Higher Regional Court of Düsseldorf, which is competent to review the FCO's decision at first instance, generally prefers suspensory conditions, as they exclude the risk that an anticompetitive situation is tolerated until the commitments are fulfilled.[249]

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[242] BGHZ 166, 165=NJW-RR 2006, 836, 842 et seq.—DB Regio/üstra.

[243] Gesetzentwurf der Bundesregierung, Entwurf eines Achten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen (8. GWB-ÄndG), BT-Drucks. 17/9852, p. 30.

[244] For an exemplary overview of the FCO's recent practice, see B. Krueger, Zusagen in Zusammenschlussfällen und Überwachung ihrer Umsetzung, NZKart 2013, 130, 132 et seqq.; a comprehensive list of merger cases between 1999 and 2008 where conditions or obligations were imposed is available in J.L. Schulte, in: Schulte, Handbuch Fusionskontrolle, 2nd ed. 2010, para 675.

[245] Sec. 36(2)No. 2 of the VwVfG.

[246] Sec. 36(2)No. 2 of the VwVfG.

[247] Sec. 36(2)No. 4 of the VwVfG.

[248] http://www.bundeskartellamt.de/EN/AboutUs/Publications/Furtherdocuments/furtherdocuments_node.html.

[249] See further Krueger, Zusagen in Zusammenschlussfällen und Überwachung ihrer Umsetzung, NZKart 2013, 130, 131.

8.6.4 Enforcement and Appeal

Pursuant to sec. 40(3a)1 of the GWB, clearance may be revoked or modified, inter alia, in case of the non-performance of an obligation attached to the clearance. Furthermore, the FCO may enforce its orders pursuant to the provisions applying to the enforcement of administrative measures, the amount of the penalty payment being at least EUR 1000 and not above EUR 10 million (sec. 86a of the GWB). Finally, parties that act contrary to an enforceable obligation pursuant to § 40(3)1 of the GWB commit an administrative offence. They may be sanctioned with fines of up to EUR 1 million for natural persons and up to 10 % of annual turnover in case of an undertaking (sec. 81(2) No. 5, (4)1 of the GWB).

The undertakings concerned are able to appeal a clearance subject to conditions or obligations although they have offered corresponding commitments, at least if they have expressed the opinion towards the FCO to accept remedies only with reservation. This may be the case if they accept remedies only if the case does not allow for unrestricted clearance while they still adhere to the opposite view.[250]

Third parties that are negatively affected by the clearance decision may appeal it if they participated in the proceedings or if they are directly and individually concerned and if they had applied to participate but were refused by the FCO for reasons of procedural economy.[251] Importantly, if the clearance decision has not become final due to an appeal by a third party, the FCO takes the view that it is possible to partly revoke a clearance pursuant to the Federal Law on Administrative Procedure (sec. 48(1)1, 50 of the Verwaltungsverfahrensgesetz, VwVfG) by adding further obligations or conditions at least if such partial withdrawal is to redress the complaint.[252]

[250] BGHZ 166, 165=NJW-RR 2006, 836, 837—DB Regio/üstra.

[251] BGHZ 169, 370=NJW 2007, 607, 608, paras 18 et seq.—pepcom; see in detail A. Neef, Drittbeschwerde nicht beigeladener Unternehmen in der Fusionskontrolle, GRUR 2008, 30; R. Bechtold, Erweiterung der Beschwerdebefugnis im Kartellverfahren, NJW 2007, 562.

[252] Bundeskartellamt, 09.03.2009, B 1-243/08, Werhan & Nauen, pp. 10 et seqq.; critical H. Bergmann and C. Burholt, in: Kölner Kommentar zum Kartellrecht Vol. 2, 2014, § 40 GWB, para 90.

Hungary

9

Anikó Keller

9.1 Introduction

Transactional resolutions in Hungary are not limited to competition law proceedings, but they are, although in another form, present in administrative and criminal proceedings.

The administrative procedure act (hereafter APA) is the general code of procedures for administrative acts and decisions in Hungary; however, specific regulations like the Competition Act supplement it with rules specific to that legal area. These specific regulations may make use of public authority contracts substituting an official decision.[1] The ministerial reasoning of APA emphasized that in many cases public authorities and clients are partners and on this basis conflict between the interests of private parties and public authorities can be avoided.

We have no information about how public contracts or commitments function in other areas of public administrative law (there are no such rules, e.g., in the environmental protection, media, energy, and bank supervision fields). Act No CLV of 1997 on consumer protection established a Conciliation Board whose procedure may end with a commitment. On the other hand, consumer protection agencies themselves do not adopt commitment decisions but conclude public contracts with parties in respect of the commitments undertaken by the parties.

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[1] Section 76 of the APA.

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Also, the New Criminal Code provides for a mediation procedure whereby the investigation may end with an agreement between the person hurt and the suspect. There is also a process similar to plea bargaining whereby the accused waives its right to have a trial. This plea bargaining process is, however, not used often since the accused cannot achieve a significantly less severe sentence and public attorneys are also cautious about relying on this mechanism.[2]

For competition law cases, also involving comparative and misleading advertising and other unfair commercial practices, the HCA may apply transactional procedures as set out in the Competition Act.

The Competition Act regulates three types of transactional procedures in respect of cases relating to restrictive agreements and/or abuse of dominance:

1. leniency introduced as of 2003[3];
2. commitment introduced as of 1 November 2005[4]; and
3. settlement introduced as of 1 July 2014.[5]

As for mergers, the HCA may attach conditions or obligations to the clearance.[6]

All of these mechanisms were created using the EU legislation as an example and are very similar to their EU counterparts. For details, please see below under Sect. 9.2.1 and under Sect. 9.3.

It must be noted that the HCA has established a unique and flourishing practice unmatched by other administrative agencies in Hungary. This also reflects that "transactional institutions" are not embedded in the Hungarian administrative law system.

Although transactional procedures may reduce the duration of the investigative procedures, this is not what they are aimed at in the first place. Rather, the HCA believes that transactional procedures contribute to the more efficient use of resources. Not only is the administrative procedure less lengthy, but there are also fewer court review procedures (e.g., in case of settlement, there is no court review due to the waiver made by the parties). The HCA believes that this is an effective method of changing the behavior of undertakings that also gives guidance to other market players.[7]

Companies prefer leniency and commitments in cases where they have a case that is hard to defend and they hope that they will either avoid or reduce their

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[2] See http://www.jogiforum.hu/files/publikaciok/orosz_judit__a_vadalku[jogi_forum].pdf.

[3] Leniency was first introduced into the Hungarian competition law by the notice of the HCA, and then as of 1 June 2009 it is incorporated into Sections 78/A-78/D of the Competition Act.

[4] Section 75 of the Competition Act.

[5] Section 73/A of the Competition Act.

[6] Section 30 (3) of the Competition Act.

[7] See point 9 of the Guidelines No. 3/2012 of the President of the Hungarian Competition Authority and the President of the Competition Council of the Hungarian Competition Authority on commitments in procedures relating to unfair commercial practices.

exposure to fines and in case of commitments, also avoid bad publicity. The new rules on settlements took effect in the summer of 2014; consequently, there are no experiences yet of how this new regime will operate.

9.2 Transactional Resolution of Agreements and the Abuse of Dominance

9.2.1 Overview of Transactional Procedures

The Competition Act regulates three types of transactional procedures:

1. leniency, which is available for certain types of agreements;
2. commitment, which is available both for agreements and abuse of dominance cases; and
3. settlement, which is available both for agreements and abuse of dominance cases.

9.2.1.1 Leniency

In the case of leniency applications, the Competition Act requires the applicant to describe the conduct which qualifies for leniency, which is an agreement or concerted practice among competitors aimed at the fixing of sale or purchase prices, market sharing, or the setting of production or sales quotas, which infringe either Section 11 of the Competition Act or Art. 101 TFEU.[8] The Competition Act only requires the applicant to acknowledge the above behavior and its participation in the behavior; however, it does not expressly require the applicant to acknowledge its liability. Whether acknowledgment of liability is a precondition of leniency is an open question, which has not yet been decided by Hungarian courts.

As a general rule, the leniency applicant has to cease its involvement in the infringement. In addition, it is a precondition of leniency (for both immunity from and a reduction of fines) that the undertaking fully and continuously cooperates with the HCA.[9] The leniency applicant has to submit all the available evidence to the HCA.[10]

Leniency is available before the proceedings are commenced. In this case, full immunity may be granted to the first undertaking which provides evidence to the HCA which enables the HCA to acquire judicial authorization for a dawn raid.[11] Once a dawn raid has been carried out and the proceedings commenced, the applicant may only qualify for full immunity if it is the first undertaking to provide evidence which enables the HCA to prove the infringement.[12] A leniency

[8] Section 78/B(1)(b) of the Competition Act.

[9] Section 78/A(7)(b) of the Competition Act.

[10] Sections 78/B(2)–(3) of the Competition Act.

[11] Section 78/A(2)(a) of the Competition Act.

[12] Section 78/A(2)(b) of the Competition Act.

application may be filed later, in the course of the proceedings; however, once the statement of objection or the investigator's report has been sent to the undertaking or the HCA has given access to the file of the case for inspection (whichever is earlier), it is more difficult to obtain a fine reduction. After this date, fines may be reduced based on leniency only if the applicant provides clear evidence which was previously unknown to the HCA and which relates to a fact which substantially influences the decision about the infringement.[13]

Leniency applicants seek to get full or partial immunity from fines, reduction of fines, or exclusion of an aggravating factor in determining the amount of the fines. The range of the reduction is set out in the Competition Act (30–50 %; 20–30 %; up to 20 %).[14] It is for the HCA to determine the exact amount of the reduction within the applicable statutory range. There is no legal basis for conducting a negotiation of the amount of the fines with the undertaking.

It is not a precondition of a successful leniency application that the applicant undertakes to indemnify third parties or undertakes to do this. To the contrary, the Competition Act enables the applicant which received immunity from fines to reject the payment of damages as long as such damages may be recovered from the other participants in the infringement.[15]

Since a successful leniency application means that the applicant provided information and evidence to the HCA which facilitated the proof of an infringement, victims of the infringement generally benefit from leniency applications. However, the undertaking receiving full immunity may reject the payment of damages as long as such damages may be recovered from the other participants of the infringement, which may put the leniency applicant in a more favorable position than the other undertakings participating in the infringement, while the victims' rights to damages is not detrimentally affected.

9.2.1.2 Commitments

Undertakings proposing commitments want to avoid a negative decision by complying with the competition rules as interpreted by the HCA. Thus, one of the main purposes of the commitment is to close the proceedings of the HCA without any declaration of the infringement.[16]

Commitments become binding upon the HCA's decision to accept the undertaking's commitment proposal.

This means that the undertaking which proposes commitments is not obliged to acknowledge its liability[17] or to assist the HCA in investigating its own or other

[13] Section 78/A(4) of the Competition Act.

[14] Section 78/A(5) of the Competition Act.

[15] Section 88/D of the Competition Act.

[16] Section 75(1) of the Competition Act.

[17] Section 23 of Guidelines No. 3/2012 of the President of the Hungarian Competition Authority and the President of the Competition Council of the Hungarian Competition Authority on commitments in procedures relating to unfair commercial practices.

parties' misconduct beyond the obligation to act in good faith in the course of the procedure and not to mislead the HCA.

A proposal for commitment may be filed at any time before the proceedings terminate. However, if the proposal is filed at an early stage of the proceedings (in the investigation phase) and therefore the HCA's procedural costs are substantially decreased, then the HCA may consider this as a reason in favor of accepting the commitment.[18]

If the HCA accepts the undertaking's commitments, the HCA does not impose fines and does not even declare the undertaking's conduct illegal. If the HCA rejects the commitments, it may impose fines; however, there is no legal basis for conducting a negotiation of the amount of the fines with the undertaking.

The statutory conditions for approving commitments do not include the provision of damages to third parties. However, undertakings may (and often do) include in their commitment proposal that they provide some sort of indemnification to third parties. If the HCA accepts such a proposal, this will be binding on the undertaking.

Commitment decisions make private enforcement more difficult than an infringement decision in which the HCA establishes the infringement. However, the undertaking may offer, in the framework of its commitment proposal, to indemnify the victims of the infringement to a certain extent (for the avoidance of doubt, this is not a legal requirement for a successful commitment and this does not prevent a claimant from subsequently claiming damages suffered in excess of the indemnification received).

9.2.1.3 Settlement

Settlement is aimed at the swift termination of the competition proceedings. The settlement declaration has to contain an acknowledgement of the undertaking's participation in the infringement.[19] As a reward, the HCA will grant the undertaking a reduction of 10 % on the fine that would otherwise be imposed. This means that successful settlement does not involve more far-reaching conduct requirements being imposed on the undertaking in addition to what the HCA may otherwise impose. In other words, it is not a precondition of a successful settlement that the applicant undertakes to indemnify third parties.

It is the competition council (the decision-making body of the HCA) which may propose to the undertaking to file a settlement declaration. The competition council may do this once the investigation report is prepared, but the statement of objections is not finalized,[20] which also means that the undertaking which makes a settlement declaration is not obliged to assist the HCA in investigating its own or other parties' misconduct. If the competition council makes such a proposal, the

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[18] Section 29 of Notice no. 3/2012 of the President of the HCA and the President of the HCA's Competition Council.

[19] Section 73/A(3)(a) of the Competition Act.

[20] Section 73/A(1) of the Competition Act.

undertaking has to answer within the deadline set by the competition council, which cannot be more than 15 days.[21]

If the undertaking makes a settlement declaration, it has to indicate to the HCA what it considers as the acceptable maximum amount of fines. If the HCA imposes fines in excess of this amount or if the statement of objections or the final decision significantly differs from the settlement declaration, the settlement declaration may be withdrawn. In such case, the undertaking's previous acknowledgement of the infringement cannot be used as evidence.[22]

A successful settlement procedure may mean that victims of the infringement will be compensated sooner since the HCA's procedure terminates in a shorter time and there will not be any lengthy subsequent judicial review procedure. However, the undertaking's acknowledgement of the infringement may put other undertakings, which still dispute the infringement, in a more difficult situation.

As for the combination of the mechanisms, we have to note that leniency and settlement may be combined and the rewards may be cumulated, while the combination of leniency and commitments or settlement and commitments is highly unlikely due to the different nature of such mechanisms.

Also, it must be noted that there is no legal basis for the HCA to negotiate in relation to infringements which are not subject to the leniency/commitment/settlement.

As for the risk of the procedure being disrupted or "hijacked" by interests of other parties, we have to note that this is not a real risk in case of settlements and leniency since third parties are not involved in such procedures. In case of commitments, however, this may pose a real risk since third parties may be consulted in respect of the commitments offered and they may use this opportunity to argue for a remedy that is broader in scope in order to create more advantageous market conditions for themselves.

9.2.2 Discretion of Competition Authorities and/or Judges During Proceedings

As discussed above, the parties (i.e., undertakings subject to the HCA procedure) have great discretion over the transactional resolution of competition law cases. Commitments can only be proposed by them, and cooperation under the leniency policy is also derived from their own decision. Though settlements of cartel cases can only be offered by the HCA, it is likely that it would do so should the parties advocate for this swifter resolution. In a sense, the parties may cause more trouble to each other. This is because certain forms of transactional resolution require the participation of all or at least most parties. In a cartel case or a restrictive agreement case, it may not be feasible to transact with only one party.

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[21] Section 73/A(2) of the Competition Act.

[22] Section 78/B(5) of the Competition Act.

The procedure of the HCA is divided into two parts. First, the investigators conduct a fact-finding exercise and summarize the results and their legal assessment in a report (investigation phase). Second, on the basis of the report and the complete file, the competition council (which is the HCA's decision-making body) prepares a statement of objections, holds a hearing, and brings a decision (decision phase).

The procedural division of the HCA's procedure complicates the application of transactional resolutions in the sense that no formal objections are addressed to the parties in the investigation phase. At this stage, it is therefore difficult to formulate commitments or to express willingness for settlement or commitments as the HCA's investigator is not entitled to make a decision on the issue and cannot shortcut or speed up the procedure. The investigation has to be completed in any case. Nevertheless, it is still useful to indicate an inclination towards a transaction and even to submit specific commitments, as the investigator's report could then include their assessment. Due to this complexity, in practice the parties also tend to apply a mixed approach. Some are only willing to negotiate with the competition council, while others start consulting already in the investigation phase. (Leniency, of course, supposes a thorough cooperation throughout the whole investigation.) The former approach involves inefficiencies as the parties basically withhold information until the beginning of the decision phase which otherwise would allow a swifter understanding and conclusion of the case. The latter approach on the other hand may be disadvantageous, revealing the company's weak points: its own perception on the illegality of its behavior or its negative effects on the market.

Ultimately, therefore, it is the competition council that determines the feasibility of a transactional outcome. In this assessment, it seems to follow a practical approach and favors such outcomes if beneficial for the markets and for the procedure in general. The discussion itself is to be started by the competition council when it communicates its objections to the parties. This communication may be a formal written statement or, especially in the case of settlements, a less formal, even verbal, one. It is for the parties to address the objections with appropriate commitments or with a written acknowledgement of the infringement in a settlement submission. Discussions and negotiations between the communication of the objections and the written submission of the party may be held with the competition council.

It is up to the competition council to accept commitments or to agree settlements. The refusal of commitments or settlement cannot be made the subject of judicial review, either separately or as part of the judicial review of the final decision. This means that the parties have no right to a transactional outcome. The refusal may even be outside the control of the company and its efforts. The competition council may decide, for instance, not to pursue a hybrid cartel case with settling and nonsettling parties or may find it more appropriate to establish an infringement instead of entering into the negotiation of commitments, in order to set an example on the market. In this decision, however, it has to have due regard to the principles of proportionality and the adequacy of competition law intervention. In the case of a commitment, this means that the competition council may choose to refuse the commitments and establish the infringement for the sake of general prevention if that is the more adequate solution for the protection of the public interest.

9.2.3 Nature of the Legal Act Concluding, Approving, or Making Binding the Settlement

A leniency is a formal decision of the competition council of the HCA. The competition council rules on whether to grant leniency only upon the request of the party applying for leniency by a separate interim decision (prior to its final decision).

A commitment is included in the final decision of the competition council against the party of an *ex officio* competition control proceeding.

The settlement is concluded by and between the competition council of the HCA and the parties subject to the proceedings opened *ex officio* pursuant to the Hungarian cartel prohibition or the prohibition of the abuse of a dominant position, or their equivalent under EU competition law (Article 101 or 102 of TFEU).

This means that the transactional decisions do not take the form of an actual agreement between the HCA and the parties to a competition supervisory proceeding. As it can be seen, the investigative body is not party to an agreement and is not entitled to issue a decision incorporating the transactional resolution. It is the decision-making body of the authority, the competition council, which is formally involved in the decision related to settlement, leniency, or commitment. Such decision of the competition council does not need to be approved by a judge.

As the provisions of the Competition Act concerning settlement will only enter into force with effect from 1 July 2014, there is no Hungarian precedent on settlement available at this stage. We assume that the fact that the undertaking has submitted a settlement statement will be included in the reasoning of the decision.

The application of the leniency policy is included only in the reasoning part of the final decision, but the decision on the granting of the leniency is included in the order of the competition council passed during the procedure. The operative part of the final decision contains a list of the parties who committed an infringement and the extent of the fines imposed on each party who committed an infringement. Therefore, it may be revealed from the operative part that an infringer is exempted from the fine or that it has received a reduced fine. However, the reasons (i.e., successful leniency applicant) are elaborated in the reasoning of the decision.

The commitment, on the other hand, is included in the operative part of the decision, and the circumstances of the commitment are included in the reasoning of the decision.

9.2.4 Legal Consequences for the Parties

The final decision on the merits involving leniency and the settlement decision declares the finding of infringement, while the decision containing a commitment does not state the finding (or nonfinding) of an infringement.

It can be stated that the decision on commitment is *per se* a modification or regulation of future conduct in a sense that it describes commitments for the client and does not contain reference to a fine or to other sanctions. However, this is not the case with leniency and settlement decisions, although a prerequisite of a successful leniency application is that the party who applies for leniency, as a main rule, terminates its involvement in the infringement, which has a *de facto* effect on the party's future conduct. The final decision (containing a reference to settlement and/or to leniency) includes a ruling on the amount of the fine, or in case of full immunity, the fact that the successful leniency applicant is exempted from the fine.

However, the interim decision on leniency cannot be challenged, and in case of settlement procedures, the party must waive the right to challenge the decision, which is also contained in the final decision. Commitment decisions may be challenged before the court. For further details in respect of the legal remedy, please see Sects. 9.2.11 and 9.3.2.

The legal sanctions in the case of noncompliance with the transactional resolution are different depending on the type of such resolution.

After receiving the interim decision on the granting of leniency, the undertaking has to comply with some conditions:

1. to terminate any involvement in the infringement;
2. to cooperate with the HCA in good faith, covering all aspects throughout the competition control proceedings; and
3. not to disclose in any way or form without the express consent of the HCA that it has submitted a request for exemption from, or for the reduction of, the fine.

In the case of a breach of the above conditions, the undertaking risks losing its immunity or a reduction in the amount of the fine.

In the case of a commitment decision, the HCA conducts a follow-up investigation to verify compliance with the decision as regards the fulfillment of the commitment. If the commitment has not been fulfilled, the HCA may impose a fine on the client or withdraw its decision. In addition, under certain circumstances, the HCA may also amend its transactional decisions (as for withdrawal and amendment, see Sect. 9.2.12 below).

The transactional agreement takes the form of a formal decision of the HCA. As such, the same applies to these agreements and their review by a court as to other formal decisions of the HCA; please see Sects. 9.2.11 and 9.3.2 below.

Court cases may also take the form of private actions, whereby it is possible to initiate "stand-alone," as well as "follow-on" actions under Hungarian law based on the infringement of the Competition Act.

Under the rules applicable prior to 1 July 2014, the court is bound by the HCA's final and binding decision on determining the (lack of) breach of competition law (the part of the decision which establishes that competition law was infringed). As of 1 July 2014, the court will only be bound by the HCA's decision which established the infringement (and not by a decision on the absence of an infringement). An interesting aspect is that the binding nature of the HCA's decision was interpreted in a 2012 Hungarian lawsuit by the highest Hungarian court—the Curia—to be limited only to HCA decisions as a result of HCA proceedings which were initiated as a result of the court informing the HCA about the initiation of a lawsuit.

The qualification of facts, e.g. the definition of the relevant market, is not binding on a court; e.g., the court may come to the conclusion that the HCA's definition of the market was not correct.

Since 2009, there has been a special statutory—rebuttable—presumption in the Competition Act: in lawsuits initiated on the basis of any civil law claim against any person alleged to be a party to a hard-core cartel (any agreements and concerted practices between companies in violation of the Hungarian or EU cartel prohibition aiming directly or indirectly to fix prices, to share markets, or to fix production or sales quotas), the presumption is that the infringement increased the price by 10 % (for the purpose of determining the impact of the infringement on the price charged by the infringer), unless proven otherwise. This presumption also applies to the infringement of the EU cartel prohibition, not only to the infringement of its Hungarian equivalent.

There are, however, limits to this presumption under general Hungarian civil law principles: the plaintiff still has to prove causation between the conduct of the infringer and the damage, as well as the actual amount of the damage; moreover, the plaintiff has to prove that it was affected by the infringement (e.g., it was a customer).

Along with a support for private actions, the Competition Act also contains provisions to protect successful leniency applicants with the following rules:

1. the leniency applicant who has received a *full immunity* from the fine *pursuant to the Competition Act* may refuse to provide compensation for any damage caused by his conduct in violation of the (HU or EU) cartel prohibition insofar as it may be recovered from the other infringer who was party to the same cartel.
2. Any civil lawsuit filed against the *fully exempted* infringer (i.e., successful leniency applicant) must be suspended until the final and binding decision of the administrative lawsuit instituted for the review of the HCA's decision.

However, both protective measures for leniency applicants refer only to full immunity, not to the reduction of the fine; moreover, they only contain a reference to the full immunity pursuant to the Competition Act (not to full immunity based on a cartel decision rendered by the European Commission).

9.2.5 Fundamental and Procedural Rights of the Parties

The key risks for parties' rights during transactional procedures are connected with the extent of the right to withdraw their declarations and the use of the withdrawn declarations by the HCA, the rules relating to the disclosure of documents produced for the purpose of such procedures to third parties, and in case of settlement, the waiver of their right to challenge the HCA's decision before court.

9.2.5.1 Right to Withdraw Declarations and the Use of Such Declarations by the HCA

According to the Competition Act,[23] applications to grant immunity from fines, so that information and evidence is submitted which enables the HCA to carry out a targeted inspection in connection with the alleged cartel, can be withdrawn before immunity is conditionally granted or if the application is rejected, within 8 days after the delivery of the decision on the rejection.

Leniency applications to grant immunity by way of providing information which enables the HCA to find an infringement in connection with the alleged cartel and leniency applications to reduce fines may not be withdrawn. In this respect, it is important to note that a leniency application requesting a grant of immunity from fines must be considered to be an application requesting the reduction of fines if the application for immunity is rejected (and the applicant did not withdraw the application). This means that once these applications have been made, the information provided may be used by the HCA irrespective of the fact of whether the leniency is granted.

9.2.5.2 Disclosure of Documents to Third Parties

Under the Competition Act in force as of 1 July 2014, corporate statements and settlement submissions may not be disclosed to third parties. Such statements may only be disclosed to other parties to the same procedure if this appears to be necessary for those parties to exercise their statutory rights in the procedure, e.g. their right to defense. In addition to this, there are strict rules which control the use of such documents by the other parties to the procedure. According to such rules, as per the applicant's request, the HCA may restrict access to corporate statements and settlement submissions so that such documents cannot be photocopied or photographed and only notes may be taken. Furthermore, the parties are allowed to use such documents only for the purpose of that particular procedure and the related judicial review procedure (review of the decision of the HCA on the merits of the case).

As for the evidence submitted under the leniency programme, no special rules apply. Depending on their contents, upon the applicant's justified request, the HCA may decide to treat such documents or a part thereof as a business secret. If this is

[23] Section 78/B (7) of the Competition Act.

the case, special rules apply to the access of such evidence, which are set forth in detail in Sect. 9.2.8.

9.2.5.3 Waiver of the Right to Challenge the HCA's Decision in Case of a Settlement Procedure

While in the case of leniency or commitment decisions there is no surrendering or waiving of constitutional and other procedural rights, in settlement procedures, the parties must waive their right to challenge the settlement decision before court when providing the settlement submission. However, if the parties consider the statement of objections or the decision on the merits prepared on the basis of the settlement submission to be different than the settlement submission itself, they may withdraw the settlement submission. In such case, the HCA must prepare a new statement of objections without building on the settlement submissions.

These waivers, however, are balanced by the right of the parties to access the file prior to making the settlement submission and the right to withdraw the settlement submission if there is a difference between it and the statement of objections or the final decision. However, it may be also argued that it goes too far and limits the right to access to courts in a way which raises constitutional concerns.[24]

As for the conditions, circumstances and conduct that may indirectly or directly increase pressure on companies, including the HCA's discretion in respect of pleas that may be raised against companies with full proof, we note that the HCA's discretion in respect of pleas that may be raised against companies without full proof is limited. Both in the case of procedures involving leniency applications and in the case of settlement procedures, the factual background must be explored in detail and supported by evidence. The preliminary views of the HCA are formulated in the statement of objections. The parties receive the statement of objections and may reply to it. In the case of settlement procedures, the parties may withdraw their settlement submission if they consider the statement of objections or the final decision to be substantially different from the settlement submission.

As for the fine setting, the HCA must impose fines pursuant to the rules set forth in the Competition Act. According to the provisions in force, the amount of the fine must be set by taking into account all circumstances of the case. Nevertheless, the legislator explicitly indicated certain aspects which the HCA must in particular take into consideration in the course of calculating the competition supervision fine:

1. the gravity of the infringement (the degree to which economic competition is endangered, the scope and extent of harm to consumers' interests);
2. the duration of the infringement;
3. the gain achieved by the infringement;
4. the position of the participants of the infringement on the market;
5. the culpability for the conduct;
6. the cooperation facilitating the proceedings; and
7. any repeated violation of the law (recidivism).

[24] Decision of the Constitutional Court 5/1992 (I.30.).

In addition to this, the Notice on Setting Fines includes the rules relating to the aspects of setting fines. According to court practice, the HCA may deviate from the rules set forth in this notice; however, it must state the reasons for the deviation.

Apart from the obligation of the HCA to take into consideration the above aspects, the HCA has wide discretionary powers in setting the amount of the fine. Thus, it falls under the discretion of the HCA, for example, whether to apply the sanction of a competition supervision fine at all or to impose other sanctions (as well).

According to the amendment of the Competition Act, which entered into force on 1 November 2005, contrary to previous rules the maximum amount of the fine is not 10 % of the net turnover of the undertaking achieved in the preceding business year but the same percentage of the turnover of the group of undertakings to which the undertaking concerned belongs. The same logic applies to the fines imposed on the professional association of undertakings; there the maximum amount of the fine is also 10 % of the net turnover which the member undertakings achieved in the preceding business year.[25]

Also, we do not think that there would be conditions, circumstances, or conduct which would constitute unjustifiable pressure on companies.

In our view, incentives to accept the benefits of a transaction resolution may be the transparent, predictable application of relevant rules of the Competition Act confirmed by court practice, the availability of notices and guidance as to the details of the procedure, and the availability of the HCA for informal discussions.

9.2.6 Right Against Self-Incrimination and Presumption of Innocence

Neither the APA nor the Competition Act provides expressly for a right against self-incrimination or the presumption of innocence. The general principles of the APA include a more general obligation that administrative procedures should be conducted fairly.[26] Despite this, parties routinely refer to both of these principles in the course of the procedures.

The Competition Act codified the principles established under EU law: the authority may not force undertakings to answer questions that would mean an admission of wrongdoing.[27] Yet they cannot refuse to hand over documents that may prove the infringement. They must also answer factual questions.

[25] Based on the LIDC Hungarian National Report of 2011.

[26] Section 4(1) of the APA.

[27] Section 64/B(1) of the Competition Act.

This right also applies in procedures that are terminated with commitments (or, to put it differently, there are no special rules for procedures that are closed due to a commitment).

The other due process requirement, the presumption of innocence, is not formally recognized in administrative procedures either. Yet it is basically respected since the HCA is obliged to prove the charges against the undertakings according to the applicable standard of proof. The undertakings investigated are not treated as wrongdoers before the competition council has established the infringement. Press releases heralding dawn raids routinely explain that the search of corporate premises does not mean that the companies have necessarily infringed the law.

There is no formal or informal obligation for parties to submit spontaneously and actively all kinds of documents or evidence material that would prove their participation in a competition law infringement (compared with the more active role of a leniency applicant due to its cooperation obligation).

There is no formal or informal obligation for parties to acknowledge liability or that an infringement of competition has occurred to benefit from a commitment order. The essence of commitment orders is that the existence of an infringement of competition rules is not decided.

That is obviously not true for settlements where undertakings must admit their wrongdoing and even waive their rights to seek court review.[28]

One feature of the Hungarian rules is that there is no special procedural framework for commitment procedures (or any other transactional procedures). This also means that the general procedural principles and safeguards apply to these cases as well. Unlike with phase one and phase two merger review procedures, there is no intermediate decision by the HCA to choose a transactional phase. Parties which are prepared to offer a commitment do not get sufficient feedback from the case handlers about the likelihood of the acceptance of their offer. The competition council gives guidance on this issue only in its statement of objections (SO) in the last phase of the procedure.

Neither in the Competition Act nor in the guidelines on commitments are there any provisions about the exclusion of documents provided before, should the authority or the company decide not to continue with a transactional resolution. This weakness has not led to litigation so far.

Given the two-stage nature of the HCA procedure, parties submit their commitments only after they have received the statement of objections of the acting competition council. By this phase, the HCA has collected almost all the facts and arguments required to prove an infringement. That is especially true for misleading advertising cases which usually do not involve such a sophisticated process as an abuse of dominance issue would call for. Even if companies are prepared to offer commitments, they nevertheless may challenge both the facts and the arguments of the HCA on the substance.

[28] This waiver applies if the decision is in line with the content of the settlement agreement.

It is hard to predict how the practice of settlements will evolve. It can be expected that undertakings settling a case will not challenge the position of the HCA since they have to admit the wrongdoing to benefit from the fine reduction.

9.2.7 Right of the Parties to Know the Case Against Them (Statement of Objections)

In the decision opening an investigation, the HCA briefly informs the parties about the alleged infringement. At the end of the investigation phase, the case handlers prepare an investigation report for the competition council which includes an indication of the subject of the investigation, the facts, supporting evidence, and the proposal of the case handlers concerning further action.[29] According to the general practice, the parties have no access to the investigation report until the competition council issues its statement of objections, but the competition council may decide to deliver it to the parties and invite their comments thereon.[30]

Before holding a hearing and making a final decision, the competition council sends to the parties the statement of objections,[31] which is similar to the Statement of Objections issued by the European Commission. This document contains the facts, legal conclusions, and proposed remedies. However, it does not specify the exact amount of the fine which the competition council intends to impose on the parties. The statement of objections is always issued after any negotiation in relation to leniency or settlement; however, a commitment offer can be made by the parties even after receiving the statement of objections. The statement of objections makes reference to the contemplated leniency or the settlement statement made by the party.

If a commitment offer was made before the statement of objections is issued, the competition council either will propose a commitment decision in the statement of objections in accordance with the commitment offer of the party or should give reasons why the commitment offer is not acceptable.

A party may not waive its right to receive the statement of objections from the competition council.

In some cases, parties make a commitment offer during the investigation phase of the procedure, i.e. before receiving the statement of objections, in which cases it can easily happen that they offer concessions that exceed what is necessary to remedy the existing competition problems. If the competition council asks for the commitment offer to be improved, where this exceeds what is necessary to eliminate the anticompetitive conduct specified in the statement of objections, the party may decide not to offer such an improved commitment, but in most cases the parties

[29] Section 71 of the Competition Act.

[30] Section 55(5) of the Competition Act.

[31] Section 73 of the Competition Act.

are willing to consider and accept the request of the competition council in order to avoid a negative decision and fine.

In the case of leniency, the Competition Act sets out the conditions for immunity or the reduction of fines.[32] When making a leniency application, the parties cannot be sure that their application would meet such conditions. The competition council makes an interim decision during the investigation on whether the application meets the statutory requirement for granting immunity or a reduction of fine. It gives certainty to the parties that they will receive leniency in the final decision of the competition council, provided that they fully cooperate with the authority during the procedure and that the investigation does not reveal that they coerced others to participate in the cartel.[33]

During settlement discussions, the competition council informs the party about the expected decision, including the range of fine.[34] Therefore, the party makes its settlement statement on the basis of such information and can expect that the statement of objections and the final decision of the competition council will reflect the same. If the statement of objections of the competition council substantially differs from the content of the settlement statement, the party may withdraw its settlement within 15 days from the date of receiving the statement of objections.[35] Also, if the final decision of the competition council deviates from the content of the settlement statement, the party may withdraw its statement.[36] In the case of a commitment offer made before receiving the statement of objections, the party can receive certainty about the possible positive outcome only when it receives the statement of objections providing for a proposed commitment decision.

The statement of objections also makes it clear if the competition council does not find the commitment offer acceptable. In the case of a commitment offer made after receiving a statement of objections, the party cannot be certain about the possible outcome until receiving the final decision of the competition council. However, they may receive some informal indication during the hearing of whether the competition council has a positive attitude towards the commitment offered.

On the one hand, there is certainty about the possible maximum fine because of the statutory limit in the Competition Act. On the other hand, although there is a Notice on Setting Fines which contains information about the calculation of fines in antitrust cases, the parties can never make an exact calculation or prediction of the expected fines. (However, the party can make a rough estimation of the expected fine on the basis of the Notice after receiving the statement of objections which contains detailed information about the infringement, including relevant product and territorial markets, relevant period of time, and the aggravating and mitigating factors of the case.) Therefore, when the party submits an application for leniency,

[32] Sections 78/A-78/C of the Competition Act.

[33] Section 78/C (2) of the Competition Act.

[34] Section 73/A (2) of the Competition Act.

[35] Section 73 (A) (4) of the Competition Act.

[36] Section 73/A (5) of the Competition Act.

it cannot calculate the expected amount of the fine for the infringement in question. In the case of leniency, once the party receives the interim decision of the competition council providing for immunity, it has a great degree of certainty that it will not receive any fine. In the case of an interim decision of the competition council on the reduction of a fine, the Competition Act provides for the level of discount but the party will have no certainty about the exact amount of the fine.[37]

In the case of settlement, the competition council tells the party the range of expected fines during the negotiations, which provides certainty to the party about the level of fine before they make a settlement statement containing the acknowledgement of liability.

In the case of a commitment offer, the party is not required to acknowledge liability and a commitment decision does not establish the infringement and does not impose any fine.

9.2.8 Right To Be Heard and Access to File

As a general rule, under the Competition Act, the parties have full access to the file, which takes place when the investigation is closed and the competition council communicates its objections.[38] As parties usually offer commitments or propose settlements after this moment, their access to the file is not restricted in any sense, with the exception of documents treated confidentially (see below). Generally, the parties do not receive the investigator's report separately but can access it during their access to the file. In some cases, especially when the parties would be ready for commitments, the competition council may send the report to the parties for comments and prepare its statement of objections on the basis of those comments. In such cases, the access to the file opens with the sending of the investigator's report.

As an exception, parties may access relevant documents in the file prior to the communication of the statement of objections, if this is indispensable in order to exercise their right to legal remedy against the decisions of the HCA passed during the procedure, which may be challenged by way of an appeal.[39] In addition, as per the party's request, the competition council may allow access to certain documents in the file for another reason if this does not jeopardize the success of the procedure.[40]

Special rules apply to the access to documents which are treated as confidential under specific legal titles.[41]

[37] Sections 78/A (2) and (5) of the Competition Act.

[38] Section 55 (5) of the Competition Act.

[39] Section 55 (5) of the Competition Act.

[40] Section 55 (6) of the Competition Act.

[41] Section 55/A of the Competition Act.

In the case of business secrets, the party must request the HCA to treat the document, including such a secret, confidentially by giving a detailed justification and must prepare a nonconfidential version of the document. It is important to note that the HCA may later change its decision on confidentiality if the relevant criteria for confidentiality are no longer fulfilled.

The decisions of the HCA on the rejection of the request on confidential treatment and on the termination of confidential treatment may be challenged by the relevant party before the court.[42]

In procedures involving leniency or commitments, the waiver to the right to be heard or the waiver to the right of access to the file is not a precondition to the proceedings or the conclusion of a transactional resolution.

The only limitation on the access to the file as a whole is when a settlement procedure is initiated. When submitting their settlement submissions, the parties must waive their right to further access to the file.[43] This, however, does not constitute a real limitation, as by the time the parties make their submissions they have already had full access to the file via the normal rules. In any case, they may ask for further access to the file before completing their submissions.

In settlements, in their submission the parties have to waive their right to a hearing, but more importantly, the right to judicial review as well.[44] The submission (and the waivers) can nevertheless be revoked if the statement of objections or the final decision of the competition council differs from the content of the settlement submission at a meaningful level.[45] As to what constitutes a meaningful level is not further described in the Competition Act, and as the settlement procedure was introduced in the Hungarian competition law as of 1 July 2014, there is no relevant practice in this respect yet.

9.2.9 Right to an Equal Treatment

One example can be given for the possible unequal treatment of companies in substantially equivalent situations: the different liability for the damage claims of leniency applicants. The leniency applicant under Hungarian competition law bears a "secondary" liability for the damages caused by the cartel[46]: any undertaking which received full immunity from the fines under the leniency rules may refuse indemnity claims as long as they can be collected from other undertakings in the same cartel. This possibility of refusal bears special significance in light of another distinctive rule according to which it is presumed under Hungarian competition law that horizontal price fixing and/or market sharing arrangements are deemed to result

[42] Sections 55/A and 55/B of the Competition Act.

[43] Section 73/A (3) of the Competition Act.

[44] Section 73/A (3) of the Competition Act.

[45] Section 73/A (5) of the Competition Act.

[46] Section 88/D of the Competition Act.

in a 10 % increase in the contract prices.[47] In this regard, the injured parties in civil lawsuits appear to be released from the necessity of actually proving the amount of the damages they have suffered by virtue of the cartel, although the presumption is not about the amount of damages but rather about the level of the price increase.

The rules summarized above uniformly entered into effect as from 1 June 2009. However, the same effective date does not mean a uniform application method. According to the amendment, the 10 % price increase presumption can be invoked in all lawsuits initiated after 1 June 2009, regardless of when the underlying cartel was committed, while the possibility for the leniency applicant to conditionally refuse indemnity claims only applies to damage claims originating from cartel activities committed after 1 June 2009.

The difference could pose a risk of unequal treatment of leniency applicants. If the HCA concludes in a decision, along with the evidence supplied by a leniency applicant, that a cartel was operated before 1 June 2009, the leniency applicant will need to consider filing a petition with the court to overturn the HCA decision (providing that all other infringers challenged the HCA decision before the court). Otherwise, the HCA decision becomes final and enforceable against the leniency applicant, and it will be liable for indemnifying the damaged parties alone. In that case, the leniency applicant will not be able to take advantage of the "secondary liability" and refuse indemnity claims because the cartel was operating before 1 June 2009. On the other hand, since the "follow-on" damage claims are asserted after 1 June 2009, unless the leniency applicant proves otherwise, it remains "automatically" liable for indemnifying the injured parties to a value equalling to at least 10 % of the contract prices affected by the alleged cartel. (Nevertheless, the leniency applicant may claim indemnity from the members of the same cartel in proportion to their involvement in the cartel—but only after the legal review of the cartel decision is over.)

This illustrates that the entry into force of regulations resulted in a fairly unequal position for the leniency applicants compared to that of other infringers and/or leniency applicants submitting evidence on infringements committed after 1 June 2009.

9.2.10 Right to an Impartial Judge

The HCA passes its transactional resolutions similarly to its regular resolutions—there is no difference in the bodies or authorities involved. The function of investigation and decision making is separated within the organization of the HCA; for details, please see Sect. 9.2.1.1. However, the body negotiating and finalizing the transactional solution is usually the decision-making body, i.e. the competition council acting in the case.

[47] Section 88/C of the Competition Act.

9.2.11 Right to Trial

Decisions on granting leniency (immunity from or reduction of fine) are passed by the HCA in the form of an order[48] against which no appeal or judicial review is possible.

Until 30 June 2014, the transactional decisions of the HCA took the form of an order in the case of commitments.[49] The order could be reviewed by a court, and the request for review must have been submitted to the competition council within 8 days of the receipt of the order. The request for review could be submitted by the parties or anybody in respect of whom the order contains provisions or who had to be notified of the order according to the Competition Act.[50]

As of 1 July 2014, both settlement decisions and commitment decisions take the form of a resolution (decision on the merits of the case).[51]

Resolutions may be challenged before court by the parties to the procedure, with the exception of the resolution passed as a result of a settlement procedure. In the latter case, the parties must waive their right to request the judicial review of the settlement decision.[52] Instead of the right to judicial review, in the case of settlement procedures the parties may withdraw their settlement submissions if the statement of objections issued by the competition council or the decision on the merits significantly differs from the contents of the settlement submission.[53] This right of withdrawal seems to constitute an acceptable guarantee for the parties in principle, although no practice could be developed in this respect to date. However, it may be argued that it goes too far and limits the right to access to courts in a way which raises constitutional concerns.[54]

The resolution of the HCA may be challenged before the court within 30 days after delivery of the same.[55] The review may be initiated by the parties and also by other participants of the procedure in connection with provisions concerning other such participants.[56]

The court is entitled both to annul the decision and to order the authority to adopt a new decision and to alter the HCA's decision.[57]

Commitment decisions taken in the form of an order, as set out by the version of the Competition Act in effect until 30 June 2014, cannot be altered by the court.[58]

[48] Section 78/C (2) of the Competition Act.

[49] Section 75 (1) of the Competition Act in force until 30 June 2014.

[50] Section 82 of the Competition Act.

[51] Section 75 (1) of the Competition Act in force as of 1 July 2014.

[52] Section 73/A (3) of the Competition Act.

[53] Section 73/A (5) of the Competition Act.

[54] Decision of the Constitutional Court 5/1992 (I.30.).

[55] Section 330 (2) of the CCP.

[56] Section 327 (1) of the CCP.

[57] Section 83 (4) of the Competition Act.

[58] Section 83 (4) of the Competition Act and Section 339 of the CCP.

However, based on the new rules effective as of 1 July 2014, commitments will be accepted in the form of a resolution, where the reviewing courts will have, at least theoretically, the right to amend such resolutions of the HCA.

A review is only admissible if the parties base their claim on the infringement of a legal provision. Administrative decisions which involve a margin of discretion are regarded as lawful if the competition authority has satisfactorily constituted the facts of the case and followed the procedural rules, if the principles of its considerations can be determined, and if the causality is established in the reasoning.[59] Only substantial procedural flaws will lead to the annulment of the decisions.

Based on the Menarini judgment of the ECHR (A. Menarini Diagnostics S.r.l. v. Italy, App. No. 43509/08), some authors argue that even if there is no legal possibility of a full review by the courts, if they carry out a full review in fact, this is compatible with the ECHR. Many authors view the Hungarian system similar to that of the Italian as in the Menarini judgment.

9.2.12 *Ne bis in idem*

First, it is important to note that the Competition Act does not contain any express provision that could be interpreted as a "ne bis in idem" principle in competition law proceedings. An express "ne bis in idem" prohibition is contained in the new Constitution, which entered into force in 2012.[60] Nevertheless, the scope of this general principle is limited to "criminal proceedings" and "criminal offenses." According to this, no one shall be liable to be tried or punished in criminal proceedings for an offense which he or she has already been acquitted or convicted for by a final and binding decision in accordance with the law. However, due to the now widely accepted criminal law characteristics of antitrust competition proceedings, it can reasonably be argued that, by analogy, this principle shall be applied to antitrust competition proceedings as well.

In addition, the APA, serving as background legislation for the Competition Act, also contains a kind of "ne bis in idem" clause.[61] According to this, if the court (having jurisdiction to review administrative decisions) has adopted a decision on the merits of the case, new proceedings may not be opened at the same authority in the same case, under the same grounds. From the mere wording of this provision, it seems that this "ne bis in idem" principle only applies to cases which have been reviewed by the courts. Nevertheless, in the case of transactional resolutions, the decision of the HCA is often not followed by a judicial review.

Furthermore, the APA sets forth that, on one occasion, the HCA may withdraw or amend its decision if it establishes the unlawfulness of such a decision and the

[59] Section 339/B of CCP.

[60] Article XXVIII (6).

[61] Section 109 (3) of APA.

decision has not yet been reviewed by the court (until the filing of the plea). The decision, however, may be withdrawn or amended within 1 year following the delivery of the decision and only if this does not violate rights obtained in good faith.[62]

Also, in the case of commitment decisions, the Competition Act in force until 30 June 2014 sets forth that commitment orders are without prejudice to the power of the HCA to start a new competition supervision proceeding in the case where there has been a material change in the circumstances or where the order was based on misleading information concerning a fact which was fundamental to the making of the resolution.[63]

The Competition Act in force as of 1 July 2014 describes in detail the cases and the time limits when the HCA may amend or withdraw its commitment decision upon the request of the parties or *ex officio*.[64]

The HCA must amend the commitment decision:

1. upon request of the undertaking obliged to fulfill the commitments if the undertaking could not comply with the commitment due to an unavoidable reason outside of its control, or
2. *ex officio* or upon request of the undertaking obliged to fulfill the commitment if the fulfillment of the commitment is no longer justified due to the change of circumstances, in particular the change of market relations or the conditions of competition,

and the result desired may be reached otherwise.

In respect of item a) above, the request may be submitted within 15 days after getting knowledge of the reason hindering compliance, but at the latest within 2 months after the occurrence of same.

The HCA must withdraw its decision not reviewed by court if the decision was based on the misleading communication of a fact material from the point of view of the passing of the decision. In such case, the decision may be withdrawn within 5 years following the delivery of the decision.

Finally, if the undertaking did not fulfill the commitment (as prescribed in the decision or in the amended decision), the HCA must withdraw its decision or impose a fine, taking into account the effective enforcement of public interests, in particular the characteristics of the market relations concerned, the conditions of competition, the degree of fulfillment of the commitment, and in case of an omission, the culpability of the undertaking's conduct. In this case, the decision may be withdrawn within 5 years after the expiry of the deadline set to fulfill the commitment, or in case of continuous commitment, within 5 years following the breach of the commitment.

62 Section 114 of APA.

63 Section 75 of the Competition Act in force until 30 June 2014.

64 Section 75 of the Competition Act.

Should the decision be withdrawn, the procedure must be recommenced so that the rules relating to the statute of limitations are not applicable and the HCA may also impose a procedural fine due to the conduct being the reason for the withdrawal.

The abovementioned rules set a strict limit for the authority to proceed in the same case twice, and therefore such rules imply that in cases other than the abovementioned ones, no procedure may be initiated based on the same facts.

Thus, from the above provisions of the Constitution and the APA, it follows that it is reasonable to expect that the HCA would be prevented from opening new proceedings if the very same conduct was already subject to an HCA proceeding which was closed with a transactional resolution (typically: commitments by the party), was not subject to court review, and does not fall within the scope of the abovementioned provisions on the possibility of amendment and withdrawal of decisions.

For the same reason, we are of the view that the *ne bis in idem* principle could also apply to leniency cases, including cases which were closed without finding an infringement due to a lack of sufficient evidence. At the same time, if new pieces of evidence arise and the decision may be withdrawn or amended in line with the APA as mentioned above, then the position of the leniency applicant would have to be preserved in the case of type A leniency applications: this could be achieved, for example, by using the powers of the HCA under the Competition Act to "copy" and "use" evidence from one proceedings into another. If the earlier evidence submitted by the HCA is thus reused in the newly opened proceedings, then the HCA would be entitled to retain the status of the leniency applicant, as well as its position which was achieved in the earlier proceedings.

As regards the immunity of individuals, the following has to be noted.

According to Hungarian law, individuals are not held liable for competition law infringements (unless they are undertakings themselves, i.e. they engage in economic activities). As a result, the question is not applicable/is irrelevant to these individuals.

At the same time, individuals can be held liable under criminal law in the specific cases of price fixing and market sharing in relation to public procurement and public concession procedures, which are punishable offenses under both the Old and the New Criminal Codes. At the same time, according to both the Old and the New Criminal Codes, the individual (e.g., employee, manager) may not be punished if the company first submitted a leniency application to the HCA.[65] The aim of introducing this provision in the Criminal Code was clearly to encourage leniency applications. As a result, an individual is protected if the company already submitted a successful leniency application.

As to the application of the "ne bis in idem" principle for other members of the same group of companies, the following has to be noted. There is no clear guidance in this respect from the case law, especially in relation to commitment/settlement

[65] Section 420 of the New Criminal Code as well as Section 296/B of the Old Criminal Code.

decisions by the HCA. At the same time, in the case of leniency applications, the HCA has so far accepted in practice that leniency applications are submitted by an undertaking, as well as all companies belonging to its group (even though the Competition Act in effect until 30 June 2014 stated that leniency applications cannot be submitted jointly by more than one undertaking.[66] As of 1 July 2014, however, the Competition Act will be changed to state that leniency applications cannot be submitted jointly by more than one "independent" undertaking: this means that the Competition Act will specifically allow leniency applications to be submitted by all the companies belonging to one company group: in case of such an application, all company group members will be protected and would receive leniency.[67]

9.3 Rights of Third Parties

9.3.1 Right To Be Heard and Access to File

The Competition Act provides a general right for third parties, including damage claimants, that can substantiate sufficient legal interest to access the file. This right opens after the end of the procedure, but an earlier access may also be given if this is necessary in order for the third party to exercise its right as ensured in statutory rules or to perform its obligation based on statutory rules or a decision of a public authority.[68]

There are several limitations on this right. First, it can be restricted if the access to the file (or rather to certain documents in it) would put the proper functioning of the HCA in danger, specifically for instance the integrity of its leniency policy.[69]

Second, access can only be given to nonconfidential versions of the confidential documents in the file. Confidentiality covers personal data, the identity of protected persons (complainant, witness), business secrets, other qualified secrets, and the internal documents of the HCA, the European Commission, and other NCAs within the EU.[70]

Third, the right to take copies included within the right of access to the file may be restricted, or access can be given only to the third party's legal counsel or expert.[71]

It is important to note that settlement submissions and corporate leniency statements enjoy a *sui generis* protection as of 1 July 2014. They cannot be accessed by third parties but only by the parties to the procedure if they could not exercise

[66] Section 78/A (8) of the Competition Act.
[67] Section 78/A (9) of the Competition Act.
[68] Section 55 (3) of the Competition Act.
[69] Section 55(4) of the Competition Act.
[70] Section 55/A (1) of the Competition Act.
[71] Section 55/B (4) of the Competition Act.

their statutory rights without access, e.g. their right to defense. Such documents may only be accessed and used by such parties for the purpose of the procedure and the judicial review of the HCA decision passed in that procedure.

As for the right to be heard in the case of third parties, there are no special rules in the case of procedures involving leniency or settlement. This means that in such procedures, the HCA may request data from such parties upon its discretion, but they are not entitled to be heard.

Furthermore, in commitment procedures the competition council may choose to start a consultation with interested third parties on the commitments offered.[72] There is, however, no right for third parties to be consulted or to appear in any of the transactional procedures discussed in this note.

9.3.2 Right to a Trial

The HCA may request data from third parties in competition supervisory procedures, but third parties do not have rights in such procedures under the Competition Act.

The transactional decisions of the HCA, with the exception of the decision passed in a settlement procedure and the order passed regarding the leniency application, may be challenged before a court. The judicial review may be initiated by the party to the procedure and also by other participants of the procedure in connection with provisions which concern such other participants.[73]

Typically in the competition supervisory procedure, there are no third parties in respect of whom provisions are included in the decision, and therefore it can be concluded that, typically, third parties are not entitled to challenge the transactional decision of the HCA. In addition, even if they are entitled to do so, this right is limited to provisions concerning that certain third party.

A commitment decision in the form of an order (which existed until 30 June 2014) can be reviewed on the request of the parties, those who are directly concerned by the order, and those who have to be notified according to the Competition Act.[74] APA requires notification of those who are directly and individually concerned by the order or those whose rights or legitimate interests might be affected by it or whose notification is required by law.[75]

In practice, the Competition Council only notifies the parties who were investigated and not, e.g., competitors, cocontractors. If any third party's right would be affected by the order, the Competition Council must notify it according to APA, but the current legal interpretation does not include competitors or any third party in the case of commitment orders.

[72] Section 75/A of the Competition Act.

[73] Section 327 of the CCP.

[74] Section 82 (3) of the Competition Act.

[75] Section 78 (2) of APA.

Complainants enjoy the same rights as parties regarding Section 78 (2) of APA, but only in the preinvestigatory phase.[76] Since commitment orders are adopted only after an *ex officio* investigation was already initiated, the complainants do not enjoy the same rights as the parties. However, based on Section 78 (2) of APA, they were notified on the commitment order and, for example, in case Vj-22/2008, the complainant challenged the order before the court, as a result of which the court annulled the order and ordered the HCA to recommence the procedure by giving detailed instructions on how to proceed.

As of 1 July 2014, the HCA's commitment decisions will take the form of a resolution, where complainants and other interested parties will not have any right to initiate judicial review.

If third parties have the right to challenge the order of the competition council, they must be considered as parties in the procedure before the court. There is no distinction in this regard.

9.3.3 Right of Equal Treatment

Until 1 July 2014, complainants enjoyed a more favorable treatment than other interested parties because complainants had the right to request judicial review against the HCA's order accepting the undertaking's commitments. This unequal treatment ceases to exist after 1 July 2014 (see above at Sect. 9.3.2).

From 1 April 2010, an individual who has knowledge of a price-fixing or market-partitioning hardcore cartel and secretly informs the HCA and supplies essential written evidence will receive an informant's fee.[77] The fee becomes payable once the HCA has established the infringement and imposed the fine in its final decision.

The HCA is required to treat the informer's personal data in strict confidence if he requests this treatment. However, the HCA has to inform the informer in advance that the full anonymity of his personal data might call into question the probative value of the evidence he supplied (i.e., the HCA, or the courts in the subsequent court review of the HCA decision, may set aside this evidence on the basis of its unknown origin). Accordingly, the informer has to decide: he either sacrifices his anonymity (in order to get the informant fee at the end of the procedure) or retains his secrecy and runs the risk of losing the informant fee. This poses an unfair and potentially unequal treatment, as the informer might lose the informant fee (due to his preference of maintaining the confidentiality of his personal data) even if the evidence he supplied is essential and sufficient to prove the infringement.

[76] Section 43/H (2) of the Competition Act.

[77] Section 79/A of the Competition Act. The fee equals to 1 % of the fine that the HCA ultimately imposes on the cartel participants in respect of the disclosed infringement, with a cap of HUF 50,000,000 (approximately EUR 185,000).

As of 1 July 2014, the competition council has the right to initiate negotiations with interested third parties before the adoption of any pre- or postmerger conditions/obligations or commitments. However, it is at the sole liberty of the competition council to initiate such negotiations, i.e. no conditions govern when and under what circumstances the competition council needs to initiate such negotiations with third parties. This implies that the competition council does not have to give any reason if he elects not to initiate the negotiations. This, at least theoretically, may lead to an unfair and discriminatory application of the negotiations which may result in the unequal treatment of third parties.

9.3.4 Principle of Legitimate Expectation and of Good Faith

The APA sets the principles of the procedure for the HCA,[78] establishing that it may not misuse its powers, and shall exercise them in a professional manner in accordance with the principles of efficiency and with the cooperation of the parties in its proceedings. The HCA shall act in good faith, within the framework of the law, bearing in mind the rights and the lawful—including economic—interests of clients. It shall protect the rights of clients they have obtained in good faith. These principles set a framework for the transactional procedures of the authority.

While there is no right for transactional outcome, these legal principles impose an obligation on the HCA to see through the procedures once they are initiated. It may not simply change its mind and abandon a half-completed settlement or commitment negotiations without reasons provided by significant changes in the underlying legal or factual situation (e.g., the party is not acting in good faith).

During the phase of the investigation, the officials of the HCA are not in a position to bring final decisions, either on the scope of the infringement or on its possible remedies, or on the question of leniency rewards. This is, however, made clear to the parties who then can decide on the pros and cons of engaging into a more in-depth cooperation. Nevertheless, the investigators provide as much assistance as appropriate for the parties to ensure the success of their cooperation. Leniency applicants are kept in a discussion aimed at the maximization of the added value of their submissions. The HCA requests clarifications and points out issues which need further elaboration.

Nevertheless, there is a tension between the public interest as perceived by the HCA, which aims at the collection of as much evidence as possible, and the interest of the leniency applicant in obtaining the maximum possible reduction without providing more evidence for it than necessary. The HCA is not interested in restricting the party's cooperation to the necessary minimum. This means that the investigators do not disclose their views on whether the party has already provided significant added value and try to keep the applicant in a continuous readiness for cooperation.

[78] Sections 1–7 of the APA.

In the case of settlements, the competition council already has a view on the scope of the infringement and its objective is to have that infringement acknowledged by the parties. The parties, on the other hand, have an interest, in light of the evidence, to reduce that scope as much as possible. While both parties are interested in reaching an amicable outcome, both can use the cessation of the negotiations as a threat. The same is true of commitment procedures, where the competition council already has a clear view on the market issue to be remedied by the commitments. In this case, both parties can use as a lever the possibility of stopping negotiations, though in this case the undertaking is in a more difficult situation than the HCA. Naturally, the HCA shall not “aim higher” than justified by the identified competition issue.

Nevertheless, transactional procedures are less prone to misuses by either the parties or the HCA because, in those cases, their interest is converging rather than opposing each other, supposing a greater level of goodwill than in normal procedures.

9.3.5 Confidentiality and Publicity of the Transactional Solutions

Nonconfidential versions of the decisions of the HCA are always made public. This rule applies to decisions affected by leniency, settlements, or commitments too. Settlement decisions mostly consist of the settlement submissions of the parties and therefore will probably tend to be short and rather of a summary nature. It is a major advantage in settling that no detailed decision is adopted by the HCA. This in turn is of course a disadvantage to private damage plaintiffs. The nonconfidential version of the statement of objections is, however, accessible to third parties after the closing of the procedure, as a general rule, and consists of the settlement submissions.

9.4 Merger Control

Remedies are possible and play an important role in merger control proceedings. Instead of prohibition, the HCA clears the concentration if the significant lessening of competition on the relevant market may be eliminated as a result of the fulfillment of certain pre- or postconditions, in particular the divestiture of individual parts of undertakings or assets or the elimination of control over an indirect participant or as a result of the compliance with certain behavioral rules and if the undertakings concerned undertake to amend the concentration in accordance with this or, in the case of the implementation of the concentration, they undertake to comply with such behavioral rules.[79]

[79] Section 30 (3) of the Competition Act.

As it is clear from the above, remedies are always negotiated between the notifying parties and the HCA, meaning that the HCA will only impose such remedies if the parties concerned voluntarily undertake to fulfill them.

9.4.1 Negotiation of Remedies

The parties are allowed to submit modifications or changes (i.e., remedies) to their transaction(s). The remedies are usually discussed with the HCA, and then the parties concerned draft and submit their proposals. This approach is also confirmed by the HCA's Notice on Conditions and Obligations in Merger Cases, according to which the parties are entitled to suggest remedies to their transaction. In this way, the parties would like to ensure that the HCA approves the planned transaction since the undertaking will avoid future competition problems which may have arisen.

It is worth mentioning that, if after a while the parties believe that they cannot or can only just partially fulfill the obligation or the condition, they are entitled to request the HCA to amend the decision clearing the concentration and prescribing remedies.

There is no difference between remedies submitted at the first stage (simplified procedure) and those submitted at the second stage (full procedure) of the procedure. According to the HCA's Notice regarding Considerations in Differentiating Between Concentrations Subject to Authorisation in the Simplified or Full Procedure, as a general rule, if conditions or obligations should be attached to the clearance, the assessment shall be carried out within the framework of a two-phase procedure, unless the concerns in connection with the competition and the proper remedy can easily be identified.

We also note that, in merger cases, the parties usually consult the HCA prior to the formal commencement of the procedure. In 2011, the HCA published its Pre-notification Guidance with the aim of facilitating the proper use of the contacts. In addition to this, as of 1 July 2014, the Competition Act also explicitly refers to such prenotification procedure stating that the undertakings in charge of applying for the clearance may initiate prenotification consultations with the HCA in order to clarify the scope of data and documents to be filed with the HCA.[80]

The prenotification contact aims to facilitate cooperation between the HCA and well-informed and well-prepared parties and their representatives. It is not the purpose of the prenotification contact to remedy any deficiencies in the preparedness of the parties and their representatives. Consequently, the parties themselves need to carry out the preliminary evaluation and risk assessment of the proposed transaction. The HCA may make observations during prenotification contact; however, the substantive evaluation of the given transaction by the HCA is only

[80] Section 69 of the Competition Act.

possible in the course of a subsequent proceeding. However, the necessity of remedies is likely to be discussed during the prenotification phase.

According to the Pre-notification Guidance, prenotification contact can generally take place in the following situations:

1. by evaluating whether the transaction concerned is subject to the competition rules, whether the transaction constitutes a concentration within the meaning of the Competition Act—if professionally well-prepared parties/their legal representatives cannot determine this independently according to the existing case law,
2. on the extent of the data/information that is needed in order to assess the transaction, the clarification of the questions stemming from the fulfillment of the notification form (the circumstances that may lead to an application requesting the elimination of the questions that need to be answered); and
3. on the competition concerns identified by the parties before initiating a procedure that should be assessed within the course of the procedure and on the contemplated remedies.

The HCA must clear the merger if the proposals eliminate the competition concerns. This means that the HCA may not refuse the clearance of the concentration if it would not significantly reduce competition on the relevant market, in particular as a result of the creation or strengthening of a dominant position. However, it is in the HCA's discretion to assess the proposals on the basis of the "substantial lessening of competition" test.

Concentrations shall be assessed upon weighing the advantages and disadvantages resulting from the concentration, such as in particular

1. the structure of the relevant markets; the existing or potential competition; the purchase and sales opportunities on the relevant markets; the costs and risks, as well as the technical, economic and legal requirements for entering into and exiting from, the market; the foreseeable impact of a concentration upon competition in the relevant markets;
2. the market position and strategy of the companies concerned, their economic and financial capability, their business policy, their competitiveness on national and foreign markets, and any expected changes therein; and
3. the effect of concentration upon the suppliers and trading parties.

The HCA makes its decision on accepting or rejecting such proposals based on information searched and collected from as wide a range of the market and other market players as is efficiently possible. However, after this suitability and feasibility check, it always remains at the HCA's own discretion to decide.

Objections of the HCA may arrive at the notifying parties both verbally and in written form. Practically, objections in respect of obvious concerns will be communicated during the prenotification contact or after the notification verbally.

In addition to this, the HCA may also communicate its concerns in the form of statement of objections.

Competitors and other interested parties may have a role in defining remedies since the HCA may request data supply from competitors and third parties in order to be able to assess whether the remedy offered is appropriate. In addition to this, the Competition Act in force as of 1 July 2014 enables the HCA to publish the nonconfidential version of the proposed remedies on its website simultaneously with the delivery of the statement of objections to the parties and to request third parties to comment on it.[81] The comments must be made within 20 days following the publication of the proposed remedies. Other than this, third parties do not have the right to be heard. Also, the Competition Act provides a general right for third parties, including damage claimants, who can substantiate sufficient legal interest to access the nonconfidential version of the file. For more information on the access to the file, please see Sect. 9.3.1.

In addition, a formal or informal complaint may be submitted to the HCA by any third party if and when detecting any infringement which falls within the competence of the HCA, including mergers executed either without, or not in line with, the HCA's clearance.

Parties have the opportunity to present their views during the prenotification consultations and also during the procedure. The HCA must hold a hearing if the party requests so or if the HCA considers it as necessary.

Waiver of basic rights (e.g., the right to be heard) shall not be a precondition of an acceptable remedy.

The HCA is entitled to use only those "means of pressure" that are foreseen by the law. For instance, an administrative penalty could be imposed if the party is not acting in good faith and hinders the procedure. Thus, putting pressure on the parties only for the sake of it, e.g. by the delay in granting authorization and/or excessive objections, cannot occur because it would mean a breach of the basic legal principle of good faith.

9.4.2 Enforcement of Remedies

Fulfillment of remedies shall be *ex officio* ensured by the HCA's follow-up investigation. As discussed above in detail, merger remedies include pre- and subsequent conditions, as well as obligations.

In respect of prior conditions, the clearance granted will enter into force by fulfilling such conditions. Clearances subject to the fulfillment of subsequent conditions will enter into force upon granting the clearance. However, the clearance will be rescinded in the case of the nonfulfillment of the condition.

Pursuant to Section 31 of the Competition Act, should the concentration be implemented without the fulfillment of the condition as prescribed in the clearance,

[81] Section 75/A of the Competition Act.

the HCA will oblige the parties to terminate the concentration by setting a reasonable deadline, in particular with regard to the divestiture of the undertaking or part of the undertaking, the assets or shares in respect of which there has been a change of control.

Furthermore, the HCA will withdraw its clearance decision if the acquiring party failed to fulfill the obligation set by the HCA.[82]

In addition, the HCA will amend its decision in the following cases:

1. upon the party's request filed at the latest by the expiry of the deadline to fulfill the obligation or the condition, if the party cannot fulfill an obligation or condition due a reason beyond its control; or
2. upon the party's request or *ex officio* if the fulfillment of the obligation is no longer required due to a change in the market relations and competition conditions;

and, the adverse effects of the concentrations which resulted in the prescription of the obligation may be eliminated in another way or also without the prescription of any obligation.

The decision may be amended within 5 years after the expiry of the deadline set to perform the obligation, or in the case of a continuous obligation, within 5 years after the infringement of the obligation.

However, it seems that the most important tool that the HCA has to ensure the fulfillment of remedies is the right to impose fines in the case of noncompliance.

In addition, if a merger is implemented without the fulfillment of conditions and obligations, any acts or legal statements arising from the exercise of control rights shall be null and void.

Finally, as mentioned above, any third party is entitled to file a formal or informal complaint with the HCA if it is believed that a concentration has been implemented without the (proper) fulfillment of the remedies as prescribed by the HCA.

9.5 Conclusion and Recommendations

It seems that the advantages offered by transactional procedures are attractive to the *parties* and such procedures may be considered as useful mechanisms both from the point of view of the HCA and the parties to such procedures.

Commitments decisions seem to be applied by the HCA mainly in abuse of dominance (and unfair-commercial-practice-related) cases only (although the scope of application is not restricted by the Competition Act to this area), while according to the Competition Act, leniency is only applicable in certain cartel cases.

[82] Section 32 of the Competition Act.

As for settlement procedures, we do not have yet experience since this mechanism has been introduced in Hungary only as of 1 July 2014.

As of 1 July 2014, *third parties* do not have a right to challenge such decisions (or other, nontransactional decisions) of the HCA before court (prior to 1 July 2014, complainants could challenge commitments orders before court). In addition, the scope of the review is limited since administrative decisions which involve a margin of discretion are regarded as lawful if the competition authority has satisfactorily constituted the facts of the case and followed the procedural rules, if the principles of its considerations can be determined, and if the causality is established in the reasoning.

This may be problematic in particular in respect of commitment decisions since they are less likely to be challenged due to their nature.

As for *third parties, as damages claimants*, commitment decisions may be challenging from the point of view of private enforcement since in such decisions, no infringement is established. Unfortunately, there is not yet court practice in this respect.

It is also an open question how the different rules of leniency and settlement procedures on the access to the file (leniency statements or settlement submissions) by third parties may affect *private enforcement* and, in turn, how private enforcement may affect the motivation of undertakings to engage into transactional procedures. Prior to 1 July 2014, leniency applications were, as a general rule, accessible to third parties. As of 1 July 2014, leniency applications and settlement submissions will not be accessible to third parties, but otherwise, either on the level of the HCA or on the level of courts, even documents considered as business secret may be available to civil claimants since both the HCA and the courts have the right to reconsider the status.

As a matter of fact, private enforcement cases are rather rare in Hungary. The reasons for this seem to be versatile, including the vague legal background that may make claiming damages difficult in case of a competition law infringement even if there is a final decision of the HCA on the infringement.

Thus, currently it is not assumed that transactional decisions would hinder the enforcement of damage claims based on competition law infringements, but rather the perception of transactional decisions is positive.

The Hungarian group does not have any particular recommendations for amendments since the system of transactional resolutions seems to be well functioning in the practice.

Italy

10

Alberto Camusso

10.1 Introduction

10.1.1 Transactional Institutions: General Framework

Any analysis of the development of transactional institutions in the Italian legal system, as well as any investigation into the nature and functions of such institutions, inevitably depends on the assessment of the entities involved in any such transactions. Such exercise therefore requires a consideration of the various frameworks for negotiation, and their manifold possible outcomes,[1] within the wider context of public administration.

In general, the Italian legal system expressly recognizes the legality of any settlement, or compromise agreement, between two or more parties with a view to prevent, or resolve, a legal dispute.[2] In the context of civil law, however, the parties' ability to enter into a settlement depends on their capacity to dispose of the rights subject to dispute and therefore to affect the settlement

[1] A number of legal expressions can be used, such as compromise, settlement, agreement, etc. In the context of this work, all such terms will be used regardless of any nuance or difference they may have, i.e. taking into account their common basis: that of an agreement between two or more parties, normally aimed at replacing a decision which would otherwise been taken by a competent Court or entity.

[2] Italian Civil Code, R.D. 16 March 1942, n. 262, Article 1965, "a settlement is a contract whereby the parties, by mutual concessions, end pending litigation or prevent litigation that could arise between them. Mutual concessions can also create, modify, or extinguish relationships other than those which arise from the subject matter of the claim and the dispute between the parties."

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itself.[3] In transferring these general concepts of Italian law to the domain of public entities or administrative bodies, one may wonder whether the nature of a settlement—as provided above—is *per se* compatible with the nature of the administrative entity or body.

The relationships between administrative law and settlement of disputes have long been debated and might be considered to have reached a point of equilibrium: on the one hand, the exercise of public power that administrative bodies are entitled, and required, to exert creates doubt that settlement transactions would be acceptable; on the other hand, one of the main principles of administrative law—efficiency[4]—clearly suggests that transactional remedies may offer very effective means for reducing public expenditure, making the entirety of the administrative machine work more efficiently and help the State attain (at least some of) its objectives in a quicker way and through more certain means.

It has been stated that transactional institutions constitute *a very effective means for social peace*, which the public administration cannot ignore.[5] This rather dated opinion from a noted scholar clearly demonstrates that the acceptability of settlement transactions for public bodies both in their relationships with other public bodies and with private entities has long since been debated. In summary, and following some decisive statements by the National Audit Court,[6] it can be said that such transactions may be permitted for public bodies.

However, the main limitation to the use of settlements or other forms of alternative dispute resolution derives from those areas where rights and powers are not disposable, i.e. all those measures and remedies adopted by public bodies that are the expression of State power and therefore exclude the possibility to enter into any compromise—most typically, this refers to the duty to impose sanctions, such as fines.

The legal practice currently envisages, for instance, transactions that are permitted in disputes between regulatory tax entities and individuals, or companies, which do not compromise the amount of the sanction imposed but rather allow flexibility on the modes of payment (for instance, permitting instalment payments).

Likewise, the Revenue Service normally resorts to mediation to prevent or settle ongoing tax-related litigation with taxpayers.[7] There are a number of other areas of administrative law, such as competition law (see below), where the development of transactional remedies has been increasing in the last few decades and can now be

[3] Italian Civil Code, R.D. 16 March 1942, n. 262, Article 1966, “in order to compromise, the parties must have the capacity to dispose of the rights which are the subject matter of litigation. A compromise is void if such rights, either by their nature or by express provision of the law, cannot be disposed of by the parties.”

[4] Italian Constitution, Article 97 “Public offices are organised according to the provisions of law, so as to ensure the efficiency and impartiality of administration.”

[5] E. Guicciardi, La transazione degli enti pubblici, in Arch.Dir.Pubbl. 1936, pagg. 64 e ss. e 205 e ss.

[6] See Corte dei Conti, in Sezione Regionale di Controllo per la Lombardia, LOMBARDIA/1116/2009/PAR.

[7] See Legislative Decree n. 546 of 31 December 1992, Article 17-*bis*; in relation to in relation to insolvency proceedings, see Article 182-*bis*, Decree n. 267 of 16 March 1942.

said to be permissible and generally acceptable. Even in the areas in which the State fully exercises its powers, including investigating, prosecuting and sanctioning powers, a certain degree of compromise has been gradually introduced.

When the code of criminal procedure was first amended in the late 1980s, a significant number of procedural changes were introduced into the code to foster the resolution of criminal proceedings by means of alternative procedures. All of these approaches aimed to reduce the Courts' workload while ensuring a higher degree of certainty of criminal sanctions, in exchange for a reduction of sentences. Among these alternative procedures, a plea bargain[8] procedure has been introduced by means of which full trial can be completely avoided and is replaced by an "agreement" between the Public Prosecutor and the defendant, who mutually accept a charge and sentence.

The legal nature of a plea bargain is sensibly far from that of mediation or other alternative settlement transactions in the realm of civil law, but the institution certainly demonstrates that public bodies are capable of conceding their sanctioning and investigating powers in exchange for a more expeditious and less uncertain outcome of the case.

It can therefore be stated that modes of transaction or settlement, in their manifold varieties, are now certainly a significant part of the administration of justice in the broader sense of the word, therefore including both the judiciary and the administrative bodies with regulatory and investigating/sanctioning powers such as the Competition Authority.[9]

10.1.2 Transactional Institutions in Competition Law

In this scenario, the introduction of transactional institutions into the Italian legal system in the area of competition law is relatively recent, dating to 2006,[10] when the ability for companies to offer commitments to remedy an alleged violation of competition law was introduced in the Italian legal system.[11]

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[8] The so-called *patteggiamento*, or more technically "applicazione della pena su richiesta"; see Italian Code of Criminal Procedure, articles 444 *et seq*.

[9] *Autorità Garante della Concorrenza e del Mercato*, hereinafter translated as Competition Authority. It is a public body, having administrative powers, which is established and operates pursuant to Law. n. 287 of 10 October 1990, Articles 10 *et seq*.

[10] Decree 4 July 2006, no. 223 and subsequent law 4 August 2006, no. 248, which introduced Articles 14 *bis* and 14 *ter* of Law. n. 287 of 10 October 1990.

[11] Law. n. 287 of 10 October 1990, Article 14 *ter*: "Within three months from notification of the launch of an investigation into the possible violation of Articles 2 or 3 of this law or Articles 81 or 82 of the EC Treaty, companies may offer commitments that would correct the anti-competitive conduct which is the subject of the investigation. The Authority may, after having assessed the suitability of such commitments and within the limits of EU law, make them binding on for those companies and terminate the proceeding without ascertaining the contravention."

Along the same lines, although by way of a very different mechanism, a leniency program was also introduced in 2010,[12] to encourage "whistle-blowing" for those undertakings which were ready to exit cartels and provide useful information for the prosecution thereof, in exchange for a substantial reduction of, or even immunity from, the usual fines imposed by the Competition Authority.

While the introduction of such legislative changes in the Italian competition law system has certainly derived from the EU experience and legislation, it can also be—at least partially—attributed to the more general trend that has been evolving in the field of administrative law, where a number of similar mechanisms have been implemented so as to make the administration system more efficient, workable, less expensive, and—last but not least—closer to those subjects (be they individuals or companies) in the interest of which the administration itself should operate.

In general terms, it can be said that the introduction of such transactional remedies or procedures has been welcomed by the business community. It is true, of course, that even before such legislative changes, the practice of the Competition Authority did include a certain degree of informal negotiations with the parties; this was specifically the case in the field of merger control, as well as in the—much less frequent—area of potentially restrictive agreements, while most serious offenses such as abuse of dominant position seemed incompatible with a transactional approach.

The major change brought about by the 2006 reform is that the process of negotiation in the dispute resolution context is now expressly recognized by law and plays a well-respected role in the overall mechanism of administration of justice in antitrust. While informal negotiations are still possible at an early stage (again, mostly in the field of merger control and, much less frequently, in the field of agreements), the law now provides for transactional mechanisms which operate once a formal investigation has been started, i.e. when adjudicative proceedings have commenced and will proceed to a formal decision—by either finding a breach of competition rules or acquitting the investigated company/ies.

Therefore, it can certainly be said that the major advantage for companies facing such proceedings is not only to be able to mitigate, or even remedy, the potential consequences of allegedly infringing behaviors but also to be able to predict the magnitude of such consequences—something which was, and still is, lacking transactional remedies, which are far more difficult to anticipate given the wide discretionary power of the Competition Authority.

Another clear advantage—favoring the Competition Authority and therefore public administration itself, as well as any involved undertakings—is that transactional procedures are clearly purported at reducing the workload, and therefore the duration and costs, of any investigating procedure. While a finding of infringement requires a heavy burden of proof, as well as a certain amount of investigative effort

[12] See Notice on the non-imposition and reduction of fines under Article 15 of law no. 287 of 10 October 1990, as modified by Resolution no. 21092 of 6 May 2010, published in Bulletin no. 18 of 24 May 2010.

(which of course matches the defensive efforts of the investigated parties), the possibility of transactional remedies clearly, and drastically, reduces all such efforts, costs, and delays.

10.1.3 Common Features and Rationale of Transactional Procedures in Competition Law

As better explained below, there are various types of transactional institutions that are currently adopted and used in competition law.

The common basis of all such institutions is that they are expressly provided for in the law and are aimed at reducing uncertainty, workload, costs, and delays. Also, in a more general framework, such transactional institutions are an expression of the State's willingness to make the administrative system more "workable" for individuals and companies while allowing all parties a right to intervene and express their position.

In this respect, transactional institutions certainly represent a step forward in the proper administration of antitrust justice. Of course, there are still a number of legal issues which such remedies may pose, some of them strictly related to the parallel track of private enforcement of antitrust rules, namely civil actions and related claims for damages; these issues will be better dealt with below.

10.2 Transactional Resolution of Agreements and the Abuse of Dominance

There are currently three main types of transactional solutions which are applicable to competition law, two of which refer to infringement and a third one relating to merger control.[13] As they differ sensibly from one another, they will be dealt with separately as follows.

10.2.1 Decisions with Commitments

10.2.1.1 General Legal Framework and Procedure

The first category is the so-called decisions with commitments, which was introduced into the Italian legal system in 2006. This type of transactional resolution applies to both agreements and abuse of dominant position, as provided under articles 2 and 3 of Italian antitrust law. Such a resolution is possible only once a formal procedure for investigation of an alleged breach of competition rules has

[13] While remedies for restrictive agreements or abuse of dominance share the same ratio and procedures, commitments within the framework of merger control have a slightly different nature; these latter will be dealt with separately at Sect. 10.3 below.

commenced, through a statement of objections issued by the Competition Authority and properly addressed to the defendant(s) and other interested third parties, such as complainants. In these circumstances, the statement of objections resumes the initial findings of the Authority, defines the potential framework for investigating the violation, and provides a *prima facie* assessment of such violation, which is of course subject to further investigations and analysis by the Authority and in relation to which all parties are invited to make their submissions.

Within 3 months of the commencement of such procedure, the parties which are alleged to have breached competition law may submit their proposal for measures and commitments to remedy, reduce, or eliminate the alleged restrictions or distortions of competition as identified by the Competition Authority in its statement of objections. The range of such proposed measures is very wide, including for instance contractual arrangements, modifications of trading or contractual conditions, demergers or dismissal of business branches or assets, as well as any other kind of contractual, commercial, or structural arrangements.

It is important to underline that such a proposition does not imply any acknowledgement or admission of guilt with respect to the statement of objections, but it rather constitutes a proposal to avoid further investigations and to specifically address any competition law concerns reflected in the statement of objections—well founded or not.

If the parties decide to enter into a “negotiation stage” with the Competition Authority, this would normally involve initial, informal contacts which can even be cultivated on an anonymous basis—typically through the parties’ lawyers. This is a very important step in verifying to what extent the Authority is willing to further negotiate and in which direction. If a proposal with commitments is therefore filed, a further, more formal negotiation process takes place within the Competition Authority until a consensus is reached about the commitments; if no such consent is reached, however, the parties are free to withdraw their proposed commitments and the Authority will proceed with its case, thus exercising its investigative powers.

Once the proposal containing commitments is received by the Competition Authority,[14] it may summon the submitting entity and, although the law does not expressly provide for a proper negotiation process, a discussion to possibly adopt the commitments takes place.

Once the commitments have been proposed in their final form,[15] the Competition Authority issues a decision that makes such commitments become an integral part of the decision; therefore, by means of this procedure, unilateral commitments

[14] See AGCM Resolution no. 16015 of 12 October 2006 for a detailed layout of the procedural rules, specifically on the submission of draft commitments to be further discussed by/with the Competition Authority.

[15] Another important step is the publication of the proposed commitments, triggering a 30-day deadline for third parties to make their submissions and comments (the so-called market test), further to which commitments can still be modified before the Competition Authority decides.

by the submitting company are actually transferred into a full administrative decision, which is thoroughly binding on the submitting party.

As stated above, a decision with commitments does not include any finding of liability, nor does it assess the potential breach of competition rules. It merely establishes that the proposed commitments appear to be proportionate and appropriate to address the Competition Authority's concerns as to a possible restriction or distortion of competition.

More specifically, the criteria adopted by the Competition Authority in assessing commitments are those of *proportionality* and *necessity* with respect to the alleged infringement, as established by EU law, although the wording of the law refers simply to the "suitability" of the proposed commitments.[16]

This procedure is applicable to cases of agreements and concerted practices, with the exclusion of typical "hard core" restrictions, such as horizontal agreements and cartels, or other more serious infringements. Likewise, the procedure is also applicable to those cases where an abuse of dominant position is at stake, but again the Competition Authority would be reluctant to enter into a decision with commitments in any case where substantial sanctions are likely to be imposed.

Therefore, as a general rule of thumb, it can be said that a decision with commitments is typically provided where the possible decision by the Competition Authority would not go beyond an injunction or, possibly, other measures to restore proper conditions of competition (such as an order to supply, an order to demerge, etc.) but would not be used in cases where substantial fines can be imposed.

Of course, third parties are allowed to intervene in the procedure.

When a statement of objection is issued by the Competition Authority, it is published on the Authority's bulletin, as well as on the official website, thus allowing any interested third party to intervene in the proceedings. The right to intervene is extended to any individual, company, or consumer associations that may claim to have an interest (normally assessed rather broadly) to express its position on the ongoing case. The right to intervene includes the right to access the Competition Authority's file, including all nonconfidential versions of the defendants' submissions, as well as related documentation (please see below).

Within the framework of the procedure, as soon as a proposal for commitments is submitted, it is again published on the bulletin and the Competition Authority's website, to allow interested third parties another opportunity to file submissions and comments, primarily on the proportionality and/or appropriateness of the proposed commitments.

Once a decision with commitments is entered, any party may appeal it—as it would be with any other decision taken by the Competition Authority—before the Regional Administrative Tribunal (RAT) of Lazio, which has been attributed exclusive jurisdiction over the Authority's administrative decisions. RAT's decisions can be further appealed before the Council of State.

[16] Law. n. 287 of 10 October 1990, Article 14 *ter*.

One of the main drawbacks for third parties, which may or may not be affected by a decision with commitments, is that such decisions always lack a finding of infringement and therefore fail to provide a strong basis for private enforcement measures, typically civil actions, including damage claims—please see below.

10.2.1.2 Decisions with Commitments: Pros and Cons

It is interesting to note that the recent and present practice of the Italian Competition Authority encompasses a large number of cases where investigated undertakings have submitted their proposed commitments, so that this procedure has now become a fundamental stage of virtually any procedure for the infringement of competition rules. Even in those cases where a finding of infringement and subsequent sanctions have been decided, prior to such decision the investigated undertakings have attempted to reach a compromise solution by submitting their proposed commitments.

As it has been noted,[17] the undoubted success of a decision with commitments is based on the fact that, albeit within a framework where the Competition Authority and the undertakings are on opposite sides, such a procedure allows both parties to find common ground and pursue mutual advantages.

From the standpoint of the Competition Authority, the main interest in adopting a decision with commitments resides in the opportunity to obtain a quick and certain restoration of a proper competitive balance, therefore aiming at establishing fair conditions for competition on the market without having to invest time and resources in a finding of infringement and subsequent sanctions. Also, a decision with commitments has far lesser chances of being appealed before the RAT—even if this remains possible, the main interest in filing an appeal would be absent.

Another clear advantage that is pursued by the Competition Authority is to simplify complex cases, where the burden of proof of an investigation would imply significant delays and efforts.

Last but not least, a decision with commitments and the negotiation process which advances such decision certainly allows the Competition Authority to be more flexible in its approach to find a solution, as a "negotiated" solution can certainly be more articulated than a finding of infringement and a sentence would be.

As to the business community, the advantages in adopting a compromise solution are likewise numerous. First, a decision with commitments avoids a finding of infringement and any further sanctions. This also turns into avoiding further consequences that may result from a finding by the Competition Authority, in terms of private enforcement measures, since there would be no precedent on which competitors or other third parties could commence Court proceedings and claim damages. Another important issue, which is always crucial in competition law cases, is the risk to reputation. While a finding of infringement can be disruptive

[17] See M. Siragusa, "Le decisioni con impegni", in "Venti anni di Antitrust", Giappichelli, Torino, 2010, pp. 391 et seq.

for the reputation of a business, and imply severe financial consequences (for instance, but not only, for publicly traded companies), a decision with commitments may avoid that risk, and in some cases this is by itself a sufficient reason for the interested undertaking to engage in the process. Also, the negotiation stage allows the undertaking to actively participate in the Competition Authority's regulatory approach to the market and competition, therefore establishing acceptable patterns and setting limits which are clearly legal, in light of the market test carried out by the Authority.

However, the increasingly frequent recourse to decisions with commitments has been frowned on by some commentators, as it would allegedly imply potentially adverse consequences. First, there is a risk that the Competition Authority would be less accurate and proactive in the preinvestigation stage, therefore being more readily available to open proceedings on the basis of a complaint filed by third parties, without properly investigating the case. This would be because the opening of the formal case would provoke a reaction in investigated companies and shift on to them the burden of revising their competition policies and possibly providing solutions, just to avoid the complexity, costs, and time frames of a full-scale case.

Second, the frequent use of such procedures has significantly increased the fully regulatory approach of the Competition Authority, which would now work more on the side of preemptive regulation of market conditions, rather than pursuing existing distortions and infringements. Such criticisms are reasonable, in that decisions with commitments should be considered not the mainstream route to addressing any kind of case but rather the preferred option to deal with those cases in which, either because of the complexity or because of the limited seriousness of the infringement, full sanctions are unlikely to be imposed. In those cases, the balance between the need for a quicker and more certain outcome, and the need for "full justice," could be favorably resolved in favor of a compromise solution.

On the other hand, such a solution should be avoided in all those cases where infringement is clearly willful, and the Competition Authority's role should be that to vigorously pursue the case to the furthest extent possible, regardless of how difficult, burdensome, and costly it is. This applies not only to the "hard core" restrictions, which are clearly excluded from the application of negotiated procedures, but also to other cases where—regardless to the nature of the infringement—the other elements surrounding the case are such as to point towards a prevailing public interest for the Authority to intervene and carry out the duties entrusted to it by the law to the fullest extent.

Another issue worth considering is the fact that negotiated procedures clearly represent, for most undertakings, a very attractive way to avoid unpleasant consequences, which are, however, in no case certain. This may overencourage companies to offer commitments which are wider, and go beyond those that are necessary, than would be appropriate for resolving the specific competition law concerns at issue; on the other hand, the Competition Authority could leverage the threat of a full-scale case, involving fines, to persuade the interested parties to offer commitments of a wider spectrum, therefore beyond the proportionality criterion.

10.2.2 Leniency Programs

10.2.2.1 Legal and Procedural Framework

The second type of transactional resolution is that of the so-called leniency programs operating in the field of cartels, which were introduced into the Italian legal system by means of changes in the law in 2006, and a further resolution by the Competition Authority in 2010.

As it is well known, since the origins of antitrust law, cartels have represented the most serious and harmful form of agreements, aimed at eliminating or restricting competition through horizontal collusion. Hence, the law provides for particularly severe legal treatment of cartels, notably the possibility for antitrust authorities to impose severe sanctions (including fines up to 10 % of the overall aggregate turnover of the undertakings concerned). On the other hand, it is also well known that cartels are normally secret, and satisfying the burden of proof is inevitably challenging for any competition authority, which must investigate, prosecute, and sanction these forms of agreements or concerted practices.

The search for a balance between these two issues, i.e. the seriousness of the infringement and the difficulty to prosecute it efficiently, has prompted the legislator and the Competition Authority to adopt measures and rules to encourage so-called whistle-blowing, i.e. providing incentives for those parties that decide to leave the cartel, discontinue its operation, and provide authorities with relevant information that is helpful in the prosecution of the cartel itself.

On this background, the Competition Authority has issued a notice on the nonimposition and reduction of fines under Section 15 of law no. 287 of 10 October 1990,[18] which applies to secret cartels, including those existing in the context of public tender procedures, with particular reference to fixing purchase and selling prices, the limitation of production or sales, and the sharing of markets (traditionally, the "hard core" restrictions).

The notice provides for the nonimposition of fines (which would be otherwise fully applicable) to an undertaking that is first to voluntarily submit to the Competition Authority information or evidence as to the existence of a cartel, provided that such evidence is decisive in the finding of an infringement, it is not already in the possession of the Authority, and the undertaking seeking the benefit of leniency immediately discontinues its participation to the cartel while fully cooperating with the Competition Authority.[19]

Any other undertakings which are second in providing to the Competition Authority similar evidence to prosecute the cartel may benefit from a reduction of fines up to 50 % of the amount which would be otherwise imposed.

[18] As modified by AGCM Resolution no. 21092 of 6 May 2010.

[19] The immediate stop of an infringing activity may be subject to exceptions, whereby it is appropriate for the ongoing investigation that the undertaking goes on participating in the cartel.

Again, a "quality test" is applied to such evidence, evaluating whether such information adds a significant contribution to the knowledge and evidence already in possession of the Competition Authority, therefore significantly supporting the finding of an infringement and prosecution thereof.

The procedure set out in the notice provides for a formal application for leniency, which invariably is advanced by an informal approach.[20]

The above-described procedure sensibly differs, in its nature, purposes, and process, from the procedure for decisions with commitments. While the latter is carried out openly, and full public access (apart from confidentiality reasons concerning some specific information disclosed to the Competition Authority) is guaranteed, so as to safeguard third parties' rights, the leniency procedures are conducted in a completely different environment, where even the application for leniency is to be kept secret by the applicant.[21]

Also, leniency procedures do not avoid a finding of infringement—rather, they are exactly purported at helping such a finding, albeit against parties which are not benefitting from the leniency procedure.

The significant degree of limitations to the parties' rights is supported by one of the prerequisites of leniency, which is the disruption of cartels by making such activities less convenient, or more risky, for undertakings to participate where, at any time, a "whistle-blower" can step out of the cartel, denounce it, and seek indemnity whereas the other members would be severely sanctioned. The issue has been debated for many years, also in light of the legal questions it poses in relation to the potential harm to procedural fairness.

It is worth noting that whenever any of the abovementioned requirements for an undertaking to benefit from the leniency program fails, the Competition Authority would regain its full sanctioning power even against the applicant. This works as a further encouragement to potential whistle-blowers to clearly choose between unlawful activity and cooperation with the Authority.

From a business perspective, leniency procedures not only represent a risk in relation to the possibility of engaging in cartel activity but may be also seen as jeopardizing to the right to a defense, which is expressly acknowledged by the Italian Constitution. This is why legal scholars have been discussing compatibility of leniency programs with basic principles of Italian law highlighting that evidence provided by one party regarding a cartel should not be treated in the same way as evidence gathered *ex officio* by the Competition Authority while exerting its public powers.

[20] Even the notice provides that "before filing a leniency application, an undertaking may approach the authority even on an anonymous basis in order to seek guidance on this notice"; see paragraph 9.

[21] Paragraph 7 c), "when contemplating the filing of a leniency application, the undertaking must not inform anyone of such intention, except other competition authorities."

In spite of the debate, however, leniency programs have been relatively successful in the last few years, although it is difficult to evaluate their importance given the innate secrecy of the cartels.

10.2.2.2 Leniency Programs: Pros and Cons

A long and lively debate on leniency programs has been going on in Europe, especially over the last 30 years. The introduction of such procedures is much more recent in the Italian system, which makes it unavoidable to refer to the wider European and international experience. One of the main, and still largely unanswered, questions about leniency programs is whether they are in fact capable of discouraging cartel activities.

Although it is certainly true that "whistle-blowing" is by itself disruptive for cartels, and has caused many cartels to be discovered, collateral questions may well arise—a paradoxical one being whether the existence of leniency in itself does not encourage cartels, whereby participating undertakings can always seek safe harbor when things take a turn for the worst or where they lose interest in pursuing the cartel. In some other cases, strategic reasons for whistle-blowers can play a very significant role, and there is even the risk that only unsuccessful cartels are denounced (which, in turn, means that successful cartels—certainly the most dangerous—remain secret).

One of the key points of the leniency programs, as well as one of the decisive factors in determining their success, is the question of immunity from sanctions. As explained above, the undertaking which first provides the Competition Authority with evidence that assists a finding of infringement benefits from a total immunity from fines, whereas any undertaking that later comes forward would simply benefit from a partial reduction of such fines.

It is crucial, however, to determine *when* an application for leniency is filed, as this may happen either before an investigation is launched by the Competition Authority or before any formal proceedings are commenced. The choice between when to file an application for leniency largely depends on how solid the Authority's case is. Therefore, even if the law does not provide for a deadline, it is clear that the further the Authority progresses in its investigation, the less it would need support and information from a whistle-blower—although this is not a general rule, since more complex cases may be in need of evidence originating from undertakings which participate to the cartel, regardless of any other investigation efforts made by the Authority.

Other, possibly even ethical, reasons are suggested by the very same concept of leniency: when the Competition Authority negotiates with wrongdoers, can it still meet the expectations of justice to provide a remedy to those suffering from a restriction of competition? Is immunity too high a price to pay in exchange for information, albeit necessary to prosecute the infringement?

On a more legal side, further issues are implied in the special treatment of information and documents disclosed by applicants for leniency—these questions will be addressed in the following paragraphs.

10.2.3 Fundamental and Procedural Rights of the Parties

10.2.3.1 General Procedural Issues

The administrative procedure which is applicable to competition law cases clearly provides for an obligation on the Competition Authority to notify its formal decision to open an investigation, with regard to both agreements and abuse of dominant position.

Such decision, however, is always the final outcome of a preinvestigation stage, which may last for a long time, in which the Competition Authority may act either *ex officio* or, more frequently, upon third party complaints and carries out a preliminary assessment of the grounds of such complaint. Also, and more importantly, in such stage the Authority gathers useful information and initial evidence, by using its widespread investigation powers both in relation to the potential defendant(s), and to third parties, which may be targeted with specific requests for information.

In this preinvestigation stage, which is barely regulated by the law, the Competition Authority is actually free to determine the scope of its enquiries, and this normally impacts the scope of the decision to open a formal investigation. The Authority may impose sanctions for those parties, both potential defendants and any other third party, that refuse to cooperate in providing the requested information and documentation or where such information and documentation are incomplete.

The proper balance between investigative powers and rights of defense is possibly more at stake at this stage rather than after a formal decision to open an investigation is issued by the Competition Authority—in this latter case, in fact, all proper safeguards will be formally in place, and the investigated parties will be informed about the substance of the case from the Authority's perspective.

With respect to transactional procedures, more often than not the initial interest for companies to submit possible commitments arises in the preinvestigation stage, when they are made aware of a possible complaint by a third party and may also understand what the Competition Authority's initial view of the case is; nonetheless, it is premature to propose any formal commitment at this stage since a formal statement of objection is still to be formulated.

While all parties maintain their rights of defense in both the preinvestigation and the investigation stage, and such rights can never be waived,[22] the actual exercise of such rights can suffer from limitations since elements gathered in the preinvestigation stage—when the potential defendant(s) is still uncertain as to what objections will be raised by the Competition Authority—may be further used in a full-scale case, *i.e.* after a statement of objection has been issued.

As to third parties, it is to be noted that since the preinvestigation stage a nonconfidential version of any submission or response filed by the potential defendant(s) is envisaged and that the Competition Authority has the discretionary power

[22] Constitution of Italian Republic, Article 24.

as to whether all such submissions should be made available to the other parties (*e.g.*, a complainant), possibly to obtain some further feedback and also with a view to limiting the exchange of allegations and charges at this early stage of the proceedings.

10.2.3.2 Statement of Objections

As soon as the Competition Authority believes that the preinvestigation stage can be concluded, and that sufficient evidence to support the allegations is available, it issues a statement of objections that must be notified to all interested parties—not only potential defendant(s) but also any possible complainant and other interested parties that might have made submissions in the preinvestigation stage.

The statement of objections must include a description of the case, a summary of the available information and potential allegations, both factual and legal, as well as the indication of the officer in charge of the investigation and the initial deadline assigned to such officer to investigate the case.

At such point, the statement of objections would not reflect any potential preliminary contact or negotiation with the Competition Authority but rather serves as a prerequisite to allow the parties to engage into further negotiations, as well as to submit the proposed commitments (as seen above, within the 3-month time limit).

10.2.3.3 Right To Be Heard and Access to File

Upon receipt of a statement of objections, all parties have a right to be heard by the Competition Authority—either personally or through an appointed representative.

Such rights, as well as any defense rights, cannot be waived and do not need be waived, whenever the parties decide to engage into a negotiated or transactional procedure. The right to access the file is, however, limited mainly because of confidentiality reasons.

Since all submissions made by the parties can be filed in a nonconfidential and a confidential version, the parties' right to access the file is limited to the nonconfidential version of documents and submissions. In some cases, this may result in a significant limitation; the proper balance between the right to access the file and the right to preserve confidentiality, however, is to be found in the Competition Authority's decision to accept the determination of confidentiality put forward by the submitting parties and/or by discussing with the parties a strict approach—as normally occurs with the European Commission.[23]

[23] Trade secrets, as well as sensitive commercial information, are normally regarded as deserving confidentiality.

10.2.3.4 Right Against Self-Incrimination

In general, the right against self-incrimination is a general principle which, albeit not expressly provided for in competition law, is to be derived by the recognition by the Italian legal system of general, international law principles.[24] This means that no one can be forced by the Competition Authority to provide information or documents which directly result in an admission of unlawful behavior or infringement.

In practice, however, and as it happens in criminal law, investigative powers—as well as the power to question parties, and to sanction them for lack of adequate and timely response—result in a sensible decrease of this fundamental safeguard. As a matter of fact, it is always very difficult to envisage, especially in a preinvestigation stage where a precise framework of objections is still to be designed, what information and documents could help the Competition Authority, at a later stage, to make a determination of infringement. At the same time, a refusal to provide documents or information can be sanctioned.

Additionally, it must also be noted that cooperation by potential defendant(s), even outside and before any application of a leniency program, would clearly constitute a mitigating factor to be considered in the imposition of fines. As a consequence, the practical impact of the right against self-incrimination is very limited.

This limitation, coupled with the introduction of transactional procedures into the Italian legal system, clearly encourages the parties to take as much advantage as possible from cooperation with the Competition Authority, which is already favored in a normal case and becomes more favored if applied within the context of a negotiation procedure.

A very important question is whether the Competition Authority would be free to use whatever information and documents contained in the proposed commitments, when such commitments are later withdrawn by the applicant—in other words, can they be used for enforcement purposes?

The answer is yes—there is no automatic protection for applicants arising from their submissions, when such submissions have been made freely and on a voluntary basis.

This means, in practice, that as soon as the parties formally file their proposed commitments, it will be in the mutual interest of the applicant and the Competition Authority to reach a mutual decision embodying such commitments; this also means, however, that the Authority will then have further leverage to make the applicant accept whatever change it proposes to the applicant's submissions.

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[24] Specifically, privilege against self-incrimination is provided by the European Convention for Human Rights and Fundamental Freedom and has been confirmed by the ECJ case 374/87, *Orkem v Commission of the European Communities*, ECR 3283.

10.2.3.5 Leniency Programs and Rights of the Parties

A fundamental issue in relation to leniency programs pertains to third party's rights, as well as to rights of defense of the applicant for leniency.

The main question refers to the possibility for third parties to gain full access to the Competition Authority's file and, therefore, any information and documents received from the leniency applicants; it further implies whether full use, including use in Court proceedings, can be made of such information and documents.

A number of issues arise in relation to the right of protection against self-incrimination, as full and unconditional access to the file would theoretically put the leniency applicant in a decidedly worse position, for example by allowing third parties to use self-incriminating documents or statements against the applicant in the framework of other proceedings.

In 2010, the Competition Authority clarified the scope and limits of access to the file, establishing that

1. access to confessory statements or documents is permitted only to those subjects that are the addressees of a statement of objection for alleged infringement of section 2 or section 101 of EU Treaty;
2. no such access is therefore allowed to third parties (such as competitors, consumers, or the like);
3. permitted access is conditional upon an undertaking not to copy any information or documents and to use such information only for the purpose of judiciary or administrative proceedings for the application of competition rules on which the procedure is based.

Therefore, applicants for leniency are protected from the use of their own statements or documents by third parties, which cannot use such information to seek to strengthen their evidentiary apparatus in the framework of private enforcement measures (typically, claim for damages deriving from cartel behavior).

As a consequence, this safeguard, which clearly protects applicants for leniency and is therefore purported at encouraging leniency as a tool for prosecuting cartels, puts third parties at a disadvantage by depriving them of potentially decisive evidence for private enforcement purposes.[25]

10.2.3.6 Legal Effects of Decisions Further to Transactional Procedures

A decision by the Competition Authority is binding on the addressees, as well as on the Authority itself. If the decision was based on incorrect, misleading, or false information provided by the parties, or if the commitments reflected in the decision

[25] It is to be recalled here that civil law systems still allow a limited degree of discovery, and therefore the burden of proof on the plaintiff can even play a significant role in discouraging private enforcement options. As to how the system works, also in combination with public enforcement mechanism, see G.A. Muscolo, "Public e private enforcement", in "Venti anni di antitrust", Giappichelli, Torino 2010, p. 1015.

are not complied with, the Competition Authority retains the power to reopen investigations and to sanction the parties as appropriate (on this point, please see below). Apart from this, the parties subject to a decision cannot be prosecuted for the same facts that were assumed as a basis for the same decision—termed *ne bis in idem* or double jeopardy.

As stated above, all decisions by the Competition Authority are made public by publication on both the Authority's bulletin and the related website. Such publicity, which is the expression of a generally accepted principle of transparency in administrative law, also serves to trigger deadlines and allow interested parties to intervene, make submissions and comments, and possibly appeal.

Any decision, including decisions with commitments, taken by the Competition Authority is not binding on any Court, given the clear-cut separation between administrative bodies and the judiciary.[26]

The most recent case law, however, has shown an increasing degree of reliance on the Competition Authority's decisions and now considers that findings of the Competition Authority constitute a "favored" source of evidence to be used in civil proceedings[27] (typically, the so-called follow-on actions for damages) and are such as to create a presumption of infringement, which can be overturned by the defendant on which the burden of proof is shifted.[28]

When applied to decisions that result from a transactional procedure, however, these principles highlight one of the major pitfalls of such procedures for third parties—that of avoiding a finding of infringement, thus leaving competitors or consumers with the very significant burden of proving the violation, the causal link, and the damages.

10.2.3.7 Judicial Review

As stated above, any decision taken by the Competition Authority can be appealed by any interested party before the RAT of Lazio, which has exclusive jurisdiction on the Authority's decisions.

Case law to date has touched on various issues deriving from decisions with commitments, namely (1) the 3-month deadline for the undertakings to submit their commitments; (2) the Competition Authority's decisions rejecting the proposed commitments, as well as the application of the proportionality test in assessing such commitments; and (3) the appropriateness of the commitments to effectively resolve the competition law concerns expressed by the Authority.

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[26] This means, for instance, that no civil Court addressed for the potential violation of competition rules is due to stay the proceedings if a parallel action is handled by the Competition Authority.

[27] See, *inter alia*, Court of Cassation, 2 February 2005, n. 2305.

[28] See Court of Cassation, of 13 February 2009, n. 3640; see also M. Tavassi, "Il ruolo dei giudici nazionali nel private enforcement, competenze concorrenti", in "Venti anni di antitrust", Giappichelli, Torino 2010, p. 1012.

On the first issue, case law has clarified that the 3-month deadline for submitting proposed commitments should be considered not as as definitive but rather as a suggested deadline. In practice, most undertakings submit their preliminary commitments within such deadline, but it is very important that the deadline is not considered as absolute since, depending on the specific circumstances of the case, undertakings may actually need a longer time to properly assess what commitments, if any, should be proposed. Additionally, the Competition Authority may also need more time to perform a proper assessment, especially when the case is complex.

On the second issue, it has been clarified by case law that any decision by the Competition Authority rejecting proposed commitments may be appealed by the applicant. Any such rejection should be based on an assessment by the Authority of the seriousness of the infringement, and case law holds that judicial review should not go into the merits of such assessment but rather evaluate whether the reasoning leading to the rejection of the commitments properly reflects the above criteria.

On the third issue, it is interesting to note that more recent case law has accepted the principle according to which the RAT may review the decision with commitments in light of the proportionality tests, i.e. assessing on the merits whether the accepted commitments are suitable, and necessary to, eliminating the alleged restrictions of competition.

This type of judicial review is particularly delicate, as it involves a substantial reassessment of the market analysis, although it should be taken into account that administrative judicial review is more focused on evaluating the consistency of the reasoning and its compliance with the legal *regime* rather than any fact-related assessment.

In summary, case law has helped identify some drawbacks of the system of decisions with commitments, namely the fact that respecting the criteria of proportionality and necessity is indeed fundamental to making such procedures what they are meant to be, instead of becoming an overarching "mainstream" remedy for a quick resolution of antitrust disputes.

10.2.3.8 Noncompliance with a Decision

In case the Competition Authority finds that commitments assumed in a decision are not complied with or that the decision is based on false, incomplete, or misleading information given by the entity or when the factual situation has changed, it can resume its powers and is entitled to prosecute the infringement.

This can be seen as a clear indication of the contractual nature[29] of antitrust transactional procedure, whereby the restoration of the Competition Authority's

[29] See Gregorio Gitti, "Gli accordi con le Autorità indipendenti", in "Venti anni di antitrust", Giappichelli, Torino 2010, pp. 1111 et foll., who underlines the transactional dynamics of procedures involving commitments and highlights the contractual nature of such remedies.

power to investigate and prosecute is a consequence of the "termination," or resolution, of the agreement underlying the decision.

In other words, the decision is binding for both sides: the Competition Authority and the company/ies. Accordingly, the Authority is released from its obligations (which are of a negative nature, i.e. to refrain from prosecuting) whenever the other side fails to respect its own obligations.[30]

10.3 Merger Control

In the area of merger control, the main difference between European and Italian laws is that the latter does not make the legality of any concentration subject to a specific authorization by the Competition Authority but rather imposes on interested parties a duty to notify the Authority about the merger before it becomes effective; no automatic suspension is provided whenever such obligation has been properly respected.

If the concentration raises doubts as to its compatibility with competition law, the Competition Authority commences an investigation, the outcome of which can be *i)* a green light to continue with the concentration, *ii)* a ban on the concentration, or *iii)* an authorization to proceed with the concentration, subject to remedies and commitments.

In the third scenario, a negotiation process takes place within the Competition Authority, albeit with less stringent and formal rules than the procedure relating to commitments for agreements and abuse of dominance.

Normally, the prospected concentration can be modified or adopted so as to include procompetitive, or less anticompetitive, measures, thereby making it acceptable for the Competition Authority. Again, as the procedure for this kind of commitment is far less regulated than that for the above-described commitments for agreements and abuse of dominance, there is no automatic and preestablished pattern.

What normally happens, however, is that any significant or potentially restrictive concentration is discussed between the interested parties and the Competition Authority well in advance of any filing so as to avoid that the Authority commences investigation. Best practice should be to advise parties to seek to obtain a shared view of the compatibility of the proposed concentration with the Authority before filing or at least to submit a first draft proposal for the concentration which is not too far away from the desirable model, from the Authority's point of view.

Third party rights to access the file or to intervene in the discussion are subject to the publication of a decision by the Competition Authority. Therefore, whenever the concentration appears *prima facie* to avoid competition law issues, such rights

[30] By furthering the analogy with civil law mechanism, one could think of the ancient principle of Roman law, *inadimplenti non est adimplendum*, now reflected in Article 1460 of Italian Civil Code.

would be virtually nonexistent. Accordingly, third parties may intervene, make submissions and comments only in those cases where the concentration requires further scrutiny, and therefore a formal investigation is started and a decision is issued.

As it happens with decisions with commitments, the Competition Authority retains the power to investigate, prosecute, and sanction any interested parties whenever the commitments reflected in the decision are not complied with.[31]

10.4 Impact on Transactional Outcome and on Market Intervention

It is arguable whether transactional procedures increase, or decrease, the predictability of competition law and its application.

Any solution to which the defendant(s) contribute clearly introduces an element of unpredictability, which in turn can result in a lesser drive for third parties to denounce, to file complaints, etc.

On the other hand, it has been said that the possibility of decisions with commitments, for instance, encourages competition authorities to commence proceedings even in circumstances where the case is less promising, in the hope that some good result would be ultimately achieved through commitments.

10.5 Conclusions

In conclusion, recourse to transactional mechanisms has become of central importance in the handling of antitrust cases in Italy.

In spite of the differences in legal nature and procedure of decisions with commitments, leniency programs, and authorizations to mergers subject to commitments, all of these remedies share and are based on the availability—or, one might rather say, the necessity—of the Competition Authority to negotiate with interested parties.

While the settlement nature of the above remedies is still debatable, and a number of arguments rather point to the authoritative nature of any administrative decision, there is little doubt that any such decision is indeed built on a certain degree of compromise and must include negotiation—i.e., the typical attitude of private parties which try to resolve their disputes, be they actual or potential.

Still, no business feels completely at ease in negotiating with a public administration body, which at the same time fulfills the role of prosecutor, negotiator, and market regulator and where the balance of negotiations is inevitably shifted towards the Competition Authority.

[31] In 2013, out of 80 concentration filings with the Italian Competition Authority, only one has been investigated as possibly implying noncompliance.

It is difficult to assess whether such transactional procedures have actually reduced the number and/or the seriousness of competition law infringements or whether effective deterrence has been achieved. Any attempt at assessing the real impact on restrictive covenants and behaviors would fail simply because the drivers of anticompetitive behavior are so numerous, and fact-specific, that it would be pretentious to calculate or predict what could, or could not, have happened if those remedies had not been in place.

Nevertheless, it is fair to say that the introduction of transactional remedies—even more, the introduction of a transactional culture in antitrust enforcement—has sensibly helped the business community to develop an increased sense of compliance with antitrust law, as well as facing market tests and competitors' challenges.

Also, the Competition Authority has derived benefits from the application of transactional procedures, not only with reference to a quicker and more certain attainment of its objectives, but also and more importantly it has gained a deeper and more sophisticated understanding of business and economic mechanisms, which in turn has increased the Authority's degree of sophistication in its approach to other cases.

The main criticism of the procedure is still related to the increasing role of the Competition Authority as a regulator rather than a prosecutor, and the peculiarity of the systems herein described is that transactional procedures combine both roles within the same entity. This may create the risk that the regulatory part prevails and that the imposing nature of the Authority prevails over the more conciliatory nature of negotiation.

Thus, the issue worth considering for the future of antitrust enforcement in relation to transactional remedies might be the separation between the two roles, whereby an independent entity should be responsible for assessing the proportionality and necessity of commitments and for adopting a final decision embodying such commitments, while a different entity should maintain its investigative powers without intervening in the negotiation process.

In this respect, the long-standing example provided by criminal law[32] could possibly shed some light on a workable system, where the roles are clearly distinguished at the investigation stage and end with the indictment of the defendant, but still allowing other mechanisms to play a role, with the involvement of several parties.[33]

A possible solution could then be reached by singling out—even within the framework of public bodies—separate entities, whereby the prosecuting side acts as

[32] One should not forget that competition law, albeit unaltered by criminal law in the Italian legal system, is the closest legal environment and a natural one to look at when devising enforcement options.

[33] Again, the criminal system clearly shows its weak points when it comes to defending third parties' rights in the framework of plea bargain procedures, as these latter normally compress the expectation to "full justice," e.g. for parties damaged by the crime which will miss the advantages of a full trial, for instance in the lack of evidence and in the difficulty to obtain damages.

a "party" in the context of an adversarial procedure and any possible agreement should be assessed by a neutral third party entity.[34]

Of course, given the very recent changes in the law introducing transactional procedures in the framework of competition law, several issues are still to be explored—among them, the impact of these procedures on private enforcement options, both in terms of possibly undermining such options and in terms of limiting access to decisive evidence. In this area, it will be clearer whether the system encourages and favors a workable system as such, thus limiting the protection for each competitor in possible enforcement options, in exchange for a greater degree of legal certainty and a safer—possibly, a more regulated—competitive environment.

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[34] This is, *mutatis mutandis*, the pattern in criminal law, where the roles of prosecuting and judging magistrates are clearly distinguished, the former being identified as a party to the proceeding, albeit endowed with stronger powers than the defendant.

Poland

11

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11.1 Introduction

Under Polish competition law, there are currently several transactional institutions that allow parties to cooperate with the competition authority in order to avoid or at least mitigate the amount of a fine to be imposed by the competition authority. Such "plea bargain" type solutions encompass leniency in cases regarding anticompetitive agreements and commitments applicable in cases of both alleged agreements restricting competition and alleged abuses of dominant position. Finally, there are also commitment decisions in merger procedure available.

All transactional institutions are based on the provisions of the Polish Act on Competition and Consumer Protection dated 16 February 2007 (hereinafter the "Act") and are enforced by the President of the Office of Competition and Consumer Protection (Polish Competition Authority—hereinafter the "PCA" or the "Authority"). In addition, on 10 June 2014, the Polish Parliament adopted a set of significant amendments to the Act which, *inter alia*, introduce a settlement procedure or some improvements to the leniency program (*e.g.*, leniency plus). The amended Act was signed by the President of Poland on 30 June 2014 and will enter into force on 18 January 2015.

The *Ratio legis* of introducing the plea bargaining model into the Polish competition law regime was to improve the effectiveness of the PCA in safeguarding

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competition on the market. On the one hand, a trade-off with undertakings allows the PCA to spare time and limited human resources by avoiding long-lasting investigations. On the other hand, undertakings perceive transactional procedures as a possibility to avoid fines (or at least to receive the reduction of a fine) or as a method to secure a merger clearance decision or conditional clearance decision. Nevertheless, it should be noted that there are also drawbacks of implementing plea bargaining model into Polish competition law. The said drawbacks are related mainly to the enforcement of the abovementioned tools by the PCA. For instance, a commitment proposal in order to be accepted should be made by the investigated undertaking at a very early stage of the proceedings. As a result, there is a limited chance for the party to present its case and the supporting legal analysis to justify its behavior before the PCA. Such an approach adopted in the PCA's *Guidelines on commitment decisions*[1] (hereinafter the "Guidelines on Commitment Decisions") can be seen—to some extent—as a limitation of the party's right to defense. We will elaborate more on this in the upcoming sections.

We would also like to note that, in general terms, transactional institutions are also available in other branches of Polish law, but their scope of relevance to antitrust proceedings is rather limited. The Act of 14 June 1960 (hereinafter the "Code of Administrative Procedure") provides for a so-called administrative settlement. However, it can only be reached between parties to proceedings before a public authority rather than between the parties and the authority itself.[2] It is worth mentioning that Polish criminal procedure provides for a solution that is much more transactional in its nature. Article 387 (1) of the Act of 6 June 1997 (hereinafter the "Code of Criminal Procedure") gives legal grounds for the institution of "voluntary submission to a penalty" that allows the court to pass a sentence without reviewing the evidence, which significantly shortens the criminal proceedings.

General Remarks: Procedural Issues

In Poland, there are two major types of proceedings conducted in case of infringements of competition rules, *i.e.*:

- explanatory (investigative) proceedings, and
- antimonopoly proceedings. The former consists of proceedings dedicated to determine initially whether an infringement that would justify the institution of antimonopoly proceedings has occurred. There are no formal parties to those proceedings, and such procedures are always commenced *ex officio*, even if a complaint was filed. In the course of those proceedings, the PCA investigates the matter, such as by carrying out an inspection (dawn raid) or requesting the

[1] Office of Competition and Consumer Protection, Guidelines on commitment decisions in cases of practices restricting competition and practices harming collective consumer interests, Warsaw 2012, available in Polish at: http://www.uokik.gov.pl/download.php?plik=12033.

[2] See: Kozieł T., Commitment Decisions under the Polish Competition Act – Enforcement Practice and Future Perspectives, Yearbook of Antitrust and Regulatory Studies 3/2010, p. 77.

undertaking(s) to submit specific information or documents. Formally, the "suspected" undertaking is not a party to the proceedings. Explanatory proceedings are always concluded with a procedural ruling (*i.e.*, a resolution) and not with an administrative decision on the merits. Therefore, the commitment decision cannot be issued at this stage. Neither the settlement procedure can be implemented in the course of explanatory proceedings.

If during the investigative proceedings it is established that an infringement is highly probable, the PCA institutes antimonopoly proceedings and officially communicates its objections to the undertaking by way of a formal notification.

According to the Act, an application for a commitment decision can be filed in the course of antimonopoly proceedings after the delivery of the formal notification. A motion for settlement (after the amendments to the Act come into effect) can be filed before the termination of the antimonopoly proceedings. A motion for leniency can be submitted in the course of both explanatory and antimonopoly proceedings.

11.2 Transactional Resolution in Case of Agreements and the Abuse of Dominance

11.2.1 Overview of Transactional Procedures

Polish competition law currently provides for two types of transactional resolutions available in case of anticompetitive practices: commitment decisions and leniency program. From 18 January 2015, also a settlement procedure will be available to parties of antimonopoly proceedings. Commitment decision is tailored predominantly for cases of an abuse of dominant position and vertical agreements. The leniency, by its very nature, is limited exclusively to parties of competition restricting agreements. Beneficiaries of a settlement procedure may receive a fixed 10 % reduction on a fine in exchange for the undertaking's voluntary acceptance of the fine.

11.2.1.1 Commitment Decisions

According to the Act, the PCA is empowered to issue commitment decisions. A commitment decision may be issued only upon an application of a party in the antimonopoly proceedings, in cases of both alleged agreements restricting competition and alleged abuses of dominant position. The legal basis for a commitment decision is provided by Article 12 of the Act. Practical applicability of the commitments under Polish competition law is ambiguous. Theoretically, it is possible to apply for a commitment decision in cartel cases. However, in practice it is rather unlikely for the PCA to accept such an application where naked cartels are concerned or even in cases related to vertical pricing restraints (such as resale price maintenance). The PCA's approach changed significantly from July 2012 when the Guidelines on Commitment Decisions were published. Before that date, the PCA in general accepted commitments in cases involving fixed or minimum resale price maintenance in vertical relations.

According to the Guidelines on Commitment Decisions, the commitment procedure should have a very limited (or exceptional) applicability to hard-core agreements that have as their object, *inter alia*, price fixing or market sharing, tender collusion or limiting or controlling production, sale, technical development, or investments.[3] In consequence, commitment proposals in such cases will be very closely scrutinized by the PCA, and the Guidelines suggest that a leniency application is the preferred way to escape fines.

Therefore, commitment decisions are applicable to anticompetitive agreements which do not constitute a hard-core restriction. As a result, the commitment decision is not considered to be a preferred route for the PCA in cartel cases.[4]

Commitment Decision vs. Admission of Guilt

Under Polish competition law, an application for a commitment decision is not formally an admission of guilt, but in practice it is treated that way. Therefore, some undertakings make sure the first written brief to the PCA in the proceedings contains sound legal arguments to defend the alleged practice, as well as an application for a commitment decision.

However, the PCA enjoys a broad discretion with respect to the acceptance of a motion for a commitment decision.

Timing to Apply for a Commitment Decision

As already mentioned above, an application for a commitment decision can be filed in the course of antimonopoly proceedings, *i.e.* after the delivery of the formal notification.

In theory, commitments may be proposed by undertakings until the final decision is issued and the infringement is proven. This is because the Act only allows commitments if the infringement is considered probable but not actually proven. In practice, the opportunity for effective submission of commitments exists only at the initial stage of antimonopoly proceedings. The Guidelines on Commitment Decisions[5] make it clear that an application for a commitment decision should be filed *in the first written brief on the merits after commencement of antimonopoly proceedings*. The first brief on the merits is filed in response to the formal notification.

There is a controversy whether, in the current state of the law, a commitment decision may be issued if the antimonopoly practice has already been stopped. According to the Guidelines on Commitment Decisions, there is such a possibility if the effects of the practice continue and the proposed commitments are going to eliminate the negative impact of the practice.[6] The amendments to the Act which

[3] See: Stawicki A., Turno B., Feliszewski T. in: Christine A Varney (ed.), *The Cartels and Leniency Review. Second edition*, Law Business Research 2014, p. 272.

[4] Stawicki A, in: Stawicki A, Stawicki E (eds), *The Act on Competition and Consumer Protection. Commentary*, Warszawa 2011, pp. 402–403.

[5] Guidelines on Commitment Decisions, p. 4.

[6] *Ibidem*, pp. 8–9.

will enter into force in January 2015 expressly stipulate that commitment decisions are available in cases of ceased practices.

Commitment Decisions and Third Parties' Involvement

As a rule there, is no third party's involvement in the commitment-making procedure. The final shape of the commitments is discussed between the PCA and the interested party only. Nevertheless, it should be emphasized that in July 2013 the PCA decided—for the first time—to launch public consultations which were to conclude the ongoing proceedings concerning the abuse of a dominant position by the leading oil company in Poland, PGNiG. The undertaking addressed the PCA to issue a commitment decision. In return, it offered to take actions which were assumed to restore the market competition. Before issuing the decision, the PCA decided to request the entities operating on the gas market to express their view on PGNiG's offer. Thus, the PCA initiated the first consultations and the market test, in relation to cases concerning the abuse of a dominant position.

According to the decision in PGNiG case,[7] 14 entities submitted comments. Most of the comments questioned the time allowed to achieve the commitments, which they regarded as too long. Taking into account the outcome of the market test, PGNiG's proposal has been modified and the commitment decision has been issued.

Commitment Decisions and Third Parties' Interests

Under Polish law, the PCA, being an administrative body, does not have the power to decide on civil claims. Therefore, issuance of the commitment decision does not formally influence possible follow-on claims brought to civil court by third parties. Moreover, the commitment decision (contrary to a decision finding an infringement) does not bind the civil courts. The civil court will have full competence to independently hear civil claims, if any are raised.

Commitments Procedure

The commitment negotiations are always initiated by the suspected party. After an application for a commitment decision is filed, the PCA may present its opinion on the proposed commitments and may also propose some changes. Sometimes, especially when sophisticated contractual relationships are involved, the negotiations may last for a couple of rounds.

Commitments accepted and imposed by the PCA in commitment decisions are purely behavioral. They often consist of an obligation to amend contracts with other parties to the antimonopoly proceedings (cases of vertical agreements) or with third parties not involved in the proceedings (mostly cases of abuse of dominant position).

[7] Decision of 31 December 2013, No. DOK-8/2013.

Sometimes, where a regulated sector (*e.g.*, energy, telecommunications) is concerned, the PCA consults a draft decision with the relevant regulatory authority, but such consultations are not mandatory or binding on the PCA.

The PCA accepts commitments and requires undertakings to comply with those commitments. In theory, a commitment decision may be appealed to court. But in practice, it is difficult to imagine such a situation, as no fine is imposed and the negotiated commitments are approved by the undertaking and subsequently accepted (in the form of a decision) by the PCA.

11.2.1.2 Leniency Program

The leniency program was introduced in Poland in May 2004 and is governed by the Act (currently Article 109 and after the amendments to the Act will come into force under Article 113a–113k) and currently also by the Regulation of the Council of Ministers of 26 January 2009 (hereafter "Leniency Regulation"). There is also "soft law" regarding the leniency (*i.e.*, the Leniency Guidelines and Guidelines on Fines).

It is possible to apply for leniency before initiation of any proceedings by the PCA, as well as during the explanatory or antimonopoly proceedings.

Leniency Procedure

According to Article 113b (2) of the amended Act, total immunity from any financial penalty will be granted only to the first leniency applicant who

- submits to the PCA a leniency application providing details on an anticompetitive agreement;
- provides the PCA with evidence sufficient for instituting antimonopoly proceedings or information that enabled the PCA to gain such evidence; or
- in case leniency application has been submitted after instituting antimonopoly proceedings, provides the PCA with evidence that to an essential extent will contribute to issuing of the decision or upon the PCA's request presents information that enabled the PCA to gain such evidence;
- provided that the PCA did not have at the time any information or pieces of evidence sufficient for instituting antimonopoly proceedings or issuing a decision;
- did not encourage other undertakings to participate in an illegal agreement;
- the applicant has ceased participating in the agreement not later than immediately after submitting the leniency application.

The first applicant who does not qualify for immunity, as well as any subsequent applicants, may benefit from a reduction in the fine provided that

- the applicant has submitted to the PCA the leniency application providing details on the anticompetitive agreement;
- the applicant has ceased participating in the agreement not later than immediately after submitting the leniency application;

- the applicant has presented to the PCA evidence that has great importance to the case providing that the PCA did not have at that time such pieces of evidence.

Fine reduction in case of applicants who do not qualify for immunity depends on "the place in the line" according to following rules:

- first applicant may gain full immunity;
- second applicant may gain reduction of the fine that would otherwise be imposed by 30–50 %;
- third applicant may gain reduction of the fine that would otherwise be imposed by 20–30 %;
- subsequent applicants may gain reduction of the fine that would otherwise be imposed by a maximum of 20 %.

Applicants for immunity, as well as subsequent applicants, are obligated by virtue of the amended Act to fully cooperate with the PCA in the course of the proceedings. Apart from providing the PCA with all necessary information, they will be obliged by virtue of law not to reveal their intention to submit the leniency application or the fact of submission of the application to the PCA. Moreover, the leniency applicants will be obliged not to impede their employees or managers in relation to making depositions.

It should also be mentioned that the Leniency Regulation provides for a "marker system." The undertaking's place in the queue for leniency (immunity or reduction of a fine) can be secured by submitting the abridged leniency application. Furthermore, the leniency application can be submitted orally. However, in such case, it shall be recorded in writing by the authorized PCA's representative. According to the Leniency Guidelines, the minutes of an oral leniency application contain the factual circumstances and the statements, evidence, and documents listed as attachments.

The amendments to the Act introduce the possibility to impose fines on individuals who manage an undertaking which entered into an agreement restricting competition. A fine may be imposed on any manager of an undertaking who intentionally, by his action or lack of action, involved the undertaking in such an agreement. This is not limited to cartels and will also cover other horizontal as well as vertical agreements. The fines on individuals can be relatively high. The cap will be set at PLN 2,000,000 (approx. EUR 500,000). Thus, as a consequence, the new law also provides for the possibility to file *leniency applications for individuals*. The same rules regarding the leniency program for undertakings will apply respectively to leniency for individuals. Also, when an undertaking applies for leniency, the leniency application covers all individuals involved in the relevant anticompetitive practice. However, a leniency application filed by an individual does not cover the relevant undertaking.

Leniency Plus Program

The amended Act provides for a leniency plus program that will be available to those undertakings who file (as the second, third, or subsequent applicant) a leniency application with respect to one matter and will provide the PCA with information regarding another anticompetitive collective practice that was previously unknown to the PCA. In such cases, the undertaking will qualify for an additional 30 % reduction of fines in respect of first matter and for a 100 % reduction in respect of the new matter (assuming that all the conditions for immunity from fines are met).

Settlement Procedure

Until now, Polish law did not recognize a settlement procedure. The upcoming changes cover this issue as well.

According to the amended Act, the settlement procedure may be commenced in the course of antimonopoly proceedings, *i.e.* after delivery of the formal notice of proceedings. The settlement procedure will be composed of several stages:

(i) the PCA invites all the parties to settle, acting *ex officio* or upon request from a party;
(ii) the parties have 14 days to decide whether or not to enter into the settlement procedure;
(iii) those which decide to enter into the procedure are then informed by the PCA about its initial findings, its expected decision, and the estimated amount of the fine after the 10 % reduction;
(iv) the parties are given 14 days to send their responses to the PCA's position;
(v) the PCA analyzes the first round of the parties' responses and sends them the modified settlement proposals (the same kind of information as in (iii) above);
(vi) the parties have then 14 additional days to submit their second responses;
(vii) having analyzed the parties' second responses, the PCA requests them to submit their final statements of acceptance within 14 days from the delivery of the request;
(viii) the final statement of a party must consist of (1) a clearly stated voluntary acceptance of the fine, (2) an acknowledgement of the amount of the fine, and (3) an acknowledgement of the receipt of information on the alleged infringements, on the right to be heard and on the possible unfavorable results of appealing from the decision;
(ix) the PCA issues its decision consistently with the proposals accepted by the parties ((viii) above).

Although the amended Act is not clear in this respect, it seems that individuals (managers) also will be entitled to settle with the PCA.

Settlement procedure will not become explicitly a guilty plea, but in practice it is at least a no-contest plea. That is because it will be possible to appeal the fine after the settlement, in which case, however, the fine reduction will be automatically withdrawn. The fixed 10 % reduction does not seem encouraging enough for undertakings in nonobvious cases where the fine might well be lowered or quashed by the court on appeal. However, the PCA may in such cases "offer" a lower basis of a fine than usual, which combined with the 10 % off may be an acceptable solution for the undertakings concerned.

The procedure is planned to cover cases of both horizontal and vertical agreements, as well as cases of abuse of dominant position. We believe that in cartel cases the PCA should be far more willing to negotiate and finalize a settlement than to issue a commitment decision.

In general terms, settlement procedure is intended to simplify and speed up the proceedings regarding competition-restricting practices. However, taking into account that the PCA will have the right to withdraw from the settlement procedure at any stage, there are serious doubts whether settlement will really be an attractive option for parties to the proceedings.

11.2.1.3 Discretion of Competition Authorities During Proceedings

In both types of transactional procedures available for unilateral and multilateral anticompetitive practices (*i.e.*, commitment decisions and leniency program), a plea bargaining is only triggered by the undertaking, never by the competition authority. Only the settlement procedure may be initiated by the PCA (as well as by the undertaking). It is also at the sole discretion of the interested party to address the PCA with a proposal for commitments or to submit a leniency application. On the other hand, the PCA has powers to reject commitment proposal, as well as a leniency application, in its own discretion.

Generally speaking, the PCA might not be willing to accept commitment proposals in case when proposals were not made early enough or when commitments are not sufficient enough to restore effective competition on the market. However, the second obstacle can be easily overcome since negotiations with the PCA's representatives over commitment proposals are available for interested undertakings.

In case of leniency programs, the PCA is obligated to accept an application that meets in a cumulative manner the criteria set forth in Article 109 of the Act (Article 113b and 113c (1) of the amended Act). However, taking into account that those criteria are not particularly straightforward, the verification of their fulfillment is rather subjective in practice. On the other hand, it is not easy to assume that the PCA is very willing to reject leniency applications because the said program is a major tool to fight cartels and other agreements restricting competition. Furthermore, one has to bear in mind that the PCA encourages undertakings—by way of public media campaigns—to increase number of leniency applications filed to the PCA. Therefore, there are reasonable arguments to claim that the PCA is much more likely to accept leniency applications rather than to reject them without justified reasons.

Until now, there has been only one case where the PCA decided not to accept a leniency application on the ground that the applicant did not meet all the requirements described in Article 109 of the Act. The application was assessed as incomplete since it did not include full and comprehensive information concerning the existence of a prohibited agreement.[8]

11.2.1.4 Nature of the Settlement Decision

The PCA's final assessment concerning both the leniency application and commitment proposals, as well as settlement procedure, is reflected in decisions issued by the PCA as outcome of the undertaken antimonopoly investigations.

In case of acceptance of the leniency applications or commitment proposals, appropriate wording is included in the operative part of the decision. On the other hand, when the PCA claims that there are no grounds to impose commitments or to grant full leniency (or at least reduce the fine), proper reasoning is included in the justification of the decision.

In case of applying settlement procedure, content of the PCA's decision is based on the final statement issued by the interested party confirming the undertaking's acceptance for level of the fine to be imposed, as well as acceptance for charges raised against the party. The said statement also includes information that the appeal to a court may result in imposing by the PCA of a higher fine (please see below).

Furthermore, it should be stressed that the PCA has a right to withdraw from a settlement procedure at any stage of the proceedings if it considers that the settlement procedure does not contribute to the acceleration of proceedings.

Together with a list of commitments imposed on the undertaking, a commitment decision will always impose a reporting obligation on the undertaking. As a result, the undertaking is given fixed deadline(s) to send progress report(s) demonstrating how it complies with the decision. For example, where the commitments include an obligation to amend a contract, the PCA will often require to receive a certified copy of the amended contract.

In the event of a failure to comply with any of the commitments (including the reporting obligation), the PCA may fine the undertaking up to the equivalent of EUR 10,000 per each day of delay.

Moreover, the PCA may also *ex officio* revoke the commitment decision, restart the antimonopoly proceedings, issue a decision declaring the practice anticompetitive, and impose a fine of up to 10 % of the overall annual turnover generated by the undertaking in the accounting year preceding the year in which the fine is imposed.

In practice, undertakings usually comply with commitment decisions on a voluntary basis. Although some minor problems with proper reporting may have occurred, we are not aware of any fines for noncompliance with commitment decisions.

[8] See Decision No. DOK 1/08. For more details, please refer to Turno B., Leniency Program łagodzenia kar pieniężnych w polskim prawie ochrony konkurencji, Wolters Kluwer, Warsaw 2013.

11.2.2 Fundamental and Procedural Rights of the Parties

11.2.2.1 Right Against Self-Incrimination and Presumption of Innocence

Duty to Provide Information

Pursuant to Article 50 (1) of the Act, the PCA is empowered to request information and documents from the undertakings party to the ongoing proceedings and also from any other undertaking that has relevant information or documents (*i.e.*, third parties) (request for information—hereinafter "RFI").

The scope of the RFI is limited by the scope of the information requested, the objective of the request, and the principle of "necessity." The same rules apply to information and documents gathered in the course of transactional procedures.

In case of failure to provide requested information (as well as providing incorrect or misleading information), the PCA may impose a fine on the undertaking equivalent to EUR 50,000,000 (Article 106 (2) of the Act).

As regards the leniency procedure, the obligation imposed on the applicants to provide the PCA with any and all proofs or pieces of evidence that it has at its disposal, as well as with any information relating to the case, upon its own initiative or upon the demand of the PCA is based on Article 109 (2) of the Act.

From the practical perspective, it should be noted that the undertaking cannot circumvent the obligation to provide information by invoking the protection of business secrets. Polish competition law provides for alternative measures to maintain sensitive information unrevealed. According to Article 71 of the Act, the PCA's representatives shall protect company secrets, as well as other information protected under other applicable regulations. Further, the party is entitled to fill a request for a limited right of access to evidence (Article 69 (4) of the Act).

Legal Professional Privilege

The Act does not currently provide for the legal professional privilege (hereinafter "LPP") rule as under the UE competition law.

However, we would argue that on the basis of the relevant legislation (*i.e.*, the Polish Criminal Code), the case law of the Court of Justice of the European Union and the European Court of Human Rights, as well as on the basis of the Bar Code of Conduct, advice rendered by qualified lawyers (advocates or legal counsels) should be legally privileged in Poland. Moreover, when the PCA applies Articles 101 or 102 of the Treaty on the Functioning of the European Union simultaneously with the relevant provisions of the domestic law, it is bound by the general principles of EU law, of which rights of defense (as a fundamental right) is a part. Thus, in such a situation, the PCA has a duty to observe the LPP rule which supports the rights of defense.

In practice, during for example a dawn raid, the PCA officials may be ready to respect the privileged character of some documents (*e.g.*, legal opinions). To the best of our knowledge, there is no clear guideline in this respect in the case law of the Polish courts (although first courts' decisions have been issued). The amended

Act includes only *quasi*-LPP rule by way of applying accordingly relevant provisions of the Code of Criminal Procedure in case of inspections in undertakings' premises. In practice, it means that during a dawn raid an authorized representative of an inspected company has the right to inform the PCA's officials that certain documents are privileged (due to the professional secrecy). According to Article 225(1) of the Code of Criminal Procedure, persons conducting the inspection must not read the documents but have to forward them to a relevant court (*i.e.* the Competition Court) which will decide whether the documents are privileged. Nevertheless, it should be noted that practical applicability of those provisions in antitrust cases will be very complex. Therefore, the *quasi*-LPP rule that is going to be introduced into Polish competition law is surely less far-reaching in scope and less straightforward in enforceability than its EU counterpart.

Right Against Self-Incrimination

In Polish antimonopoly proceedings, there are no clear standards when it comes to the guarantee of the presumption of innocence and the privilege against self-incrimination. The latter is not regulated in the Polish administrative procedure despite the opinions pointing to such a need.[9] In consequence, in some cases, it may happen that undertakings are forced to confess to violating competition law rules.

Although there are no binding rules safeguarding the right against self-incrimination during antimonopoly proceedings, some authors[10] are convinced that such an obligation imposed on the competition authority stems directly from Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Since Poland is a party to the Convention, its provisions (including Article 6 providing for the right to fair trial) are a binding source of law in Poland, *i.e.* rules incorporated in the Convention are applicable in a direct manner.[11]

11.2.2.2 Right of the Parties to Be Informed About the Case (Statement of Objections)

The PCA formally informs undertakings concerned about the case against them in a resolution on the commencement of antimonopoly proceedings. From the legal

[9] See: Turno B, Prawo odmowy przekazania informacji służącej wykryciu naruszenia reguł konkurencji w orzecznictwie Europejskiego Trybunału Sprawiedliwości, (2009) 3 Ruch Prawniczy Ekonomiczny i Społeczny 45–48. Bernatt M., Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji, Warsaw, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 2011, pp. 190–191; Krüger J, in: Stawicki A, Stawicki E (eds), The Act on Competition and Consumer Protection. Commentary, Warszawa 2011, p. 764.

[10] See: Bernatt M., Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji, Warsaw, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 2011, pp. 190–191.

[11] See: Turno B, Prawo odmowy przekazania informacji służącej wykryciu naruszenia reguł konkurencji w orzecznictwie Europejskiego Trybunału Sprawiedliwości, (2009) 3 Ruch Prawniczy Ekonomiczny i Społeczny 45–48, p. 45.

standpoint, since the initial phase of the proceedings before the PCA, *i.e.* explanatory proceedings, does not have formal parties, there is no formal obligation to inform about objections. Similarly, the PCA does not inform undertakings (*e.g.*, those that responded to the RFI) of termination of the explanatory proceedings.

In a vast majority of cases, resolutions on the commencement of antimonopoly proceedings contain solely very general information about charges without detailed justification. They lack a detailed description of the facts and evidence collected in the case files, as well as initial legal assessment concerning factual background.

The fact of receiving a resolution on the institution of antimonopoly proceedings seems to be particularly important in case of commitment proposals to be made by the interested undertakings. As it has already been stressed, Guidelines on Commitment Decisions indicate that the commitment proposal should be made at a very early stage of the proceedings, preferably in the party's response to the said resolution, in order to be successfully accepted by the PCA.

With respect to the leniency program, it is predictable that the party's application is much more likely to be accepted also when submitted at a very early stage or even when antimonopoly proceedings have not yet been instituted. In such circumstances, information on competition restricting practice that was unknown to the PCA is particularly valuable and will probably result in total immunity from fines.

11.2.2.3 Right to Be Heard and Access to the File

Article 10 of the Code of Administrative Procedure constitutes the formal basis for the enforcement of the right to be heard during antimonopoly proceedings. It ensures that the parties are actively involved in each stage of the proceedings and free to express an opinion on the evidence and materials collected and the claims filed. The counterpart (or the expression) of the right to be heard in the Act itself is to be found in Article 74, pursuant thereto the PCA when issuing a decision shall take into consideration only the charges in respect of which the parties concerned could present their position. In terms of transactional procedures, it should be taken for granted that the right to be heard is obeyed since both commitments and leniency are based on cooperation between the parties and the PCA.

Under Polish competition law, only undertakings taking part in ongoing antimonopoly proceedings have access to the case files. This right is conferred to all the parties to the proceedings before the PCA. Such right is nevertheless subject to potential restrictions. Thus, under Article 69 (1) of the Act, the PCA can limit access to case files in situations where business secrets or any other legally protected secrets might be revealed. For that purpose, the party to the proceedings or third parties (in case they provide the PCA with the information pertaining to the case) need to file a request for confidentiality of sensitive business information. Such request shall indicate not only the precise scope of the sensitive business information but also the justification demonstrating why the particular parts of information or documents are sensitive. Further, limitations to the right to access files are covered by Article 70 (1) of the amended Act, which provides that none of the information submitted to the PCA by a leniency applicant (as well as the application itself) or by a settlement applicant is disclosed to other parties until all parties to the proceedings are formally invited by the PCA to get acquainted with case files just before issuing the decision. However, according to Article 70 (4) of the amended Act, documents which contain information submitted by leniency or settlement applicants can be photocopied by parties to the proceedings upon prior written consent of the applicant. Moreover, handwritten notes of said files are allowed on the condition that they will be used for the purpose of the ongoing proceedings or during appeal only (Article 70 (4) of the amended Act).

11.2.2.4 Right to an Equal Treatment

Enforcement of commitment decisions as well as leniency program under Polish law can lead to unequal treatment of the parties applying for the abovementioned transactional institutions. Such risk occurs because the PCA enjoys wide discretion in using these tools. Article 12 of the Act clearly states that the PCA **may or may not accept** the content of the commitments proposed by the parties to the proceedings.

Although provisions regulating leniency program are more straightforward and the PCA is obligated to grant full immunity (or fine reduction) whenever applicants meet formal criteria, the assessment of meeting those requirements lays purely on the PCA. Therefore, practical enforcement of the leniency program is also highly dependent on the PCA's approach in every single case.

As a result, it is theoretically possible to imagine a situation when the PCA treats the parties to the proceedings differently in terms of transactional institutions despite the fact they are in similar or even identical positions. However, the right to equal treatment in the antimonopoly proceedings can be derived from Article 32 of the Constitution of the Republic of Poland of 2 April 1997 (hereafter "the Constitution"), which states that "All persons shall have the right to equal treatment by public authorities." Moreover, the right to an equal treatment of parties to the proceedings before the PCA is also based on the Code of Administrative Procedure that is applicable in antitrust proceedings. Article 8 of said Code provides for a general principle that "Public administration bodies are required to conduct proceedings in such a way so as to increase the trust of citizens in the State bodies and public awareness and appreciation of the law." As a result, public authorities are obligated to act in a predictable manner that includes equal treatment of parties in equal situations. It should be emphasized that pursuant to Article 83 of the Act, the Code of Administrative Procedure provisions are directly applicable in matters not regulated by the Act itself.

11.2.2.5 Right to Trial

Under Polish law, the right to appeal against administrative decisions (judicial review) is guaranteed by the Constitution. Therefore, the PCA's decisions imposing a commitment, as well as those granting leniency, may formally be appealed to the Court for Competition and Consumer Protection (hereafter "the

Competition Court"), and this right cannot be waived. Since such decisions are usually treated as "win-win" situations, an appeal is unlikely. However, in cases where transactional institutions are not put into action, the party to the proceedings has the right to appeal to the *Competition Court* within 14 days of being served with the decision of the PCA. Entities which are not the addressees of the decision (*i.e.*, third parties) are not entitled to appeal the decision to the Competition Court. The Competition Court is entitled to assess the case on the merits as it acts as the first instance court.

A ruling of the Competition Court may be subject to a further appeal filed with the court of the second instance, *i.e.* with the Court of Appeal. The ruling of the latter can be further appealed to the Supreme Court with a cassation appeal. However, a cassation appeal is accepted by the Supreme Court only in individually selected cases (*e.g.*, where there is a novel issue of law or there is a manifest error in the verdict of the Court of Appeal).

In principle, a decision resulting from the settlement procedure may also be subject to judicial review. In such a case, however, the PCA will have the power to change its decision and impose a fine which amount would not take into account the outcome of the settlement. The so modified decision may also be appealed. Moreover, it should be stressed that under Polish competition law regime the judicial review is claimed to be the most effective tool to safeguard the right to an impartial judge since almost every aspect of the transactional solution is dependent on the competition Authority's discretion. There is no formal differentiation between investigational and decision-making powers of the PCA. As a result, an administrative body is solely responsible for the initial scrutiny of commitment proposals, leniency applications, or the settlement procedure. The same body makes final decisions in this regard. Moreover, it should be mentioned that the amended Act gives the PCA authorization to institute proceedings against an undertaking accused of entering into an agreement restricting competition and against individuals who manage such undertaking. Consequently, the same case handler/case team is responsible for both cases simultaneously. Such circumstance violates the principle of impartiality in a very visible manner.

11.2.2.6 *Ne Bis in Idem*

The principle *ne bis in idem* does not apply to transactional resolutions of competition law proceedings. Therefore, also in case of leniency application, the applicant informing the PCA about bid rigging will face the responsibility under the Polish Penal Code. We believe that such approach toward *ne bis in idem* rule is very unfortunate as it deters many potential applicants from filling leniency in case of bid-rigging cartels.

11.2.3 Rights of Third Parties

11.2.3.1 Right to Be Heard and Access to the File

Entities which are not directly involved in proceedings (*i.e. third parties*—entities other than the PCA and the defendant company) do not have the status of party to the proceedings. Thus, they do not have access to the case file. Their influence on the final scope of the decision is limited as they are only entitled to file amicus brief in the course of the proceedings. In addition, according to the current practice of the PCA, it is usually possible for the third parties to voice concerns related to the case during a meeting with the Authority. However, third parties do not have legal instruments to effectively ensure that the PCA considers their arguments in making its decision.

In addition, in the course of the proceedings, the PCA may carry out a market inquiry by sending out questionnaires to, among others, complainants, competitors, and/or contactors of the parties involved in the proceedings. In such case, they are obliged to provide the PCA with the requested information and/or documents, under the penalty of financial fine which amounts to 50,000,000 EUR.

11.2.3.2 Right to Trial

Third parties are not entitled to appeal the PCA's final decisions or settlements to the Competition Court. In order to lodge an appeal, each entity has to demonstrate that it has legal interest in the annulment of the particular decision or settlements. Taking into account that in the hereto practice of the administrative authorities the motion of the legal interest was defined very narrowly, entities other than addressees of the decision should not be considered as having legal interest to take actions against the decision. They may only appeal (1) the PCA's orders and decisions which relate directly to their rights and obligations, *e.g*. the PCA's order to treat the information and documents provided by the third party as confidential or the PCA's decision imposing a financial fine on the third party for lack of the cooperation in the context of PCA's RFI.[12]

11.2.3.3 Confidentiality and Publicity of the Transactional Solutions

The PCA cannot disclose to any third party or distribute within the public administration information and documents included in the case files.

The access to information and documents included in the case files may be restricted towards the notifying party in case the third party requests the PCA to consider some parts of information and documents as confidential due to the fact that they constitute sensitive business data of the third party.

The PCA may also, on the request of the notifying party, consider the deadline to fulfill commitments as confidential information.

[12] See Sect. 11.2.2.1.

Each merger decision is published on the website of the PCA within a few calendar days of its issuance. The confidential data is not available in the published version of the decision.

11.3 Commitments and Merger Control

11.3.1 Substantive Provisions

General provisions related to merger control proceedings are included in the Act, while relevant procedural aspects are governed by the Code of Administrative Procedure. The substantial amendment to the Act[13] that will come into force on the 18th of January 2015 is also modifying merger provisions.

11.3.2 Clearance Decision

The PCA issues three types of decisions in merger cases: (1) an unconditional clearance, (2) a conditional clearance subject to commitments, or (3) a prohibition decision. Please note that the merger filing will not be reviewed based on merit in case of formal obstacles or party's withdrawal before issuance of the decision.

In case of transactions which are considered to significantly restrict the competition on the relevant market (due to substantial aggregation of market share or reduction of strong competitors on the market), it is likely for the PCA to issue conditional decision, including commitments. Commitments are intended as a mean to ensure that affected markets remain competitive.

11.3.3 Commitments

The Act provides for two types of commitments: behavioral and structural. Given that the list of commitments included in the Act is exemplary, the PCA is entitled to implement other behavioral and structural commitments than the ones indicated in the Act.

The analysis of current decisions issued by the PCA indicates that the Authority is willing to impose behavioral commitments additionally to structural measures. In the recent decision pertaining to the acquisition by *Henkel* of part of the assets of *PZ Cussons*, two major laundry detergent companies, a structural commitment was accompanied by the requirement for *Henkel* to ensure that prior to the transfer of the

[13] See above, Sect. 11.1.

assets to new investor the level of sales of the divested assets, as well as expenditure incurred for the advertising, should remain fixed.[14]

In another decision pertaining to the acquisition of control by *UPC* over *Aster*,[15] a structural remedy was accompanied by the requirement for *UPC* to ensure that prior to the transfer of the assets to a new investor, the consumers' access to the services would not be limited in any manner and that those services are provided at least at the same level as previously. The decision also obliged *UPC* to guarantee that consumers would have the right to freely choose an alternative service provider upon transfer of the network to a new investor.

Commitments imposed on merging parties in recent cases included also reporting obligation. Within the timeframe specified in the decision, the merging parties had to report of the implementation of the other imposed obligations.

11.3.3.1 Behavioral Commitments

Behavioral commitments take the form of an obligation to act or to carry out business activity in a manner prescribed in the decision. The PCA is increasingly reluctant to rely on these kinds of behavioral remedies as an effective instrument to address competition concerns (as opposed to the 1990s, when the PCA was willing to clear concentrations, which raised competition concerns, relying solely on the condition to adhere to certain future market conduct.[16] Recent decisions clearly show that divestment orders are currently employed as primary tools to remedy competition concerns (see our comments below). However, there are still examples of the PCA employing a behavioral type of commitments in specific cases (for example, in *Multikino/Silver Screen* case, *Multikino* was cleared to acquire a control over Silver Screen on the condition that it would withdraw and refrain from activities aimed at acquiring the rights to the cinema located in the commercial centre in Gdańsk.[17]

[14] PCA, decision of 6 February 2014, DKK-11/2014, acquisition by Henkel AG & Co. KGaA with its registered seat in Dusseldorf (Germany) part of the assets of PZ Cussons (Holdings) Limited with its registered seat in Manchester (United Kingdom), PZ Cussons Polska S.A. with its registered seat in Warsaw and PZ Cussons (International) Limited z with its registered seat in Manchester (United Kingdom).

[15] PCA, decision of 5 September 2011, DKK-101/11, acquisition by UPC Polska Sp. z o.o. with its registered seat in Warsaw (Poland) control over Aster Sp. z o.o. with its registered seat in Warsaw (Poland).

[16] For example, the acquisition of several breweries by Heineken was cleared by the PCA on the condition that the merged entity will continue to purchase hops from local producers for a designated period of time.

[17] PCA, decision of 19 June 2008, DKK-49/08, Multikino S.A. with its registered seat in Warsaw, Silver Screen Targówek Sp. z o.o. with its registered seat in Warsaw, Silver Screen World Cinemas Sp. z o.o. with its registered seat in Warsaw, Silver Screen Wola Sp. z o.o. with its registered seat in Warsaw and SC—Personel Sp. z o.o. with its registered seat in Warsaw.

11.3.3.2 Structural Commitments

According to the Act, structural commitments can take the form of (1) the disposal of the entirety or part of the assets of one or several undertakings and (2) the divestment of control over an undertaking or undertakings, in particular by disposing of a block of stocks or shares or to dismiss one or several undertakings from the position in the management or supervisory board.

Divestment/disposal obligations are currently employed as primary measures to remedy competition concerns in merger cases. Over the recent years, conditional clearances included predominantly that type of commitment.

Pursuant to divestment/disposal obligation, the notifying party is obliged to sell selected assets (either acquired or own assets) within a prescribed period of time. The deadline for enforcement of the commitment starts on the day of issuance of a conditional decision or on the day of closing of the transaction. According to the current practice of the PCA, a period of 12–18 months is considered sufficient to fulfill these kinds of commitments. However, the approach of the PCA in this respect differs on a case-by-case basis, depending on, among others, the scope of the imposed commitment and whether the economic sector within each of the parties is active.

In recent merger cases, conditional clearance decisions included a commitment to dispose of the particular assets (own or acquired) to an independent investor which ensures that the business attributed to the disposed assets will be continued in the same manner as prior to the divestment. In addition, the choice of particular investor was subject to the PCA approval. The PCA obliges also the notifying party to demonstrate that the investor was previously active on the same markets. In other cases, the notifying party was obliged to procure a declaration of an investor's intent.

It should be noted that in the practice of the PCA, the Authority did not conduct detailed investigations regarding the potential investors, and if the criteria in question were met, the PCA issued its approval. However, in light of the recent cases, it seems that the pertinent approach of the PCA has changed and the PCA started reviewing whether the acquired business will be continued in the same manner as prior to the divestment.

The PCA tends to approve the parties' requests to suspend the proceedings for a period necessary to accept an investor. Therefore, the clock starts ticking again when the investor is considered by the PCA to fall under the relevant requirements.

11.3.4 Negotiation of Remedies

11.3.4.1 Discussion on Commitments

The amendment to the Act introduces a two-phase review procedure which divides concentrations based on the criterion of complexity. Transactions which do not give rise to any competition concerns will be reviewed by the PCA during the first phase. On the other hand, transactions, where the definition of the relevant market is very complex or there is a risk of significant impediment of competition, will be qualified to the second phase of the proceedings. Simultaneously, the PCA conveys to the notifying party its concerns with regard to the concentration. The notifying party may comment upon the PCA decision to instigate the second phase of proceedings within a 14-day period (this period may be extended up to 28 days at the party's request). The party may present its view in two possible scenarios: it may provide the Authority with legal and economic data in order to clear the transaction or may propose commitments. In this respect, the notifying party is entitled to produce all types of evidence (*e.g.*, expert witness opinion).

If in light of additional materials provided by the party or as an outcome of the investigation during the second phase of the proceedings the transaction still gives rise to competition concerns, discussion on commitments may be commenced both by the PCA and the notifying party. The type, the scope, and the timeframe to enforce the relevant commitments will be then subject to the decision of the Authority. Please note that the Act does not prohibit the merging parties to submit revised proposal of commitments. The Authority may consider such proposal, but it is not bound with it. In practice, it is difficult for a party to substantially amend the initial draft commitments proposed by the PCA or to persuade the PCA to accept its own draft commitments during negotiations. At this stage, further discussion about the relevant market is usually not possible.

The conditional clearance may be issued only if the party consents to the type and scope of commitments. Otherwise, the PCA issues a prohibition decision. The PCA is entitled to determine, at its sole discretion, the type and scope of commitments. In this respect, the Authority is only bound by the law, in particular the Constitution and general principles of administrative procedure (*e.g.*, the principle of proportionality, the protection of justified interest of the parties).

11.3.4.2 Third Parties' Rights

Entities which are not directly involved in merger proceedings (*i.e.*, third parties) are entitled to present the PCA with an argumentation demonstrating the risks related to the transaction. According to the practice of the PCA, it is usually possible for the third parties to voice concerns related to the proposed transaction during a meeting with the PCA. Nonetheless, the third parties do not have legal instruments to effectively ensure that the PCA considers their arguments in the process of issuing a conditional decision.

The third parties may find demonstrating their arguments against merger difficult due to the fact that the PCA cannot disclose to any third party information and documents included in the case files. The third parties do not have rights comparable to those which are granted to the notifying party. Hence, under no circumstances third parties may have access to the case files.

In addition, in the course of merger control proceedings, the PCA may carry out a market inquiry by sending out questionnaires to customers and business partners of the parties involved in the concentration. In such case, customers and business partners are obliged to provide the PCA with the requested information and/or documents.

11.3.4.3 Appellate Rights

The conditional decision, even if it is issued upon party's approval, may be appealed to the Competition Court by the notifying party. The Competition Court is entitled to assess concentration on the merits, as it acts as the first instance court. The appeal may be lodged within 30 calendar days from the date of receipt of the decision (please note that before the amendment, this period was much shorter as it counted only 14 days). Third parties (*e.g.*, competitors or business partners) are not allowed to file the abovementioned appeal or to accede to the appeal proceedings.

In practice, conditional decisions are not appealed to the Competition Court. However, the parties to the concentration tend to appeal from a decision prohibiting the transaction.

11.3.5 Enforcement of Remedies

The addressee of conditional decision is required to provide the PCA with information regarding enforcement of commitments. The PCA usually obliges the acquiring party to submit such information in a prescribed period of time, although, according to the Act, the acquiring party is *ex lege* obliged to report to the PCA "after the fulfilment" of commitments.[18]

Contrary to the practice of the European Commission, the PCA does not appoint a trustee, nor does it include mandatory arbitration clauses in a conditional merger clearance. However, the Act does not prohibit the PCA to do so.

As to the enforcement of structural commitments, the PCA tends to limit the choice of the party as regards the investor (*i.e.*, the purchaser of the shares or assets). For this purpose, in a number of conditional decisions,[19] the PCA stipulates the additional requirement of a priori acceptance of the investor by the PCA before closing the divestment transaction.

In case the party did not comply with the commitments included in the conditional decision, the PCA may revoke this decision. However, if the transaction was executed, the decision may be revoked only if the competition on the market cannot be restored in any other way (the Authority should apply the proportionality test). In such case, the PCA may revoke the decision within 5 years from the day of closing

[18] See PCA, decision of 31 March 2014, DKK-40/2014, acquisition of control by Neuca S.A. with its registered seat in Toruń over ACP Pharma S.A. with its registered seat in Warsaw, page 3—duty to submit monthly reports to the PCA.

[19] See PCA, decision of 26 March 2012, DKK-23/2012, acquisition of control by Zakłady Farmaceutyczne Polpharma S.A with its registered seat in Starogard Gdański over Warszawskie Zakłady Farmaceutyczne Polfa S.A. with its registered seat in Warsaw; PCA, decision of 6 February 2014, DKK-11/2014, acquisition by Henkel AG & Co. KGaA with its registered seat in Dusseldorf (Germany) part of the assets of PZ Cussons (Holdings) Limited with its registered seat in Manchester (United Kingdom), PZ Cussons Polska S.A. with its registered seat in Warsaw and PZ Cussons (International) Limited z with its registered seat in Manchester (United Kingdom).

of the transaction. In its 24-year history, the PCA has never revoked any of its decision.

In addition, the PCA may impose a financial fine on the merging party which did not implement the commitments included in the conditional decision. The pertinent financial fine may amount to the equivalent of 10,000 EUR (maximum cap) for each day of delay in the fulfillment of the commitments imposed. Decision regarding the fine may be appealed to the Competition Court and further to the Court of Appeals. Ultimately, a cassation complaint may be lodged to the Supreme Court. In most of the cases where the parties did not enforce the commitments, the PCA imposed such fines. For example, in the most recent proceedings involving Carrefour B.V., the company was fined for noncompliance with the obligation to divest some commercial premises (supermarkets) previously acquired from Ahold Polska sp. z o.o.[20] It should be noted that under the amended Act, the managing person will also be directly liable for delay in commitment implementation and in such case may be fined with a financial fine amounting to 50 times the average wage (currently: 50×3896.74 PLN = ~ 50×941.22 EUR).

11.4 Impact on Transactional Outcome and on Market Intervention

Undertakings may be deterred from entering the dialogue with the PCA due to the rigid approach of the Authority in its decisional practice. Cases where the PCA focuses on single aspect of business relations between undertakings and does not take into account the wider economic context of pertinent situation are a good example of such rigid approach. The discussion that follows relates to decisions issued by the PCA in antitrust and merger cases that are relevant in this respect.

11.4.1 Antitrust

In December 2007, the PCA commenced antitrust proceedings against *Xella Polska*—a construction material manufacturer—and its largest distributors. The PCA questioned the contractual clauses according to which the distributors are obliged not to sell their products below the purchase price. During the antimonopoly proceedings, *Xella Polska* submitted the obligations whereby it committed itself to revise the existing distribution agreements and delete the alleged competitive clauses. On 4 July 2008, the PCA issued a decision which

[20] See PCA, decision of 28 August 2009, DKK-58/2009, Carrefour B.V. with its registered seat in Amsterdam, the Netherlands; Competition Court, judgment of 3 October 2011, XVII AmA 8/10; Court of Appeals in Warsaw, judgment of 17 May 2012, VI ACa 1428/11; Supreme Court, judgment of 3 October 2013, III SK 51/12.

enjoined *Xella Polska* to comply with the proposed commitments.[21] In the decision, the PCA highlighted that it is not economically profitable for the distributor to sell the products below the purchase price (in some circumstances, conduct contrary to the questioned practice, *i.e.* sale of products below the purchase price, may be qualified as dumping pricing which constitutes the act of unfair competition prohibited under the Polish law). However, in the opinion of the PCA, the sole wording of the alleged clause was anticompetitive by itself and it might cause anticompetitive effects in the future (even if it was not anticompetitive at the moment of the issuance of the decision). The PCA did not impose a fine on *Xella Polska* for participating in anticompetitive agreements; however, any further defense of the contested clauses could result in a financial fine, as well as protracted proceedings before the Competition Court and possibly higher instances. Instead, *Xella Polska* was obliged to review 600 agreements with different distributors.

This case shows that the PCA, when assessing the undertakings' practice in light of competition law, may focus solely on pure wording of the contractual clause and neglect the wider economic context of the case (character of the marketed products, dumping pricing, actual conduct of the undertakings). The rigid interpretation of each contractual clause without any reference to the context of the undertakings' conduct may deter the entrepreneurs from entering any dialogue with the PCA, which may lead to the adverse effect in particular in RPM cases.

11.4.2 Mergers

As to merger cases, a good example of the rigid attitude of the PCA is the *Auchan Polska/Real* case. During merger control proceedings, the PCA thoroughly examined local markets for FMCG retail sales in HSD (hypermarkets, supermarkets, and discounters). In its decision of 21 January 2014, the PCA ordered *Auchan Polska* to divest 8 of 57 acquired Real hypermarkets purchased from *Metro Group* within 18 months. The Authority modified its approach to FMCG retail markets by limiting the product market definition to the hypermarkets only. Subsequently, the PCA focused mainly on the market shares and disregarded the other circumstances such as competition pressure exercised by entities active on the neighboring markets (supermarkets, discounts). In particular, the PCA did not

[21] PCA decision of 4 July 2008, DOK-3/2008, Xella Polska Sp. z o.o. with its registered seat in Warsaw, BIST Białobrzeski, Stykowski Sp. j. with its registered seat in Warsaw, Centrum Zaopatrzenia Budowlanego "Hadex" Sp. z o.o. with its registered seat in Jastrzębie Zdrój, "GEN–BUD" S.A. with its registered seat in Warsaw, Grupa Polskie Składy Budowlane S.A. with its registered seat in Wełecz, Materiały Budowlane "Wesołek" Sp. z o.o. with its registered seat in Chocicza, "PEAMCO" Materiały Budowlane J. i B. Tomczak Sp. j. with its registered seat in Leszno, "P.H.U. i B. Sambud II" s.c. with its registered seat in Ostrołęka,P.P.H. U. "Tęcza" Hurtownia Artykułów Budowlanych E. Żur with its registered seat in Koszalin, Przedsiębiorstwo Wielobranżowe "MATEX" Z.M.P. Rogoziński Sp. j. with its registered seat in Wolsztyn and Saint-Gobain Dystrybucja Budowlana Sp. z o.o. with its registered seat in Wrocław.

take into account the dynamic expansion of discounters and characteristics of marketed products (limited substitutability between various FMCG products, private labeling). The pertinent case demonstrates that the rigid attitude of the PCA to approaching issues related to market definitions may constitute a deterrent factor in merger cases as well.

Taking into account the general provisions of Polish and European competition laws, the soft law documents (*i.e.*, guidelines, codes of conduct) issued by the PCA and the Commission increase transparency of actions taken by the competition authorities. For example, the PCA has issued the following guidelines pertaining to the merger and antitrust proceedings:

- Clarification on issuing the commitment decision in cases of competition restricting practices and practices infringing the collective consumers interests (2012);
- Clarification concerning the assessment by the President of UOKiK of the notified concentrations (2012);
- Guidelines on the criteria and procedure of notifying the intention of concentration to the President of UOKiK (2010);
- Guidelines relating to the leniency programme (2009);
- Guidelines on setting fines for competition-restricting practices (2008).

These documents may be considered as very useful measure allowing undertakings to conduct their business in line with the position of the PCA. However, as the abovementioned guidelines are not binding for the PCA, its policy is not always considered by undertakings as transparent.

11.5 Conclusion and Recommendations

Polish competition law regime recognizes several transactional institutions that are predominantly aimed at speeding up proceedings and improving effectiveness of the PCA's enforcement actions. As result, one could argue that Polish undertakings are well equipped to take advantages of "plea bargaining" solutions when dealing with the PCA. It is true in theory, but the devil is in the details. Since the majority of transactional institutions are in practice dependent on the PCA's own discretion, the final outcome of such "negotiations" with the authority is highly unpredictable. Therefore, we can only recommend an increase in the transparency of the juridical practice relating to the implementation of transactional solutions that will have for effect, without a doubt, to enhance their recognition among undertakings operating in Poland.

Serbia

12

Darija Ognjenovic

12.1 Introduction

12.1.1 Transactional Proceedings in Serbia

Transactional proceedings are not widely used in the Serbian legal system. Other than under competition regulations, which will be analyzed in detail in this Report, they are only recognized in criminal proceedings, where the mechanism of a plea bargain has been introduced only recently. Namely, as of 2012, the Criminal Code has recognized the "agreement with prosecutor on admittance of guilt" and further sets forth the conditions required for its application (only for certain types of criminal offenses, etc.). Such agreement has to be approved by the sitting judge. Unfortunately, a plea bargain is still not commonly used in practice. To the best of our knowledge, only around 50 cases have ended in a plea bargain since its introduction into the legal system.

Otherwise, laws regulating civil and administrative proceedings do not recognize transactional proceedings.

As regards competition regulations, the Law on Protection of Competition (Official Herald of the Republic of Serbia no. 51/2009 and 95/2013, hereinafter the "Law") provides for three types[1] of transactional procedures: (1) leniency; (2) temporary stay of proceedings available, i.e. commitment decision; and

[1] Similarly to the EU concept abandoned in 2004, Serbian Law provides for the individual exemption of restrictive agreements. Although negotiations are not explicitly provided for under the Law, in practice parties sometimes do negotiate certain provisions of the agreement with the authority. However, this cannot be considered as transactional proceedings and thus is left out of the scope of this Report.

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(3) remedies within merger control. Leniency is only for participation in relation to restrictive agreements—abuse of dominance is out of scope of leniency, but a temporary stay of proceedings by interpretation of the Law (since there is no explicit provision) can be related to both restrictive agreements and to abuse of dominance.[2]

12.1.2 Overview of General (Nontransactional) Competition Infringement Proceedings

Proceedings for investigation of competition infringements by both the execution and/or implementation of restrictive agreements and abuse of dominance are initiated *ex officio* by the Commission, by rendering a formal decision on commencement, on the basis of complaints submitted by third parties of an alleged competition law infringement, information, or other available data (Article 35 of the Law). The decision on commencement contains the legal basis of, and the reasons for, the initiation of an investigation, as well as a request to third parties to submit relevant data and information they possess to the Commission.

Once the investigation is completed, but before rendering a decision on whether a competition infringement has occurred, the Commission is obliged to inform the defendant about the facts and evidence on which it will base its decision (*statement of objections*), in order for the party to reply to such allegation, propose new evidence, and submit its defense argumentation (*statement of defense*).

Besides the declaration of infringement and the financial penalty, the decision on infringement also includes measure for termination of the infringement and the prevention of the same or similar infringements in the future, i.e. *behavioral measures*. This is done by ordering or prohibiting certain behavior (e.g., prohibition of the behavior that has caused the infringement of competition or any similar explicit or implicit form of such behavior, ordering publication of the effects of the Competition's decision, requesting that consumers are notified of the changed practice, etc). If there is a significant chance that the infringement will be repeated, the Commission is entitled to declare *structural measures*. Please note that in line with the wording of Article 59 of the Law, the Government should have rendered a Decree that would regulate in detail the types and requirements for imposing these measures, but such Decree has not been rendered as at the date of this Report.

[2] The Law provides that the abuse of a dominant position is prohibited and lists, as an example, the types of behavior that are considered to constitute an abuse, thus providing a nonexhaustive list of abusive behavior. Similarly to Article 102 of the Treaty on Functioning of the EU, the following are set out under the Law as examples of abusive behavior: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limitation to production, market, or technical development; (c) applying dissimilar conditions to equivalent transactions with different trading parties, whereby treating them unfavorably in comparison with their competitors; (d) making the conclusion of contracts or agreements conditional upon acceptance of supplementary obligations, which, by its nature or commercial custom and practice, have no connection with the subject matter of such agreement.

Decisions on competition infringements are published on the official website of the Commission and in the Official Herald of the Republic of Serbia. Decisions on competition infringement are subject to judicial review by filing a complaint with the Administrative Court. The fines for both restrictive agreements and the abuse of dominance are up to 10 % of the annual turnover of the party that has committed the infringement.

12.2 Transactional Resolution of Agreements and the Abuse of Dominance

12.2.1 Overview of Transactional Proceedings

12.2.1.1 Leniency

Pursuant to Article 69 of the Law, the authority, the Commission for Protection of Competition (hereinafter the "Commission"), shall grant lenient treatment to a party in a restrictive agreement, provided that such party (1) was the first to report the agreement to the Commission or (2) submitted the evidence based on which the Commission rendered the decision on infringement. Lenient treatment can be granted notwithstanding that the agreement is vertical or horizontal since the Law does not distinguish between the two with respect to leniency. In practice, so far the parties filed for leniency only in relation to vertical arrangements.

The condition for the exemption from penalties is that either (1) the Commission has not had any information on the existence of anticompetitive agreement or (2) it has been aware of its existence but has not had sufficient information that would allow it to commence proceedings.

In case a party does not meet the criteria for the relief from the fine, it can benefit from the reduction of fines, under the condition that, in the course of the proceeding, it submits evidence to the Commission, which at that time were not otherwise available. Furthermore, that evidence needs to be sufficient for the Commission to finalize the proceedings and render a decision on the infringement.

It is further explicitly stated under the Law that a party that has initiated a restrictive agreement cannot benefit from either full or partial immunity.

Besides the Law, there are two additional bylaws regulating leniency in more detail—the Decree rendered by the Government and the Guidelines rendered by the Commission.

The Decree repeats the conditions for the exemption from penalties prescribed under the Law (i.e., that the party was the first to report, that it submitted sufficient evidence, and that it did not initiate or organize the restrictive agreement) and sets out additional requirements. Namely, the applicant has to sign a written statement whereunder it declares that it will fully cooperate with the Commission in good faith and that it shall not undertake any action which might jeopardize the proceedings, and in particular it shall not disclose the relevant data to third parties (except if so approved by the Commission), and that it shall not hide or destroy evidence. A further requirement is that the applicant submits all the data, documents, and information it possesses and immediately ceases its participation in the restrictive agreement, unless otherwise required by the Commission, with the goal to collect evidence.

The Commission's Guidelines contain the same requirements for both full and partial immunity as set out under the Law and the Decree, while they particularly point out the importance of full, constant, and unconditional cooperation with the Commission. Further, the Guidelines regulate in more detail the commencement and course of the proceedings. It is stated under the Decree that the applicant can either (1) report the restrictive agreement and request immunity from fines or (2) approach the Commission without revealing its identity (e.g., via an intermediary) or the identity of other participants in the arrangement, with a short description of the agreement. In the latter case, the Commission will inform the applicant whether it has already had the information on such agreement (if not, it will instruct the applicant to apply for full immunity, and if it has, it will instruct the latter to apply for a partial immunity).

The Guidelines recognize the marker principle, in practically the same manner as under the EU Leniency Notice of 2006. They further regulate in detail the content of the applications, which should be submitted in the prescribed form. There is a possibility of submission of a verbal, instead of a written, application; however, this has never been used in practice. The possibility of submission of a joint application is explicitly excluded. Further, the application for partial immunity can be submitted during the proceedings, until the moment when the Commission informs the parties of the material facts and evidence on which it will base its decision (i.e., until it issues statement of objections, inviting the party to submit a statement of defense).

The rules for reducing the amount of fines are the following: (1) the fines for the first to report can be decreased by 30–50 %, (2) the fines for the second to report can be decreased by 20–30 %, and (3) the fines for the third and every further to report can be decreased by 20 %.

In general, notwithstanding the leniency, the decision on the competition infringement (including conclusion or implementation of restrictive agreement) includes the pecuniary fines as an administrative sanction (called the "measure for protection of competition"), prescribed for all competition infringements, including the restrictive agreements, amounting to up to 10 % of the annual turnover in the year preceding the commencement of investigation proceedings. There are also two bylaws regulating the calculation of the amount of fines in more detail. The key criteria are the seriousness of the breach and its duration, and additional factors include the intentions of the party committing the breach, cooperation with the Commission, potential repeated breach, incitement of other parties, etc. In the Commission's practice, the imposed fines have been in the range of 0.8–7 % of the annual turnover.

The first leniency application was submitted in October 2009, prior to enactment of the currently valid Law (in force as of 01 November 2009). A major retailer, Metro Cash and Carry, submitted an application for exemption from fines due to participation in numerous vertical agreements containing, among others, resale price maintenance, during the period of the validity of the old Law (per old Law, the fines were imposed not by the Commission but by courts in separate misdemeanour proceedings, which was one of its major shortfalls). That Law had a provision stating that the penalty shall not be imposed to the party who revealed the existence of the agreement and its participants prior to commencement of the proceedings, without further details). The idea of the applicant was to benefit from the exemption from fines under the old Law since the Law of 2009 contained different rules and requirements. In line with the transitional provision of the Law enacted in 2009, the old Law should have been applied to the proceedings *commenced* before its effective date. Therefore, the question of the applicable law was raised, as there was no consistent standpoint of the Commission. In particular, some officers thought that the moment when the proceedings were commenced was the time of filing of the application, while the others believed that it was the moment when the Commission rendered its conclusion on commencement. Finally, the Commission took the view that the proceedings commenced at the time of rendering the conclusion and, therefore, it decided to apply the new Law and the leniency application was subsequently dismissed.

The Commission started applying the leniency program in 2011, when a party to two different restrictive vertical agreements (Idea, a major chain of supermarkets) was granted full immunity from the fines[3] since it was the first to report and it fulfilled the other criteria (although, initially, the Commission refused to grant it leniency, it did so following a decision of the Administrative Court). It is also interesting that, in the Swiss Lion case, the Commission granted full immunity to both parties, accepting the finding of the Court that they had filed pursuant to the old Law and should be granted immunity based on that Law.

According to the Commission Report for 2011, the leniency program was declared as the most important way of revealing competition infringements, which represented an effective incentive for the parties to report restrictive agreements and discontinue competition violations.

In the practice of the Commission, the decision on leniency application (whether positive or negative) is a part of the general decision on infringement. Namely, the decision declares the infringement, sets forth the amount of fines and behavioral measures, and, finally, contains a declaration whether the applicant is granted the lenient treatment.

Pursuant to the Commission Report for 2012, there were no leniency applications submitted during that year. The Report for 2013 has not been published at the time of writing this Report, and thus it cannot be determined with certainty whether any leniency applications were filed during 2013 (note that no leniency decisions were published in 2013 and 2014; however, there is a possibility that the proceedings were commenced upon the leniency applications but have not been completed yet).

[3] Commission Case 4/02-13/2011 Commission vs Idea and Swisslion.

12.2.1.2 Commitment Decision

In accordance with the previously valid version of Article 58 of the Law, the Commission was entitled to stay the proceedings for the period of up to 6 months, if the breach of competition was insignificant and the party undertook to discontinue and not repeat the infringing action, i.e. that it would reimburse or restore the damage caused. According to the recent amendments to this Article, enacted at the end of 2013,[4] the Commission will stay proceedings if the party submits a proposal of measures it shall undertake in order to remedy the breach, including the conditions and deadlines for the implementation of such measures. A party can submit the commitment proposal until the moment of receipt of the statement of objections.

Once the Commission receives the commitment proposal, it shall publish its brief summary on its web page (including the main elements of the case and proposed measures) and invite all third interested parties to deliver their comments, state their positions and opinions within the following 20 days.

It is further explicitly stated under the Law that the Commission is not required to accept the proposal. If it does, it shall render a decision to stay the proceedings, under which it will set forth the deadline for implementation of the commitment and delivery of the respective evidence.

The proceedings shall continue if, within 3 years of rendering of the commitment decision, one of the following occurs: (1) the circumstances on which the decision was based have materially changed, (2) a party does not meet its commitments, or (3) the Commission determines that during the proceedings the party has submitted false, incomplete, or misleading evidence.

To the best of our knowledge, no commitment decision has ever been proposed or rendered in practice.

12.2.2 Discretion of Competition Authorities During Proceedings

In both leniency and commitment decision cases, the parties to the proceedings are to initiate the transactional proceedings, i.e. the Commission is not by the wording of the Law entitled to propose either leniency or commitment decision. However, by analogy with the practice of the Commission in other types of cases, the possibility that the Commission might verbally suggest to a party to file a commitment proposal (if it deems that there are grounds) cannot be excluded.

In leniency cases, the requirements for both full and partial immunity are regulated in detail, and thus the discretion of the Commission is not very wide—it should practically evaluate whether all of the requirements have been met. On the other hand, there are no detailed rules regarding commitment decisions, which is

[4] Per the explanation given by the Commission, the provisions regulating commitment decision were amended in order to comply with Article 9 of the EU Regulation 1/2003.

why the level of discretion of the authority, when deciding whether it would accept or reject the proposal, is rather high.

12.2.3 Legal Nature of the Transactional Decisions

There are no separate rules which would regulate the legal nature of the transactional decisions. Therefore, general rules for decisions of the Commission are applicable. The decisions of the Commission regarding infringements of competition law (either due to restrictive agreements or abuse of dominance) are full and final in the first instance, i.e. there is no body of the second instance and there is no right to appeal. They represent unilateral administrative decisions, immediately enforceable, since there are no second instance proceedings (they are, however, subject to judicial control of the Administrative Court[5]).

The final decision declaring the infringement, full or partial immunity (and in the latter case, the amount of fines) in case of leniency, or agreed commitments, including the deadlines for their implementation in case of commitment decisions, are part of the operational element (holding) of the decision. The justification also contains facts of the case, evidence, and reasoning.

12.2.4 Legal Consequences for the Parties

Both leniency and commitment decisions are binding for the parties. In case of leniency, the decision declares the breach, potential behavioral measures, and the declaration on exemption from or reduction of fine. If a party does not comply with the behavioral measures, the Commission is entitled to initiate new proceedings. As regards the commitment decisions, the situation is rather similar. The Commission monitors the implementation of commitments within the period of 3 years, and in case the party fails to implement the proposed commitments, it will lift the stay and resume the proceedings. In either case, the Commission may order new behavioral measures[6] and impose fines of up to 10 % of annual turnover (note that noncompliance with the measures or commitments, i.e. repetition of breach, would be considered an aggravating circumstance in line with the rules determining the amount of fines). A new decision is subject to the claim to the Administrative Court.

[5] For details, please see below under Sect. 12.3.5.

[6] There is as well a possibility of imposing structural measures; however, they have never been declared in practice.

12.3 Fundamental and Procedural Rights of the Parties

12.3.1 Right Against Self-Incrimination and Presumption of Innocence

The presumption of innocence and right against self-incrimination are widely recognized in the Serbian legal system, especially under the Criminal Code. Unlike the EU trends, the only criminalized anticompetitive behavior in Serbia is the abuse of dominance. Other types of infringements, e.g. bid rigging or cartels, are not subject to criminal prosecution. In accordance with the wording of the Criminal Code, a person[7] responsible for the abuse of a dominant or monopolistic position or the conclusion of a monopolistic agreement that causes distortion in the market, which causes harmful effects to competitors and consumers, shall be imprisoned for the period from 6 months up to 5 years. The practice of the criminal courts related to this criminal offense is practically nonexistent.

In contrast to the criminal proceedings, competition law investigations do not recognize the right against self-incrimination. The parties are obliged to submit all the relevant data and information, regardless of whether such data and information might incriminate the responsible persons or the company.[8] The duty to cooperate with the authorities is even more articulated in the transactional (i.e., leniency) proceedings than in the regular types of proceedings, as envisaged above under Sect. 12.2.1.1. In particular, full cooperation is one of the main requirements for granting lenient treatment. In all types of the proceedings, failure to cooperate, i.e. failure to submit the data and information required by the Commission, can be subject to a procedural penalty in the amount of EUR 500 up to 5000 for each day of noncompliance.

In accordance with the Commission's Guidelines regulating leniency, if upon receipt of the Commission's information that it does not qualify for the full immunity the applicant decides to withdraw the submitted evidence, that withdrawal does not affect the right of the Commission to obtain the evidence from either the party or other participants in the proceedings, using its powers. The applicant should give a statement within 5 working days of the receipt of the Commission's information whether it applies for partial immunity. If it does not provide the statement within the set deadline, it shall be deemed that the former has consented to the Commission's use of all of the submitted evidence in the proceeding.

Further, the regulations neither provide for any safeguards which would ensure that statements given by a party during the discussion cannot be used against the party in the case the negotiations fail nor set forth the rules on communication on a

[7] Per Law on Criminal Liability of Legal Entities, a company can also be subject to criminal liability and can be imposed a fine (in the most severe cases, it can be liquidated).

[8] The Law is silent on the right against self-incrimination and presumption of innocence and there is no formal requirement for either the waiver or acknowledgment of guilt or liability.

"without prejudice" basis. This shows that the right against self-incrimination practically does not exist in the transactional proceedings.

The Law recognizes the principle of legal privilege, stating under Article 51 that all types of communication between the defendant and its attorneys are privileged. However, the Chairman of the Commission has the right to investigate even privileged communications, in case it suspects that there is an abuse of such communication. This rule is drafted in a manner that it leaves huge discretionary right to the authority and practically denies the principle of privileged communications.

12.3.2 Right of the Parties to Know the Case Against Them (Statement of Objections)

In standard proceedings (which may end by rendering commitment decision), the proceedings commence by rendering a conclusion on commencement, which contains the description of actions that might represent a breach of the competition rules, legal grounds, and the reasons for investigation. That conclusion is delivered to a party and published both on the web page of the Commission and the Official Herald.[9] Upon completion of the investigation, the Commission is obliged to deliver to the defendant a statement of objections, containing all relevant facts and evidence. The party is entitled to submit a statement of defense in response to such allegation, whereunder it can propose new evidence and submit its defense argumentation.

The commitment proposal can be submitted as of the moment of the commencement of the proceedings, during the investigation but not later than by the receipt of the statement of objections. The same goes for a leniency application for partial immunity—it can be submitted during the investigation until the issuance of the statement of objections by the Commission. Therefore, the proposal for transactional solution has to be given by the parties *prior to* receipt of the statement of objections.

As regards certainty and predictability for the companies prior to the commitment decision, the Law is rather unclear and there is no relevant practice. Namely, per wording of Article 58 Paragraph 4 of the Law, if the Commission deems that it is likely that the proposed commitments will remedy the breach, it shall render a decision based on the proposal. However, according to Paragraph 5, it is not obliged to accept the proposal. Therefore, it is questionable whether the Commission can only accept/reject the proposal or can modify it as it deems appropriate. It could be assumed that the latter is the case; however, only practice (which does not exist at the moment) will tell.

[9] Unless the Chairman of the Commission deems that the publication might jeopardize the proceedings, in which case it is only delivered to a defendant.

As regards the level of fines, it is sufficiently predictable to companies since there are rather detailed rules regulating both the amount of fines in regular and leniency proceedings for the parties which qualify for the partial immunity.[10]

12.3.3 Right To Be Heard and Access to File

Pursuant to Article 33 of the Law, the following market participants are considered as the parties to the proceedings: (1) the entity which has filed the merger notification, (2) the parties that have submitted a request for individual exemption of the restrictive agreement, and (3) the entity against whom a proceeding has been initiated. It is further explicitly set forth that the persons who report a breach of competition law (i.e., who have filed a "complaint for investigation of breach of competition") or persons who submit the relevant data and information (which obviously is a reference to other market participants, i.e. suppliers, customers, competitors, etc.) do not have the status of a party.

Article 43 Paragraph 1 of the Law stipulates that the party is entitled to review the case file and photocopy "certain parts" of the file. Namely, the following parts of the file cannot be reviewed: (1) minutes on voting, (2) drafts of decisions, (3) documents marked as classified, and (4) protected data.[11]

Having in mind the above, it can be concluded that the parties have access to the case file as of the moment of the commencement of the proceedings.

12.3.4 Right to an Impartial Judge

Transactional resolutions (both leniency and commitment decisions) are rendered by the Commission Counsel and are full and final in the first instance, i.e. they are not either approved or ratified by another authority. However, the decisions are subject to the control of the Administrative Court, with whom the party dissatisfied with the decision can file a complaint (please see below under 2.2.5).

12.3.5 Right to Trial

A party to the competition proceedings can file a complaint with the Administrative Court within 30 days of the receipt of the decision. The proceeding before the court is regulated by the Law on Administrative Disputes, which is of rather general nature, and it states that, among others, the complaint can be filed because of an incorrect application of the substantive law (there are no further references to the

[10] For details, please see under Sect. 12.2.1.1.

[11] For definition of protected data, please see Sect. 12.4.4 below.

grounds for challenge).[12] Furthermore, the Administrative Court is overwhelmed with the significant number of pending cases arising out of numerous types of administrative procedures (e.g., tax, customs, election issues, etc.). There are no judges specialized in competition issues, although there are certain pending projects in place to advance their education. For the time being, the judges cannot appraise complex economic issues and therefore most of the judgments are based on formal and not substantive reasons. This has been appropriately noted by the EU Commission during monitoring the implementation of EU competition regulations and practice, as per Article 73 of the EU Accession Treaty.

The court can deny or accept the claim. In the latter case, it is entitled to render a new decision, i.e. exercise full jurisdiction (which does not happen in practice) or return the case file to the administrative authority (i.e., the Commission) for the repeated trial. The deadline for the Administrative Court to render the decision is 2 months and is complied with by the court in most of the cases.

However, judgments of the Administrative Court are subject to extraordinary legal remedies filed with the Supreme Court of Cassation, which is rather slow, and sometimes it takes it more than a year to render a decision.

The Commission (in its annual reports and public announcements) often expresses the need for educating judges of both courts and increasing their responsiveness, but so far, without visible results.

12.3.6 *Ne bis in idem*

The general *ne bis in idem* principle is widely recognized in the Serbian legal system, including criminal, civil, and administrative laws. There is no explicit reference to this principle under the Competition Law; however, it is recognized under the Law on Administrative Procedure (which is *mutatis mutandi* applicable to competition proceedings). Therefore, it can be concluded that any decision rendered in the competition proceedings, including transactional, cannot be the subject of a repeated proceedings, except in limited circumstances (e.g., if the decision was rendered based on false evidence/statements or by committing of a criminal offense, and similar).

A potential transactional resolution declaring the infringement does not trigger immunity from criminal prosecution (note that only the abuse of dominance is subject to criminal prosecution).[13]

[12] There are other grounds, e.g. rendering the decision by noncompetent body, etc., which are irrelevant for this Report.

[13] For details, please see 12.3.1 above.

12.4 Rights of Third Parties

12.4.1 Right To Be Heard and Access to File

Unlike the parties, whose rights of access to file are provided under Article 43 Paragraph 1 of the Law, as envisaged in detail under 12.3.3 hereunder, persons who have reported a breach of competition law, persons who have provided information, or others who may have interest in monitoring the proceedings, have the right to be informed of the course of the proceeding (Paragraph 3). Further, the persons who reported the breach (i.e., filed the “complaint”) are entitled to be informed of the outcome of their complaint. In accordance with the following Paragraph 4, the Counsel of the Commission should have rendered the rules which regulate in detail the content and manner of providing the access to the case file to the previously mentioned third persons. However, no such bylaw has been rendered to date. On the other hand, the Commission has rendered the Instructions regulating the publication of its decisions and disclosure of the data based on, among other things, the Notice on the rules for access to the Commission file in cases. These Instructions only regulate the manner of publication of the decisions and nondisclosure of protected data to the general public, i.e. there are no separate rules which would regulate access to the case files to the interested persons, as referred to under Article 43.

Therefore, it can be concluded that, at the moment, rights of third parties to access the case files are rather limited.

12.4.2 Right to Trial

As explained above under 12.4.1, third parties have the right to be informed of the course of the proceedings, but they are not considered a party to the proceedings.

As stated above under 12.2.4, the decisions of the Commission are final in the first instance, i.e. they are not appealable. Therefore, the only legal remedy is filing a complaint with the Administrative Court. According to Law on Administrative Disputes (Article 11), any physical or legal person, who deems that an administrative act (please note that the decisions of the Commission are considered administrative acts) has breached some of its rights or interests based on the law, can be a claimant in the administrative dispute.

It was questionable in legal theory whether the above can be interpreted in a manner that a third party to the competition proceedings, e.g. a competitor not satisfied with a decision of the Commission, would be entitled to file a complaint against such a decision.[14] The response was given by the Administrative Court[15]

[14] There is a possibility for so-called interested parties to participate in the court proceedings initiated by the party to the competition proceedings, however, only the parties “whom cancelation of the decision would directly cause damage” and not vice versa.

[15] The decision was not publicly available.

and subsequently confirmed by the Supreme Court of Cassation in 2013[16] (the Supreme Court of Cassation is competent for extraordinary legal remedies against judgments of, among others, the Administrative Court). Namely, the Commission granted an individual exemption to the exclusive distribution agreement made between Telekom Serbia (a state-owned major Serbian telecom operator) and Centrosinergija, on the distribution of prepaid mobile recharges. The consequence of such approval was that Telekom terminated the distribution agreements with all other distributors. Four of those distributors filed a complaint with the Administrative Court, claiming that their right to operate their business was breached by termination of the distribution agreements, directly caused by the decision of the Commission. Further, their argument in favor of the existence of the legal interest was by analogy to the right to file a complaint for breach of competition law in the competition proceedings. In its response to the complaint, the Commission expressed its position that the challenged decision only related to the parties in the agreement and thus did not affect their rights or interests. This position was confirmed by both the Administrative Court and the Supreme Court of Cassation.

The two mentioned court decisions represent the precedent with respect to the rights of third parties to challenge decisions of the Commission. Although the legal system in Serbia is not based on precedents and the general rule is that the courts are not bound by decisions of the same or other courts in similar matters, in practice, all the courts tend to firmly stick to the previous decisions and repeat the same argumentation.

Based on the above stated, it could be assumed that third parties, i.e. competitors, suppliers etc., are generally not entitled to challenge decisions of the Commission, including transactional decisions.

12.4.3 Follow-on Actions

“Follow-on” actions are regulated by only one provision (Article 73 Paragraph 2), which regulates that the damage caused by breach of competition regulations can be claimed before the court in a standard litigation proceeding, if the breach was determined by the decision of the Commission. The respective article was drafted in a manner that it could be interpreted that the decision of the Commission on infringement is a condition precedent to filing a complaint, i.e. that it is not allowed to file a “stand-alone” action. This would completely exclude a possibility of stand-alone actions and would be contrary to the practice of the European Court of Justice.[17] To the best of our knowledge, stand-alone actions have never been filed

[16] Supreme Court, Case 547/2012.

[17] In accordance with Article 73 of the Agreement on Stabilization and Association between Serbia and the EU, the Commission is obliged to apply EU regulations (directives and soft law), as well as the practice of EU institutions—European Commission and both the Court of Justice and the General Court.

in practice. Anyhow, it would be interesting to see the standpoint of the court with respect to this provision, i.e. whether the court might have a different interpretation.

Paragraph 2 of Article 73 of the Law further explicitly provides that, notwithstanding the decision on infringement, the existence of damage cannot be assumed, but it has to be proved before the court. This could potentially cause issues in practice, having in mind the awareness and knowledge of competition related issues by local judges and financial experts.[18] Therefore, it is questionable how those cases would be handled in practice. So far there has only been one case of follow-on action, before the civil and not commercial court, since the claimants were physical persons—raw milk producers. The complaint was filed upon rendering the decision of the Commission declaring an abuse of dominance by two milk producers—Imlek and Mlekara.[19] The case is still pending, and thus it can be concluded that at this point of time, the court practice is practically nonexistent.

Having in mind the above-explained current situation and lack of practice, the interests of the third parties are not adequately protected, and their right to follow-on action, although provided for under the Law, is very limited in scope.

12.4.4 Confidentiality and Publicity of the Transactional Solutions

As envisaged above under Sect. 12.3.3, the rule applicable to all the proceedings before the Commission, including transactional, is that *a party* has access to case file, except for minutes of voting of Commission's Counsel members, draft decisions, protected data, and classified documents.

According to definition in Article 45 of the Law, the protected data can be designated as such based on a request of a party to the proceedings, a third person who has reported a breach of competition or submitted the data to the Commission. The data shall be granted protected status only if the Commission finds that the interest of the person requiring protection is justified and that its interest is substantially more important in comparison to the public interest.

Classified documents are not at all defined under the wording of the Law; it may be assumed that those would be the documents designated as such by the Commission based on its discretion.

Third parties with legal interest are entitled to "monitor" the procedure; however, separate rules related to the manner of monitoring and submission of data and information to third parties have never been rendered by the Commission (for details, please 2.3.1 above).

According to Article 1 of the Instructions regulating the publication of the Commission's decisions and disclosure of the data, the Commission publishes the following decisions: (1) on commencement of the proceedings *ex officio*, (2) on

[18] Who would be in charge of calculating the amount of damages.

[19] Commission Case 5/0-02-533/2012 Commission vs. Imlek and Mlekara.

infringement of competition, (3) on individual exemption, and (4) on merger notification. All of the parts of the decision (introduction, holding, and confidential version of justification) are to be published.

Further, pursuant to Article 4 of the Instructions, the Commission publishes (1) its official opinions, (2) information on the outcome of the complaint for determination of breach of competition, and (3) conclusions on completion of a proceeding that it deems to be of general importance or of significant public interest. This formulation leaves too much discretion to the Commission since it freely decides which opinions and decisions it would publish, without any prescribed criteria. This leads to a lack of published practice, which is rather important in the sense of awareness of the market participants and competition advocacy.

12.5 Merger Control

Similarly to the EU position, the procedure can be completed in Phase 1 (summary procedure) or Phase 2 (investigation procedure). The deadlines for the Commission to render a decision are 1 month for Phase 1 and 4 months for Phase 2, calculated as of the moment the complete documentation is submitted.

If the procedure goes into Phase 2, the Commission can either prohibit the merger or grant conditional clearance, subject to commitments. Possible commitments are not listed under the Law, but it is left to be decided by the Commission on a case-by-case basis. In practice, the commitments (remedies) are both structural and behavioral. The most common measures imposed by the Commission were sale of part of the business (including appointment of a trustee for sale), submission of reports on sale to the Commission within certain time period, restrictions related to the sale of products to subsidiaries, restrictions related to the price of products, etc.

12.5.1 Negotiation of Remedies

According to wording of the Law (Article 66 Paragraph 1), if upon completion of Phase 1 investigation the Commission finds that the transaction does not meet the conditions for approval, it will inform the applicant of the relevant facts (statement of objections[20]) and invite it to provide its statement. According to Paragraph 2, the applicant is entitled to propose special conditions (i.e., remedies) it would be willing to accept (which would eliminate competition concerns) in order to obtain the approval. If the Commission finds that the proposed conditions are appropriate,

[20] Issuance of statement of objections by the Commission stops the clock, and the deadlines shall be calculated as of receipt of the response.

it will grant conditional approval, whereunder it will determine the deadlines for implementation of remedies and the manner of monitoring the remedies.

As set out above, the wording of the Law is rather wide and does not specify sufficient details. However, in practice, the parties sometimes propose remedies in the initial application, in order to speed up the process, i.e. not to wait for the Commission to invite them to provide the statement of defense. Furthermore, although the Law sets forth only the submission of statement, the parties to the transaction in practice hold meetings with the Commission, where the remedies are negotiated. Depending on the complexity of the transaction, the parties can hold several meetings with the Commission and exchange more than one written proposal. Finally, when remedies are agreed, the Commission renders its decision on conditional clearance or, if the agreement is not reached, on the prohibition of the concentration. The discretion of the competition authorities to accept or reject proposals of notifying parties is rather high.

In recent practice of the Commission, there have only been a few conditional approvals, e.g. the Commission approved foreign-to-foreign mergers in the airline industry,[21] whereunder the parties have been ordered to retain the code-sharing arrangement with the local air carrier for a certain time period and to refrain from increasing prices during the same period. Further, the Commission has conditionally approved the merger of two major retail chains and two sugar producers.[22] In both cases, the concentration was banned under the initial decision but conditionally approved upon cancellation of the decision by the court.

Once the Commission decides to run a Phase 2 procedure, such conclusion is published and third parties are invited to submit the relevant data and information. This is practically the only right granted to third parties, who can express their arguments against the proposed merger. However, the Commission is not obliged to take them into consideration.

Further, it has not happened in practice; however, it is questionable whether the Administrative Court would accept the right of a third party to file a claim against the decision on merger, having in mind its practice whereunder it has expressed the standpoint that only the parties to the competition proceedings are entitled to file the claim (please see 2.3.2).

12.5.2 Enforcement of Remedies

Again, since the Law does not contain any particular details, the practice has developed the role of a "Monitoring Trustee." This is a person appointed by the applicant to monitor the implementation of remedies and to communicate with the Commission, within the set deadlines. It has to be a person who is not related to the applicant or any physical persons related to the applicant, usually an attorney.

[21] Case 6/0-02-114/09 Lufthansa and Austrian Airlines.

[22] Case 6/0-02-3/2013 Sunoko and Hellenic Sugar Industry.

According to Article 67 of the Law, if the parties fail to implement remedies, the Commission is entitled to (note: does not have to but may) impose measures required for reestablishment or preservation of competition at the relevant market, i.e. deconcentration measures. Those could be divestiture of a company, sale of shares, termination of contracts, or any other similar measures required to establish market conditions which existed prior to merger in the relevant market.

Third parties (e.g., competitors and suppliers) are not entitled to require the enforcement of remedies, since they are not a party to the proceedings. They could only submit a complaint for determination of breach of competition based on general rules. However, as envisaged above under 12.4.1, they could only be entitled to receive the information concerning the outcome of their complaint (i.e., whether the proceedings have been commenced or not) and monitor the proceedings (there are no rules regulating details regarding monitoring).

To the best of our knowledge, the Commission has never ordered any deconcentration measures.

12.6 Impact on Transactional Outcome and on Market Intervention

In principle, according to the standpoint of the Commission, the purpose and the goal of leniency is to enable the investigation of cases of which the Commission would not otherwise have any knowledge. In its Report for 2012, the Commission stated that leniency is the most important tool for the discovery of competition infringements. Granting lenient treatment to the applicant is justified by the fact that the latter was not an initiator of the restrictive arrangement and it enabled the Commission to expose and fine other participants, which is a manner of individual and general prevention.

The situation is similar regarding commitment decisions, where ceasing infringing activities and prevention of further infringements is achieved without imposing fines.

Unlike a commitment decision, leniency could potentially increase the unpredictability of competition regulations. However, its beneficial effects seem to justify unpredictability to a certain extent.

12.7 Conclusion and Recommendations

Since the introduction of the first Competition Law in 2005 and the establishment of the Commission,[23] as the competent authority, until the present day, significant progress in the field of competition has been achieved. However, there is always

[23] There was the Antimonopoly Law in force and the respective antimonopoly authority in the seventies; however, the law was not applied in practice at all.

room for improvement, and thus the existing regulations should be amended and new regulations should be introduced in order to (1) reduce the discretionary rights of the Commission in order to increase legal certainty and (2) facilitate a more active role for third parties in competition proceedings.

Spain 13

Julia Suderow and Amaya Angulo Garzaro

13.1 Introduction

The Spanish Competition Act regulates cartels and other antitrust matters.[1] The Defence of Competition Regulation (CR) implements specific sections of the Competition Act, including procedural questions such as sanction proceedings and the Spanish Leniency Programme.[2] Furthermore, the Spanish Competition Authority has issued guidelines on termination of infringement proceedings by commitments and on the leniency programme in order to establish clear and secure proceedings for undertakings and interested parties.[3] As in other European Member States, Spanish Competition Authorities are also entitled to apply Articles 101 and 102 TFEU, where applicable.

This legal framework is enforced in Spain by the National Competition Authority (*Comisión Nacional de los Mercados y la Competencia*, the "CNMC") and by

[1] Law on the Protection of Competition 15/2007 of 3 July 2007, Official Gazette 2007 [159].

[2] Royal Decree 261/2008 of 22 February 2008, approving the Defence of Competition Regulation, Official Gazette 2008 [50] [11575–11604].

[3] See Guidelines on termination by commitments of infringement proceedings of October 2010, and Notice of 19 June 2013, issued by the Spanish National Competition Commission on the leniency program.

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certain regional authorities, if their behaviour impacts only on the Autonomous Region where they have jurisdiction.[4]

For many years, the administrative enforcement of the Spanish Competition Act followed strict procedural provisions. Certain behaviours were subject to prior authorisation, and infringements were punished by the public authorities.[5]

The first Spanish Competition Act was enacted in 1963. However, its enforcement was so discrete as to be nearly irrelevant.[6] According to the Defence of Competition Act 16/1989 of 17 July, practical experience of transactions in antitrust proceedings was limited due to strict procedural rules. The White Book for the reform of Spanish Competition Act of January 2005 described the experience in transactions as "disappointing" due to "severe procedures".[7] Specifically, Act 16/1989 limited transactions to the first stage of the proceeding even before the statement of objections. Moreover, any transaction was subject to the approval of all parties involved in the case, which also includes complaining parties.[8] These strict rules made any transactions nearly impossible.

Article 52 of the reform, which was implemented in October of 2007 and regulated through the Competition Act 15/2007 (Ley de Defensa de la Competencia, the "LDC"), established a new termination procedure through commitments and developed certain procedural aspects in Article 39 of the CR, thereby introducing negotiated solutions into the Spanish Antitrust Enforcement system.[9] Furthermore, this reform introduced a very successful leniency programme which includes opportunities for immunity and fine reductions, following the ECN Leniency Programme model.[10]

[4] Law 3/2013 established the creation of a single regulatory body in Spain, combining the functions of the former National Competition Commission (the "CNC") and the regulators of the following sectors: energy, telecommunications, media, post, railway transport, air transport and gambling. Law 1/2002 of 21 February regulates the allocation of cases between the national authority and the regional authorities. Regional authorities can only enforce their powers in relation to infringements whose effects are limited to its specific jurisdiction.

[5] L.A. Velasco San Pedro, La terminación convencional del procedimiento sancionador en materia de defensa de la competencia, Revista de derecho de la competencia y la distribución, 2008 (4), pp. 169–182.

[6] See F. Marcos, Competition law private litigation in the Spanish Courts, 1999–2012, Working Paper IE Law School, 2013(6) and Law on the Repression of Anticompetitive Practices 110/1963 of 20 July, Official Gazette 1963 Practices [175] [11144–11152].

[7] The Ministry of Economy and Taxation, Libro Blanco para la reforma del sistema español de defensa de la Competencia, 20 January 2005, http://www.cncompetencia.es/tabid/76/Default.aspx?EntryId=11366&Command=Core_Download&Method=attachment (accessed 15 October 2014).

[8] L.A. Velasco San Pedro, La terminación convencional del procedimiento sancionador en materia de defensa de la competencia, Revista de derecho de la competencia y la distribución, 2008 (4), pp. 169–182.

[9] Royal Decree 261/2008 of 22 February, approving the Defence of Competition Regulation, *Official Gazette* 2008 [50] [11575–11604] and Spanish Competition Act 15/2007 of 3 July, *Official Gazette* 2007 [159] [28848–28872].

[10] J. M. Beneyto, J. Suderow, El sistema de clemencia, in J. M. Beneyto and Prof. J. Maillo (dirs), La nueva Ley de Defensa de la Compentencia: análisis y comentarios, Bosch, Madrid 2009.

Since 2009, the CNMC investigation and sanctioning activity had grown rapidly, and, at the same time, settlement proceedings had become more interesting for undertakings. Nowadays, they are a real option for stakeholders, authorities and undertakings.

13.1.1 Background and Legal Basis

Settlement solutions in administrative procedures were introduced in the Spanish legal system in the area of urban planning legislation. The first regulation that included a settlement proceeding was the Valencia Soil Act of 25 June 1992.[11] Subsequently, the other Spanish regions adopted similar proceedings in this area. Furthermore, the National Government developed a national procedure in Act 30/1992 of 26 November which establishes the calculation of damages caused to the public administration.[12]

Settlement resolutions are used in several areas of Spanish Administrative Law, such as for instance

1. social security sanctions[13];
2. tax law[14];
3. traffic.[15]

Furthermore, they are also used as an essential tool in criminal proceedings as established by Articles 655 of the Code of Criminal Procedure and Articles 80 to 87 of the Criminal Code. Settlement terminations are very commonly used in criminal proceedings to establish penalties of under 2 years in prison. If the sentence is for less than 2 years, the condemned individual might avoid prison under certain circumstances.

Finally, Article 88 of the Administrative Procedural Code 30/1992 of 30 November establishes a general framework applicable to all types of settlement agreements that should enhance the functioning of the public administration.

The aforementioned rule, set out in Article 88 of the Administrative Procedural Code 30/1992 of 30 November, defines the general principles applicable to all types of settlement agreements with the Public Administration. As we will see, these principles have been developed for cartel cases by the Competition Act and the CR.

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[11] T. R. Fernández Rodríguez, La terminación convencional en el procedimiento sancionador por conductas Anticoncurrenciales, Revista de Derecho de la Competencia y la Distribución, 2012 (2), pp. 35–48.

[12] C. Guzman, J. Fornells, Commitment decisions in Antitrust cases under the Spanish Competition Act 15/2007, according to the guidelines of the Spanish Competition Authority, p. 4.

[13] See Article 40 of the Royal Decree 5/2000, of 4 August 2000.

[14] See Articles 155 and 156 of the General tax Act, of 17 December 2003.

[15] See Article 67 of the Traffic Act of 2 March 1990.

13.1.2 Benefits of Negotiated Solutions

Settlement agreements are viewed as elements of the administration of justice. The National Competition Authority, the CNMC, has emphasised that termination of a sanction proceeding through a settlement agreement or commitment decision is a faster way of ending investigations. Termination through commitments is an atypical conclusion in which the CNMC finishes the case accepting certain binding commitments offered voluntarily by the alleged infringers and concludes that there are no longer grounds for action by the CNMC. These commitments are binding on the parties without, however, establishing an infringement. Therefore, no fine will be imposed.

This procedure helps to re-establish proper competition conditions that might have been harmed by the anticompetitive behaviour detected. The commitments proposed solve competition concerns protecting consumer welfare and the public interest.

Furthermore, settlement procedures respect the principle of effectiveness enabling a better use of the resources of the Competition Authorities as the time and effort invested in inspections can be considerably reduced in comparison to traditional sanction proceedings.[16]

The main arguments in favour of a settlement with the Competition Authority are the avoidance of a formal infringement order and the corresponding sanction in the strict sense, simplification of the proceedings and faster resolution of the case. Moreover, with an agreement, uncertainty regarding the proceedings can be drastically reduced.

Nonetheless, settlement procedures might not be appropriate for companies with worthy defences because they have acted within the law and, in spite of that, they might feel under pressure to opt for the settlement proceeding, instead of fighting for their innocence.

CNMC Settlement procedures are limited to administrative sanction proceedings. Therefore, undertakings might face civil actions seeking for compensation of damages since the negotiated solution does not include the damages that could have been caused by the investigated conduct. Nevertheless, *follow-on actions* will be more difficult if they are based on a commitment decision as the content of the resolution does not include the finding of an infringement or the recognition of liability.

Finally, settlement proceedings might help to reduce the duration of investigations, thereby quickly restoring undistorted conditions of competition in the markets. In Spain, this procedure could be used until the draft resolution is submitted by the Investigation Division to the Council according to Article 52.3 of the LDC.

[16] See CNC, Guidelines on termination by commitments of infringement proceedings, October 2011, ap.10. http://www.cnmc.es/Portals/0/Ficheros/cnmc/normativa/COMUNICACI%C3%93N%20ATC.pdf, accessed 15 October 2014.

13.2 Termination of Infringement Proceedings by Commitment

13.2.1 Overview of Settlement Procedures

The provisions included in Articles 52 of the Spanish Competition Act and 39 of the Competition Regulation are also supported by the 2011 CNMC notice,[17] which defines applicable proceedings and concentrates the experience acquired during the first 4 years with this mechanism.

In principle, settlement agreements are available for any type of restriction of competition prohibited by Articles 1 to 3 LDC. Nonetheless, in general terms a termination by commitments will not be initiated when the investigation involves one off behaviours with no continuity or violations of Article 1 LDC related to a "hard core" cartel.[18]

Termination by commitments and the leniency programme—immunity or fine reduction—are alternative and not complementary options. The criteria to choose between both systems are mainly substantive; the settlement solution is not open for violations of Article 1 LDC or Article 101 TFEU relating to cartels or one off actions. Undertakings that have infringed this Article can apply for the leniency programme in order to obtain a reduction of the potential fines that might be imposed by the CNMC.

Theoretically, companies do not have any influence as long as the characterisation of the alleged conduct is clear. However, in some cases, the company should try to clarify this issue with the Investigation Division before filing any kind of request.

13.2.2 Start and Timing of the Negotiation with the Authority

Time is an important factor for the Authority. Therefore, the CNMC encourages undertakings to signal their interest in presenting commitments as soon as possible. The earlier the request is made, the more feasible it will be to finalise the proceedings through a commitment decision. On the contrary, the greater the CNMC's conviction that a violation has been committed, the more unlikely it is that the CNMC will conclude that the public interest can be safeguarded without punishing the anticompetitive conduct. In this regard, it is expected that the further the investigation progresses, the less beneficial will be coming to terms with the commitments because the positive effects of satisfying the public interest in a swift

[17] CNC, Guidelines on termination by commitments of infringement proceedings, October 2011, http://www.cnmc.es/Portals/0/Ficheros/cnmc/normativa/COMUNICACI%C3%93N%20ATC.pdf (accessed 15 October 2014).

[18] Cartel offences can be dealt through the specific leniency programme established by article 62 LDC that includes not only immunity but also reduction of the fine.

conclusion will be weakened by the time elapsed, in order to allow an effective and rapid implementation of the remedies that put an end to the competition concerns.

Early submissions are therefore welcomed, and they should be generally presented before the end of the stipulated time limit for replying to the statement of objections. After this stage of the proceedings, a request is no longer possible. Nonetheless, the proposal can also be made after the statement of objections is notified to the undertakings. Therefore, the proposing undertaking shall replace limiting commitments to the behaviours defined in the statement of objections.[19] It should be highlighted that, in a recent case, the National Court clarified that bringing forward a proposal for an agreement after the motion for a resolution is issued should not be considered since the instruction stage will be finished. The Supreme Court is currently reviewing this decision and evaluating if the final date should be the date of the proposal to the Council or the date of issuing the proposal.[20]

The decision to initiate theses proceedings is within the Spanish Competition Authority's discretion. In each case, the CNMC must apply the margin of authority it holds to evaluate the issues involved. According to Article 39 CR, the decision whether to begin the process of reaching a termination by commitment rests with the Investigation Division of the CNMC upon prior proposal of the affected undertaking.

The alleged infringers may ask the Investigation Division to start the settlement proceeding once the corresponding sanction proceedings have been opened. Without prejudice to what is set out above, the Investigation Division can invite the affected undertakings to seek a termination by commitments.

13.2.3 Discretion of the Spanish Competition Authority

Article 52 of the LDC sets out the initiative to propose a negotiation to the undertakings, and the Regulation provides further detail indicating that the Investigation Division can adopt a negotiated termination after a proposal regarding the alleged infringers. Nonetheless, the Authority can also invite the undertakings to make a proposal about settlement proceedings as established in the Notification. The Spanish Competition Authority has complete discretion as it can freely decide whether to accept a proposal to negotiate.

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[19] C. Guzman, J. Fornells, Commitment decisions in Antitrust cases under the Spanish Competition Act 15/2007, according to the guidelines of the Spanish Competition Authority, CNC, W. P. IE Law School, A18-197, p. 10.

[20] C. Guzman, J. Fornells, Commitment decisions in Antitrust cases under the Spanish Competition Act 15/2007, according to the guidelines of the Spanish Competition Authority, CNC, W. P. IE Law School, A18-197, p. 10. Judgment of the National Court 3267/2012—Empresas Estibadoras, of 5 July 2012, rec. 800/2009. Decision of the CNC in the case S/0232/10, *Prisa Zeta*, of 24 November 2011.

Usually, the Investigation Division will begin to analyse negotiated solution after the proposal regarding the undertaking is filed, if the substantive requirements are fulfilled. If the proposed agreement is not suitable for the negotiated solution, the Investigation Division will inform the undertaking.

In this respect, it should be noted that the undertakings have no right to a negotiated proceeding. They can propose it, and if the Competition Authority agrees, they will enter into negotiations.

After the first proposal regarding the undertaking is filed, the Authority will examine the proposal, and then discussions about the content of the commitments may take place. However, in practice, the Investigation Division invites and facilitates meetings and information exchanges in order to obtain the best commitments to preserving competition and the public interest.

The CNMC decision will be influenced by the following objective criteria:

1. when and how the undertaking presents the proposal;
2. nature of the investigated conduct and effects of the conduct in the market;
3. feasibility of the proposed commitments.

The proposal will be accepted only if it addresses the competition concerns and effectively solves the competition issues identified in the market. The commitments accepted must safeguard the public interest. The law leaves the CNMC some discretion for deciding the circumstances in which a termination by commitments is admissible. This discretion is necessary since it is very difficult to determine *ex ante* all the potential behaviours that can result from a negotiated solution.

The parties have the right to present new proposals if the first proposal is rejected by the CNMC. The second version of the proposal must be presented within 10 days from the reasoned statement of inadequacy of the first commitment proposal. Therefore, the parties do not have any right to a negotiated outcome, although the statement about inadequacy must be reasoned.

The object of the negotiation proceeding is to achieve a practical and reasonable solution to the issue detected with the cooperation of the investigated undertakings and affected parties.[21] The principle of equal treatment has to be respected throughout the proceedings.

The CNMC follows the principle of proportionality if the agreement proposed resolves the competition issue detected and if the freedom of the undertaking is not restricted in an unjustified manner.

[21] C. Guzman, J. Fornells, Commitment decisions in Antitrust cases under the Spanish Competition Act 15/2007, according to the guidelines of the Spanish Competition Authority, CNC, W. P. IE Law School, A18-197, p. 13.

13.2.4 Content of the Agreement

The request for termination by commitments can be made even if only some of the presumed infringers participate in the investigation, but it must cover all of the presumed prohibited behaviours for which the applicant is responsible, identified when the proceeding was formally opened or, if applicable, in the statement of objections.

The application for initiation of the termination by commitments should contain the general contours of the commitments offered, along with a statement explaining and justifying why these proposals are adequate and sufficient to permit termination on the basis of commitments. Article 39 RDC requires resolution of the effects of the conduct investigated, and public interest must be guaranteed.

The proposed commitments may be of a behavioural or structural nature. Thus, for instance, the proposal can include modification of behaviour; finalisation of certain arrangements; elimination of provisions from agreements, by-laws or contracts; disinvestment; or refraining from engaging in certain economic activities.

The following requirements will be viewed positively by CNMC[22]:

1. effective, clear and unequivocal resolution of the competition issues detected;
2. quick and effective implementation of the commitments offered;
3. workable and efficient monitoring of the commitments.

The practical experience of the CNMC indicates that the following types of commitments are easy to implement and control: suppression and modification of certain clauses of agreements, regulations or by-laws that have provoked unjustified restriction of competition.[23]

Furthermore, the compromise to make public a resolution of the Authority between the members of an association and other third parties is also a clear proposal that can be easily accepted.[24]

However, parties to the agreement should avoid unclear or vague commitments that do not really resolve the competition issues detected. Practice has shown more complex commitments establishing guarantees for future behaviours or certain

[22] Para 24 of CNC Guidelines on termination by commitments of infringement proceedings, October 2011, http://www.cnmc.es/Portals/0/Ficheros/cnmc/normativa/COMUNICACI%C3%93N%20ATC.pdf, accessed 15 October 2014.

[23] Decision of the CNC in the case S/0127/09, *Procuradores*, of 20 May 2010; Decision of the CNC in the case S/0189/09, *Consejo General de Colegios oficiales de aparejadores y arquitectos técnicos*, of 28 July 2010; Decision of the CNC in the case S/0203/09, *COAPI*, of 22 December 2010.

[24] See Decision of the CNC in the case S/0127/09—Procuradores, of 20 May 2010; Decision of the CNC in the case S/0189/09, *Consejo General de Colegios oficiales de aparejadores y arquitectos técnicos*, of 28 July 2010.

behavioural rules[25] that were not sufficiently detailed; in some occasions, the affected company did not know how to act. The liberty of the undertaking was restricted in an unjustified manner.

13.2.5 Content of the Termination Resolution

Termination through commitments before the Spanish Competition Authority does not actually imply acknowledgment of guilt or liability. In the case of a settlement, the final decision will not include any explicit finding about the liability of the undertaking involved. In its guidelines of September 2011 about settlement proceedings, the CNMC has clarified that, despite of the acceptance of the settlement termination of the sanction proceedings and without evaluating the infringement of Spanish Antitrust provisions, the CNMC can report about the compatibility of the affected conduct with the Law. Furthermore, the Authority will explain why the proposed commitments will solve the issue detected in the market.[26]

The agreement and termination decision will not contain any reference about mandatory cooperation between the undertaking and CNCM, but at an initial stage the undertaking shall meet CNMC and explain the proposed agreement and conditions. Moreover, the proposed monitoring of the agreement should be effective.

13.2.6 Third Parties and Termination by Commitments

Third parties do have certain influence during the negotiation, and their rights have to be considered both during and after the process. Among others, the Investigation Division will send the non-confidential version to other parties involved in the investigation and other interested parties. It may also send a non-confidential version of the commitments offered to other parties not involved in the proceedings, within the framework of the requests for information provided in the law. These parties will have 10 days to present their allegations or respond with the information requested, which will be used to assess the adequacy of the commitments. Third parties are usually invited to meetings with the undertaking and the Investigation Division in order to clarify if the proposed commitments can be implemented and will solve the detected competition issues. If the resolution includes a modification of conditions or behaviours in the market, the affected parties shall accept them.

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[25] Decision of the CNC in the case 2738/06, *GALP*, of 06 April 2011; Decision of the CNC in the case 2697/06, *Cepsa Estaciones de Servicio S.A.*, of 29 July 2009; Decision of the CNC in the case 2800/07, *Signus Ecovalor y Fabricantes Neumáticos*, of 20 May 2010: Decision of the CNC in the case S/0246/10, *Vocento/Godó*, of 30 June 2011.

[26] See paragraph 45 of CNC Guidelines on termination by commitments of infringement proceedings, October 2011, http://www.cnmc.es/Portals/0/Ficheros/cnmc/normativa/COMUNICACI%C3%93N%20ATC.pdf (accessed 15 October 2014).

Third parties can present their comments to the proposal of settlement agreements before the Competition Authority decides whether to accept the agreement. However, the Authority can decide independently. Therefore, settlement procedures are not exposed to high risk by the interests of other parties.

As mentioned above, settlement resolutions do not include an evaluation about the infringement or, in particular, about the parties' liability to the agreement. Therefore, simple following actions based on settlement resolutions are not possible. However, if the agreement includes references regarding distortion of competition, this information can still be used by the claimant in a civil proceeding.

In any event, stand-alone actions are available for potential claimants, but they shall provide evidence about the liability of the undertaking by themselves.

13.2.7 Nature of the Settlement

After the negotiation stage, the Investigation Division forwards the proposal after the negotiation to the CNMC Council. The Council then decides if the proposal respects the principles established in the LDC and issues the corresponding decision containing the commitments reached. In particular, the CNMC Council will review the proposal if the proposed commitments solve competition concerns detected in the market and guarantee the public interest. If the proposal does not fulfil these requirements, the undertakings affected will have additional time to present a new version of the proposal. The CNMC Council can (a) decide to finish the sanction proceedings through a commitment decision if the proposal is acceptable or (b) consider the proposed commitments inadequate.

The effects of the agreement will be the same as for a sanctioning decision, but they usually imply a waiver of the right of appeal before the courts. The commitments are binding when they are included in the operative part of the CNMC's final termination decision and when this decision becomes firm. In the proceeding against the Sugar Cartel,[27] the Supreme Court has clarified that findings of facts in administrative proceedings will be given effect by civil courts which, moreover, may only deviate from the legal interpretation given to these findings if such interpretation is explicitly and adequately reasoned. In both cases, the court based its decisions about the illegal conduct on the facts described in the administrative proceedings. Non-compliance with the settlement resolution is a severe infringement sanctioned by section 62.4 c) of the LDC. In the case of non-compliance, the CNMC can reopen the sanction proceedings and also impose coercive fines of up to EUR 12,000 per day as established in Article 67 LDC.[28]

[27] Judgment of the Spanish Supreme Court 5462/2012, *Acor*, of 8 June 2012, rec. 2163/2009 and Judgment of the Spanish Supreme Court 5819/2013, *Ebro Puleva*, of 7 November 2013, rec. 2472/2011.

[28] J. M. Beneyto, J. Suderow, El sistema de clemencia in: J. M. Beneyto and Prof. J. Maillo (dir), La nueva Ley de Defensa de la Competencia, analisis y comentarios, Bosch, Madrid 2009.

13.3 Leniency and Fine Reduction Programmes

13.3.1 Introductory Remarks

The 2007 Competition Act introduced a leniency system granting total immunity and reduction of fines to cooperating undertakings and individuals in cartel cases. This system is further defined in the Competition Regulation and the 2013 reformed leniency guidelines.[29] As in other European countries, full immunity is reserved for the first company or individual who provides evidence which, in the view of the CNMC, will enable it to undertake an inspection or establish an infringement of Article 1 LDC. Cartels are defined by the Competition Act as “any secret agreement between two or more competitors regarding price fixing, the fixing of production or sales quotas, market sharing, including bid rigging, or import or export restrictions”. This definition has also been extended by the CNMC in its resolutions to mere exchange of sensitive commercial information between competitors.[30]

Full immunity is reserved for the first undertaking or individual to provide evidence that enables the CNMC to order an inspection or prove a cartel infringement. This is subject to the condition that the CNMC does not already have sufficient evidence. Partial leniency or reduction of the fine is granted to undertakings when they present evidence that adds significant value with respect to the evidence that the CNMC already possesses, so that the investigation of the infringement is significantly easier for the CNMC.

The second and subsequent applicants providing additional evidence may see a reduction in their fines from 30 % to 50 % for the first undertaking to provide significant added value, 20 % to 30 % for the second and a maximum of up to 20 % for subsequent undertakings.

Applications can be submitted written or orally, together with the relevant evidence. Legal representatives or members of management bodies who have participated in the infringement will also be covered by the leniency application for the corresponding undertaking. Leniency and reduction of the fine are subject to following conditions:

1. immediate cessation of participation in the infringement, unless the CNMC considers participation necessary to preserve the effectiveness of an investigation;
2. non-destruction by applicant of any evidence related to the leniency application;
3. no direct or indirect disclosure to third parties of the fact of the application or any of its content;
4. no coercion measures against other undertakings or members of the cartel;

[29] J. M. Beneyto, J. Suderow, El sistema de clemencia in J. M. Beneyto and Prof. J. Maillo (dirs), La nueva Ley de Defensa de la Compentencia, análisis y comentarios Bosch, Madrid 2009.

[30] Decision of the CNC in the case S/0086/08, *Peluquería Profesional*, of 2 March 2011.

5. full and continuous and diligent cooperation with the CNMC during the complete investigation stage.

13.3.2 Cooperation Duties of the Undertakings

As mentioned above, during the investigation, the applicant shall cooperate fully and on a continuous basis and expeditiously throughout the investigation and end involvement in the alleged cartel except for what would, in the CNMC's view, be reasonably necessary to preserve the effectiveness of the inspections.[31]

Full cooperation implies the following duties:

1. providing without delay all relevant information and evidence relating to the presumed cartel that is in its possession or available to it;
2. being fully available to the CNMC to respond, without delay, to all requests that could contribute to establish the underlying facts;
3. facilitating interviews with the company's employees and current executives and, if applicable, former executives;
4. refraining from destroying, falsifying or concealing relevant information or evidence in relation to the presumed cartel; and
5. abstaining from disclosing the filling or content of the application for the fine exemption or reduction, prior to notification of the statement of objections or to the time established by the Authority.

Furthermore, applicants should not destroy any evidence relating to the cartel or disclose the intention to submit an application or its content to third parties other than other National Authorities or the European Commission.

Applicants for reduction are also required to respect the aforementioned cooperation rules.

Additionally, the applicant shall recognise the infringement without any limitations in order to obtain full reduction of the fine that otherwise would have been imposed by the CNMC.

If the undertakings have applied for leniency, they shall respond to all questions submitted by the CNMC. In any event, the questions should be related to the case itself. Leniency applicants have to provide sufficient evidence to demonstrate infringement. This can of course imply the involvement of third parties such as other cartel members and employees, managers, etc. who participated in the cartel.

The Spanish Competition Authority applies strict rules in order to determine if undertakings have fully and continuously cooperated. In certain cases in which the information provided by an undertaking had added value, the CNMC has not

[31] Ap. 66 of CNC, Comunicación sobre el Programa de Clemencia, 19 June 2013, Official Gazette 2013 [196] [60718–60733].

granted full immunity to the undertakings as it considered that they had not cooperated enough.[32]

Without prejudice, the applicants have the right to know if the CNMC intends to maintain the conditional immunity or not. In the statement of objections, the Investigation Division shall explain if it maintains the conditional exemption that was granted. Furthermore, over the course of the investigation, the Investigation Division will evaluate if the applicant is fulfilling its cooperation duties. If it believes that the duties have been breached, it will submit a reasoned proposal to the CNMC Council, so that the applicant has the opportunity to submit pleadings on the matter. However, the evaluation of the Investigation Division is not binding for the Council. In the case *Vinos de Jerez*, the Council did not follow the recommendation and rejected immunity because the information provided by the applicant had in any event already been collected in dawn raids carried out before the application, although this information was not checked by the Authority at the time of the application, and because the conduct of the applicant's defence was inconsistent with the concept of cooperation.[33]

This cooperation duty lasts until the end of the sanction proceedings. Applicants who try to hinder the investigation or the proceedings could be sanctioned and will not have access to leniency or fine reduction schemes as established in Sections 65.2 LDC and 52 of the Competition Regulation RDC.

The CNMC decision regarding immunity is subject to judicial review if the applicant considers that its rights have not been respected.

13.3.3 Fundamental and Procedural Rights of Leniency Applicants

The Spanish competition sanctioning system is enshrined in Administrative Law. Nonetheless, criminal law principles do also apply to the administrative sanction proceedings. The fundamental rights of the undertakings investigated must be respected throughout the proceedings.

Parties have the right to avoid self-incrimination and are presumed innocent during the sanction proceedings as long as they do not participate in the leniency programme. Obviously, applicants for leniency or fine reduction must recognise their liability and incriminate themselves.

A leniency applicant's waiver is voluntary and rewarded with full immunity. The undertaking can freely choose if it wishes to apply for leniency. Therefore, this waiver is fully compatible with the rights of the parties involved.

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[32] Decision of the CNC in the case S/0086/08—Peluquería Profesional, of 2 March 2011 and Decision of the CNC in the case S/0244/10, *Navieras Baleares*, of 23 February 2012.

[33] Decision of the CNC in the case S/0167/09, *Productores de Uva y Vinos de Jerez*, of 6 October 2011.

The National Courts have already explicitly recognised that the presumption of innocence also applies to any competition law proceedings against companies if the matter can result in imposition of a fine.[34]

On several occasions, the Spanish Courts have established that the presumption of innocence is not violated if the administrative case is based on probable causes under specific circumstances.[35] Probable causes are accepted if they can demonstrate the infringer's alleged conduct. The Courts must also clarify how they find that the conduct was committed by the sanctioned individual basing their reasoning on probable causes. These findings cannot be irrational, absurd or arbitrary.

By the end of the investigation stage, which can last up to 18 months, the Investigation Division will issue a statement of objections.[36] Before the statement of objections is issued, the parties can discuss matters with the CNCM, but there is no specific obligation for the CNMC to issue written objections.

The complete file, including an application for leniency, can only be reviewed by the other undertakings which did not apply for leniency after the statement of objections is disclosed to all undertakings investigated.[37]

13.3.4 Rights of the Undertakings and CNMC Powers of Investigation

The Authority has a full catalogue of powers during the investigation stage. During an inspection or dawn raid, they can interview individuals and enter premises, private homes and vehicles if the affected party accepts or is with a judicial warrant. Usually, the CNMC requests a warrant before inspection in order to avoid any delays or difficulties. The investigation is restricted to the matter at hand, and the Authority will exclude documents protected from the inspection by legal privilege.[38] Fishing expeditions or complete copies of employees' hard disks are not allowed and exceed what is necessary to fulfil the objective of the inspection.[39]

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[34] Judgment of the National Court 40/2013, *Licitaciones de carreteras*, of 8 January 2013, rec. 656/2011.

[35] The Spanish Supreme Court reiterates the Spanish Constitutional Court's doctrine. For an example, see Judgment of the Spanish Supreme Court 426/1999, *Farmacéutica Veterinaria*, of 28 January 1999, rec.: 263/1995.

[36] Article 50 LDC. This time period can be extended in case it is suspended by the Authority; see Decision of the CNC in the case S/0086/08, *Peluquería Profesional*, of 2 March 2011.

[37] Article 51 LDC. Interested parties of the proceeding will have access to said information if required to submit a response to the statement of objections.

[38] Judgment of the National Court 4235/2009, *Asociación Nacional de Perfumería y Cosmética (STANPA),* of 30 September 2009, rec. 3/2008, confirmed by the Judgment of the Spanish Supreme Court 3887/2012, of 27 April 2012, rec. 6552/2009; Decision of the CNC in the case S/0086/08, *Peluquería Profesional*, of 2 March 2011.

[39] Judgment of the National Court 4235/2009, *Asociación Nacional de Perfumería y Cosmética (STANPA),* of 30 September 2009, rec. 3/2008, confirmed by the Judgment of the Spanish Supreme Court 3887/2012, of 27 April 2012, rec. 6552/2009; Decision of the CNC in the case S/0086/08, *Peluquería Profesional*, of 2 March 2011.

13.3.5 Legal Privilege

Documents drafted by external lawyers are protected by legal privilege and cannot be used by the Authority. After a brief examination, the Investigation Division shall return any document protected by this privilege to the undertaking affected.

In-house legal advice is not specifically protected by the rules of legal privilege. Although Spanish legislation does not regulate this matter, the National Court has followed the principles of the ECJ in the Akzo Nobel case, excluding in-house legal advice from the legal privilege.[40]

13.3.6 Protection of Confidentiality and Disclosure Rules

The main risk for the leniency applicant or undertakings interested is that they have to provide information that can be used by the CNMC or by third parties with access to the proceedings or who are notified by the CNMC if they request information from them. It is not possible to negotiate the fine in the sanction proceedings, but an undertaking can try to obtain a reduction of the fine through the leniency programme and cooperation with the Authority as described above.

In principle, interested parties, complainants and other investigated undertakings can request access to the file, including corporate statements, minutes of hearings or meetings and any other documents submitted by companies during the sanction proceedings as long as they are not protected by the confidentiality rules established in the LDC and CR. Investigated undertakings can request confidential treatment of business secrets. This information will not be revealed to other parties at any time. However, confidential information cannot be used in the Authority's statement of objections or in the resolution and therefore will not be applicable when deciding if the application fulfils the requirements of the leniency programme.

The information filed by the leniency applicant is subject to specific confidentiality rules. Applicants can submit oral statements in order to protect themselves against future follow-on claims. Oral submissions are recorded in the CNMC offices and then transcribed. Any evidence submitted during the recording will be attached to the transcription.

As mentioned above, the application and the documents, statements and evidence filed are kept confidential in a separate file until the statement of objections is disclosed to all the parties investigated. Moreover, the identity of the leniency applicant is maintained confidential during the investigation.

The CNMC and the regional Competition Authorities must disclose any information requested by the Spanish Civil Courts. However, a strict and express

[40] CJEU case C-97/08 P, *Akzo Nobel NV y otros v. Comisión*, ECR. 2009 I-8237 and Judgment of the National Court 4235/2009, *Asociación Nacional de Perfumería y Cosmética (STANPA),* of 30 September 2009, rec. 3/2008, confirmed by the Judgment of the Spanish Supreme Court 3887/2012, of 27 April 2012, rec. 6552/2009.

exception protects those documents declared confidential by the Authorities. Leniency applications and oral statements can be declared confidential at any time. Furthermore, Spain will not grant pre-trial discovery of documents as notified to the Hague Conference for Private International Law. Finally, trial disclosure is subject to strict procedural rules.

13.4 Conclusions

According to the Spanish Competition Act, a firm which might be engaged in an anticompetitive behaviour has two options to avoid the sanction before its imposition: the commitment procedure or the leniency programme. Both are limited by a "time factor": the first because commitments should be generally presented before the end of the time limit for replying to the statement of objections; the second because of the risk of another prior undertaking.

After having analysed both, and starting with the commitment procedure, we can conclude that the main benefits of this option of the Spanish Competition Act are avoidance of a formal finding of an infringement against the concerned undertaking, which means that no fine will be imposed, and faster resolution of the case, with less uncertainty about the binding results of the proceedings. On the other hand, it also benefits society because it solves all competition concerns protecting consumer welfare and the public interest in a sufficient and adequate manner.

However, the disadvantages must be also taken into account, especially the fact that an undertaking might feel under pressure to opt for the settlement proceeding instead of fighting for its innocence and the hurdle that applicants for compensation will suffer because follow-on actions will be more difficult. No infringement is established through this atypical procedure, and it does not actually imply acknowledgment of guilt or liability. The first action might be a problem in order to guarantee the fundamental rights of the parties.

In the case of the leniency programme, the main advantages for companies are immunity or reductions that the Authority might grant them, and for the authorities, the information provided must be enough to enable it to undertake an inspection or to establish an infringement of Article 1 LDC and Article 101 TFEU. Therefore, investigation of the infringement is significantly easier for the CNMC.

Nevertheless, the main issue is the discretion the CNMC has in order to consider if the evidence added significant value. Furthermore, there are cases where the CNMC did not grant full immunity to the undertakings as it considered that they had not cooperated enough.

Despite the above risk, the leniency programme is fully compatible with the rights of the parties involved because the undertaking can freely choose if it wants to apply for leniency.

Appendix 1: Procedures Finalised by a Commitment Decision

Date	Case
16/03/2009	S/0076/08 Convenio de Contact Center
17/03/2009	S/0077/08 Convenio Seguridad
29/07/2009	2697/06 Cepsa Estaciones de Servicio S.A.
28/01/2010	S/0020/07 Trío Plus
20/05/2010	2800/07 Signus Ecovalor y Fabricantes Neumáticos
20/05/2010	S/0127/09 Procuradores
28/07/2010	S/0189/09 Consejo General de Colegios oficiales de aparejadores y arquitectos técnicos
07/09/2010	SA CAN/0003/10 Explosivos Canarios
13/09/2010	S/0162/09 Semillas de Girasol
29/11/2010	S/0002/07 Colegio Arquitectos Técnicos Cuenca
30/11/2010	S/0255/10 Puntos Suministro E.ON
22/12/2010	S/0203/09 COAPI
24/01/2011	S/0096/08 Fábrica Nacional de Moneda y Timbre
17/03/2011	S/0012/07 Puerto de Barcelona
23/03/2011	S/0156/09 AISGE
06/04/2011	2738/06 GALP
30/06/2011	S/0245/10 Antena 3/Veo TV/Disney Chanel
30/06/2011	S/0246/10 Vocento/Godó
22/09/2011	S/0302/10 Orona/Omega
28/12/2011	S/0235/10 Convenios FEMP-Consejos Generales de Colegios Profesionales
16/08/2012	S/0338/11 Subaru
18/02/2013	S/0386/11 Ionmed Esterilización
19/02/2013	S/0348/11 Unión Interprofesional de Madrid
22/03/2013	S/0418/12 All Sports Media
17/09/2013	S/0291/10 Mutualidad General Abogacía
20/09/2013	S/0337/11 Distribuidores de CO2
12/06/2014	S/0457/13 General Motors

Source: information from the CNC and CNMC

Appendix 2: Decisions Where the Leniency Programme Has Been Applied

Date	Case
10/12/2009	S/0085/08 Dentífricos
21/01/2010	S/0084/08 Fabricantes de Gel
28/07/2010	S/0091/08 Vinos Finos de Jerez
31/07/2010	S/0120/08 Transitarios
02/03/2011	S/0086/08 Peluquería Profesional
24/06/2011	S/0185/09 Bombas de Fluidos
10/11/2011	S/0241/10 Navieras Ceuta-2
02/12/2011	S/0251/10 Envases Hortofrutícolas
23/02/2012	S/0244/10 Navieras Baleares
02/08/2012	S/0287/10 Postensado y Geotecnia
15/10/2012	S/0318/10 Exportación de Sobres
07/11/2012	S/0331/11 Navieras Marruecos
21/11/2012	S/0317/10 Material de Archivo
15/02/2013	S/0343/11 Manipulado de Papel
28/02/2013	S/0342/11 Espuma de Poliuretano
25/03/2013	S/0316/10 Sobres de Papel
23/05/2013	S/0303/10 Distribuidores Saneamiento
30/07/2013	S/0380/11 Coches de Alquiler
26/06/2014	S/0445/12 Equipos contra Incendios

Source: J. R. Borrell, J.L. Jiménez, and J. M. Ordóñez, J. M. "Redefiniendo los incentivos a la colusión: el programa de clemencia" *Medio siglo de aplicación de las normas de Competencia en España*, CNC, 2013(07), http://www.cncompetencia.es/Portals/0/PDFs/Docs/Borrell_Jimenez_Ordonez_Leniency_CNC.pdf (accessed 15 October 2014, p. 17, updated by authors)

Sweden

14

Helene Andersson

14.1 Introduction

Ever since Sweden decided to join forces with the other EU Member States and become part of the EU, Swedish competition legislation has been closely modelled on its EU equivalent. Last year, Sweden celebrated the 20th anniversary of its modern competition law regime. The competition law rules are currently contained in the Swedish Competition Act (hereinafter "the Act"),[1] which entered into force on 1 November 2008. However, the substantive antitrust provisions have been the same since 1993 and mirror Articles 101 and 102 TFEU.

Initially, it was only the substantive rules that were brought in line with EU competition legislation, as the decision was made to shape the procedural rules in another manner. Unlike the European Commission, the Swedish Competition Authority (hereinafter "the SCA") has not been granted the powers to impose fines on competition law offenders. It may order a company to terminate an infringement or even accept commitments under penalty of a fine, but when it comes to actually imposing any sanctions, the SCA has to turn to the courts. Thus, when the SCA considers that a company has participated in restrictive practices or abused its dominant position contrary to Chapter 2, Section 1 or 7 of the Act, it has to turn to the Stockholm District Court and request the court to impose fines.

Over the years, the Swedish legislator has at times chosen to draw inspiration from Brussels also when it comes to certain procedural aspects of Swedish competition law enforcement.

[1] Sw. Konkurrenslagen (SFS 2008:579).

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One example was the adoption of a leniency programme in 2002. Six years later, and following the introduction of the European Commission's (hereinafter "the Commission") settlement procedure in June 2008, a similar—although in no way identical—procedure was introduced also under the Swedish system. Under the Swedish settlement procedure, the SCA has the powers to issue so-called fine orders where an infringement of either Chapter 2, Section 1 (restrictive practices) or Chapter 2, Section 7 (abuse of dominance) of the Act has been established and provided that the company addressed by such order chooses to consent in writing. The acceptance makes the order legally binding, thereby allowing the company to avoid a lengthy court proceeding. The SCA is then prevented from instituting proceedings before the Stockholm District Court.[2]

The introduction of the fine order was preceded by a discussion as to whether a more profound revision of the procedural system was required or desired and whether the SCA should be granted general powers to impose fines in competition cases. This was not the first time that the SCA's powers were up for debate, but as so many times before, the decision was made not to grant the SCA general fining powers. The main concern raised by stakeholders during the debate was that the major cartel cases that had been brought by the SCA had all required lengthy preliminary hearings in order to sort facts and pleas before the actual hearing could take place.

It was acknowledged that a system where the competition authority has the powers to impose fines will indeed guarantee a more effective and efficient competition law enforcement. However, at the same time, such a system would not contain equally effective procedural safeguards and was therefore not considered desirable from a due process perspective. The decision was therefore made to keep the old sanctioning system, save for the introduction of the fine order.[3]

Transactional resolutions, such as the settlement procedure, have definitely allowed parties to choose a more expedient procedure. It is not uncommon that a cartel case, from the date of the dawn raid to the final ruling by the Market Court (which is the court of last instance) can take 5 years or more. A company willing to admit its guilt and accept a fine order may now avoid lengthy court proceedings. However, as will be discussed below, there is no possibility of settlement until the circumstances of the case are clear, and a fine order will thus not be issued before the SCA has finished its investigation.

14.2 Transactional Resolutions of Agreements and the Abuse of Dominance

When the Swedish competition rules were revised in 1993 pending the EU membership, the Competition Act that was adopted at the time provided no room for transactional resolutions.

[2] Chapter 6, Section 16 of the Act.

[3] See, *e.g.*, the preparatory works to the Act, SOU 2006:099, En ny konkurrenslag, at p. 311.

It was not until 2002 that a leniency programme was formally introduced. Two years later, in 2004, the SCA was granted the powers to accept commitments. In 2008, the competition rules were once again revised, and through the adoption of the Act, it is now also possible for companies to enter into settlement agreements—or rather to accept a fine order—if they are willing to admit to the infringement and want to put their past behaviour behind them. These are really the only transactional resolutions of antitrust procedures available under Swedish law.

Below is a brief presentation of each transactional resolution.

14.2.1 Commitments

Chapter 3, Section 1 of the Act empowers the SCA to order companies to terminate infringements of the prohibitions on restrictive practices or abuse of dominance contained in the Act or Articles 101 and 102 of the TFEU. However, if during the course of an investigation the company or companies under investigation offer to accept commitments that may eliminate any competition concerns, the SCA may accept such commitments and declare that there are no longer any grounds for action under Chapter 3, Section 4 of the Act.

The commitment proposal should thus be made by the company under investigation. However, in practice it is not always clear on whose initiative the commitment was drafted. It may well be that the SCA and the undertaking meet during the course of the investigation and that there is an informal discussion on how to best solve the problem.

The possibility for the SCA to accept commitments was introduced in July 2004 following the adoption at EU level of Council Regulation 1/2003[4] (hereinafter "the Regulation"). Article 5 of the Regulation provides that the Member State authorities should have the power to apply Articles 101 and 102 TFEU. For this purpose, they may make decisions to accept commitments.

The Swedish rules on commitments have been closely modelled on Article 9 (1) of the Regulation, which lays down the procedures for the Commission when accepting commitments. Just as under Article 9(1) of the Regulation, commitment decisions made by the SCA should find that there are no longer grounds for action by the SCA without concluding whether or not there has been or still is an infringement.[5]

When the Act was adopted in 2008, the wording of the provision on commitments was revised to ensure that the *only* legal effect of a commitment decision is that the SCA does not find any grounds for action. The revision was made after the SCA had received complaints from the Commission. Under Article 11(4) of the Regulation, Member State authorities shall inform the Commission

[4] Council Regulation (EC) 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 L1/1.

[5] See preamble 13 to the Regulation.

before adopting commitment decisions. During the course of such a procedure, the Commission complained of the wording of the decision in question where the SCA had declared that following the commitment there would no longer be an infringement of the competition rules.[6] According to the Commission, such statement went against the prohibition on Member States to grant negative clearance.

A decision by the SCA to accept a voluntary commitment may cover a specified period. As long as the decision applies, the SCA may not issue a prohibition decision regarding the practice covered by the commitment. Like the Commission, the SCA may revoke its decision to accept the commitments where

1. there has been a change in any of the facts which were material to the making of the decision,
2. the parties commit a breach of any obligation attached to the decision, or
3. the decision is based on incomplete, incorrect or misleading information submitted by the parties.

A commitment shall be combined with a periodic penalty payment. When the rules were introduced in 2004, the SCA was not given the powers to attach conditional fines itself, as the legislator saw the risk that the SCA would then attempt to persuade undertakings to offer (or propose) commitments that went further than was necessary to eliminate any competition concerns. The SCA would therefore have to request the Stockholm District Court to attach conditional fines to voluntary commitments. When the competition rules were revised, and the Act was adopted in 2008, stakeholders did no longer see any cause for concern, and the Act now grants the SCA the powers to attach conditional fines.[7] However, the decision to actually impose such payment in the event that the undertaking does not stick to the commitment will have to be made by the Stockholm District Court. Hereby, the company is guaranteed a judicial review of the SCA's decision before any fines are actually imposed.[8]

There are a number of cases that have been closed through voluntary commitments. One recent case concerns an investigation into the practices of a Swedish trade association (*Föreningen Ackrediterade Laboratorier*).[9] After having found that the general provisions applied by the trade association were restrictive of competition and thus in breach of Chapter 2, Section 1 of the Act, the association

[6] Proposition 2007/08:135, *En ny konkurrenslag*, at p. 179.

[7] Chapter 6, Section 1 of the Act.

[8] Chapter 6, Section 2 of the Act.

[9] Decision Dnr 346/2008, Föreningen Ackrediterade Laboratorier.

voluntarily undertook to change its general provisions.[10] The SCA accepted the commitment and decided to attach a conditional fine of SEK 750,000.

14.2.2 Leniency

The willingness of undertakings to assist and facilitate the investigation of the SCA has always been reflected in the fine eventually imposed. However, it was not until 2002 that a formal leniency programme was introduced in Sweden. Initially, the programme covered both restrictive practices and abuse of dominance. However, when the Act entered into force in November 2008, the possibility for dominant firms to receive immunity was abandoned. Still, the scope of the programme is wider than its EU equivalent as all kinds of restrictive practices, and not only cartels, are covered by the programme.

The rules on leniency are laid down in Chapter 3, Sections 12–15 of the Act.

14.2.2.1 Immunity from Fines

According to Chapter 3, Section 12 of the Act, an undertaking may be granted immunity from fines if it discloses its participation in an illegal cartel. A notification submitted by a number of undertakings jointly will not be regarded as a notification under the Act. Consequently, a joint notification will result in none of the undertakings fulfilling the conditions for immunity from fines.

To be granted full immunity, the undertaking must fulfil the following requirements:

1. it must be the first to notify the SCA of the cartel;
2. notification must be made before the SCA has sufficient information from other sources to be in a position to intervene against the cartel, that is, the SCA must not possess enough evidence to carry out an inspection according to Chapter 5, Section 3 of the Act; and
3. the undertaking must submit all information concerning the illegal cartel and cooperate fully with the SCA.

However, it is possible to be granted full immunity also in situations where the SCA is already in possession of sufficient evidence to take action, provided that no other company has submitted a leniency application and that the company in

[10] In the preliminary assessment of the SCA, the general provisions issued by the association governing the actions of member laboratories contained a potentially anti-competitive clause. The provisions set out fixed percentage rates for determining charges payable when deliveries are delayed. In the SCA's view, the laboratory companies should compete over the rates they charge because this can influence speed of delivery. The trade association's voluntary undertaking involved revising the general provisions so that they now recommend the negotiation of separate agreements regarding deductions for time lost (delay charges).

question has in some other way *to a very significant extent facilitated the investigation* of the infringement.

The undertaking must cease to be a member of the cartel. It may consult with the SCA on how it shall cease its participation in the infringement.

Immunity from fines may not be granted, however, if the undertaking has compelled another undertaking to participate in the restrictive agreement, as it is then considered manifestly unreasonable to grant that company immunity from fines.

14.2.2.2 Reduction of Fines

Undertakings that are not the first to notify a cartel to the SCA or do so when the SCA is already in possession of evidence of the cartel may still benefit from a reduction of fines if they cooperate fully with the SCA. According to Chapter 3, Section 13 of the Act, the fine may be set at a lower amount than would be the case when applying Chapter 3, Section 12 if the undertaking has provided significant assistance in the investigation into its own participation in the infringement or that of others.

Today it appears that most of the cartel cases decided by the Commission originate from a leniency application. In Sweden, however, the leniency programme does not appear to be equally successful, although it is claimed that around 50 % of the cases handled by the SCA originates from a leniency application. Perhaps a majority of these cases are closed instead of brought to court.

14.2.3 Settlements

Furthermore, in November 2008, the SCA was granted the powers to enter into settlement agreements with cartelists. Cartel proceedings tend to be both lengthy and costly. Undertakings that wish to put the infringement behind them, and are willing to admit their guilt, are now given the opportunity to accept an administrative fine proposed by the SCA, a so-called fine order.

The term settlement may be misleading as it is the SCA that decides whether or not a fine order shall be offered and on what terms. The amount of the fine is not up for negotiation. Nor will the company accepting the fine order receive a reduction in the fine. The reason for this being that the legislator did not seek to set up a system where companies could or should be "persuaded" to admit guilt.

Under the new rules, an undertaking that accepts a fine, within the time period and in the manner that the SCA decides, avoids a trial, as the SCA may then not bring action against the undertaking. The timely acceptance of the fine order will have the same legal status as a binding judgment. Another requirement is that an order may only be issued if the SCA considers that the material circumstances regarding the infringement are clear. This means that a company may propose a fine order at an early stage of the investigation, but the order will not be issued until the investigation is over and the SCA has the Statement of Objections ready for distribution to the companies concerned.[11]

According to the preparatory works, the legal certainty may be jeopardised if the infringement has not been properly investigated and the companies have been given the opportunity to take part in the case built against them and the evidence available to the SCA. Only then can a company make a reasoned decision as to whether it should go to court or accept a fine order.[12]

Not only shall the material circumstances be clear; a fine order may not be issued where there are questions in law that may serve as precedent and where there is thus an interest to have the court decide on the matter.

If the SCA, after having performed the investigation, considers that one or more companies should be granted the possibility of a fine order, it will, when sending out the Statement of Objections, offer such companies the possibility to accept a fine order instead of taking matters to court. In such case, the SCA will send out a pre-printed form to be signed and returned by the company within 3 weeks.

Chapter 3, Section 19 of the Act provides that a fine order for which consent has been given shall upon appeal be set aside under the preconditions specified in Chapter 59, Section 6, first paragraph of the Swedish Code of Judicial Procedure. The latter deals with summary penalties consented to by a suspect and the situations where such penalties can be set aside by the suspect. The same conditions shall apply to fine orders.

According to this provision, a fine order may only be set aside if

1. the consent cannot be considered a valid voluntary declaration of intent;
2. an error occurred during the processing of the matter of such a character that the order should be considered invalid; or
3. the order is otherwise inconsistent with a statutory provision.

A party that wishes to appeal must do so in writing to the Stockholm District Court within 1 year from consent being given for the order. In cases concerning appeal against a fine order, the SCA is the respondent party.

If a fine order is set aside, the undertaking may not thereafter be imposed an obligation to pay a higher administrative fine for the same infringement.

So far, the SCA has issued fine orders on three occasions. The first concerned a market-sharing cartel in the market for power line poles. The cartel was exposed when *ScanPole AB* provided information on its illegal cooperation with its sole competitor, *Rundvirke Poles AB*, through a leniency application. Being presented with convincing evidence of the cartel activity, *Rundvirke* chose to accept a fine order of SEK 2 million, thereby avoiding a trial.[13]

[11] Chapter 3, Section 18 of the Act. See also: http://konkurrensverket.se/t/Page____4120.aspx.

[12] Regeringens proposition 2007/08:135, Ny konkurrenslag m.m., at p. 88.

[13] Decision Dnr 237/2007.

The second case concerned a bid-rigging cartel in the market for transportations of deceased, where three undertakers accepted fine orders totalling less than SEK 1 million. The most recent case, which concerned bid rigging in a tender for waste transportation, was taken in December 2011 and subsequently settled. The companies which accepted the fine were two of the six companies that had submitted offers in the tender. The fines amounted to SEK 175,000 and SEK 293,000, respectively. The modest amounts reflect the limited scope of the cartel: it related to one tender in one city, lasted for a little over one month, and the parties had not won the contract.[14]

The case of *ScanPole* and *Rundvirke* was a schoolbook example of a market-sharing cartel, where two players had divided the market between them. This is a situation where the SCA will typically be able to offer a fine order; the circumstances are clear, and there are no complex questions in law to be dealt with by the court. The two other cases are also typical, in that although they concerned serious infringements, they were of limited scope and the fines imposed were low.

Another possible situation is where there is a major cartel but where the involvement of some of the undertakings is peripheral. In the largest Swedish cartel case to date, *the asphalt cartel* case,[15] the SCA decided not to bring action against two of the cartelists, as their involvement had been so peripheral that the costs of the court proceedings would have exceeded the fine requested by the SCA. Today, these companies may not have been that lucky. Instead, the SCA would probably have offered them the possibility of a fine order before going to court.

14.2.4 Fundamental and Procedural Rights of the Parties

As all other Member States of the EU, Sweden has acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “the ECHR” or “the European Convention on Human Rights”). Furthermore, the European Charter of Fundamental Rights (“the Charter”) is applicable whenever Member States apply EU law.

Thus, Sweden shall assure that the procedures before the SCA and the Swedish courts meet the standards of the ECHR and the Charter, thus protecting rights such as the right to privacy (Article 7 of the Charter/Article 8 of the ECHR), the right to good administration (Article 41 of the Charter) and the right to a fair trial laid down in Article 47 of the Charter and Article 6 of the ECHR.

When it comes to due process issues, it is important to have in mind at all times that the powers of the SCA to use force or impose sanctions are very limited and that it is the court that will decide on such matters.

[14] Decision Dnr 327/2010.

[15] NCC AB m.fl. ./. Konkurrensverket, Marknadsdomstolens dom 2009:1.

The SCA will have to require the assistance of the Stockholm District Court already at a very early stage of a competition case, as it is the court and not the SCA that issues inspection decisions. Thus, the initial decision whether the SCA has enough evidence/indicia to carry out an on-the-spot investigation is in the hands of the court and not the SCA.

Furthermore, with regard to both voluntary commitments and leniency applications, it is the court that will eventually decide on the sanction.

As the powers of the SCA are circumscribed to such extent, much of the critique directed towards the EU system is not valid in Sweden.

Today, companies challenging Commission decisions in antitrust cases appear to invoke violations of fundamental rights more or less on a regular basis. The debate is intense also outside the courtrooms, and one of the more common objections against the EU system is that it fails to respect Article 6(1) of the ECHR and the right to a fair trial.

The critics argue that the protection provided by the EU Courts falls far short of the protection afforded under the ECHR.[16] Some even argue that the ECHR requires the Commission to be deprived of its adjudicating powers and that fines in antitrust cases should instead be imposed by a court.

However, at this point, most accept the fact that the Commission has both investigatory and adjudicative powers. Instead, the discussion focuses on the judicial review performed by the EU Courts in general and the General Court in particular. According to the critics, the General Court is too deferential towards the Commission and is granting the Commission too large a margin of appreciation, failing to respect the principle of equality of arms. Some even refer to this as the "judicial deference doctrine".[17]

More specifically, the criticism against the Courts' (limited) review is focused on two issues: the EU Courts' assessment of the fines imposed by the Commission in antitrust proceedings and their review of any complex economic or technical assessments undertaken by the Commission.

As the Swedish system is structured differently, many of the concerns expressed above do not apply here.

First, the Stockholm District Court will decide on the dawn raid. If the SCA believes that the investigation provides evidence of restrictive practices or abuse of dominance, it will once again have to turn to the court and request the court to impose fines. During such proceedings (*i.e.*, where the SCA requests that a fine is

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[16] See, *e.g.*, Aslam and Ramsden, EC Dawn Raids: A Human Rights Violation?, The Competition Law Review, Volume 5 Issue 1, December 2008, pp. 61–87. See also the appeal by Saint Gobain SA which raises the question whether the imposition of a fine by an administrative body which holds powers both on investigation and sanction is compatible with the right to an independent and impartial tribunal and of the right to respect for the presumption of innocence. Case T-56/09, Saint Gobain v. European Commission, pending.

[17] See, *e.g.*, Jaeger, The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?, Journal of European Competition Law and Practice, 2011 2(4):295–314.

imposed), the SCA and the undertakings will have equal standing. The courts will by necessity carry out a very thorough examination of the allegations made and the evidence presented by the parties to the proceeding. Furthermore, the court will be presided not only by a number of jurists but also by economic experts in order to ensure that any complex economic issues are assessed properly.

14.2.4.1 The Administrative Procedure Act

Before discussing specific rights, a few words should be mentioned about the legislation governing the work of all public bodies in Sweden—including the SCA—namely the Administrative Procedure Act.[18]

The Administrative Procedure Act applies, in principle, to all administrative authorities. It consequently affects a large part of the operations of central and local governments. The primary objective of the Administrative Procedure Act is to protect the legal security of citizens in their contact with administrative bodies. Another important aim is to ensure that the authorities provide efficient service to the public. Furthermore, it shall promote the expeditious processing of decisions by trying to avoid matters having to be considered at too many instances.

The Administrative Procedure Act imposes certain rules for legal security, for example requirements of impartiality, careful processing and uniform assessment. At the same time, it is based on the view that there is a link between legal security and service. It is thus not sufficient that authorities act impartially, carefully and otherwise correctly in the formal legal sense. They must also provide rapid, simple and clear information and assist citizens to exercise their rights. The Administrative Procedure Act contains, for example, rules on the service duty of authorities, rules on their collaboration and coordination with other authorities, rules on rapid and simple processing of matters, rules on the use of easily understood government language and rules on oral elements of the processing. The Administrative Procedure Act constitutes the foundation for how administrative matters should be dealt with by laying down certain rules that, in principle, must be applied by all authorities in all fields.

Important issues governed by the Administrative Procedure Act include the following:

- Representative and counsel—a person who in connection with a matter to be dealt with by an authority desires to engage a representative or counsel is normally entitled to do so. A person who engages a representative or counsel must usually bear the expenses involved.
- Oral processing—an applicant, appellant or another party who wishes to provide information orally in a matter to be dealt with by an authority should normally be allowed to do so. Furthermore, an authority may, on its own initiative, decide on oral processing.

[18] Sw: Förvaltningslagen (SFS1986:223).

- Access to information—the Administrative Procedure Act provides that a party is entitled to access the authority's file. The authority shall, on its own motion, provide a party with information that has been received from another person that is of significance to the determination of the matter. The party shall be given an opportunity to express his/her views on such information.
- Reasons for decision, notification of decision and notification of how to appeal—authorities must give reasons for their decisions and notify the parties about the decision. They are also under a duty to explain how the decision may be appealed against.[19]

14.2.4.2 Right Against Self-Incrimination and Presumption of Innocence

Like in the other EU Member States and the Contracting States to the ECHR, there is both a right against self-incrimination and a principle of the presumption of innocence. However, the CJEU has given the right against self-incrimination in competition cases a rather narrow scope of application. Under EU law, the right does only cover oral statements, and no one should be forced, during the course of an interview or a hearing, to admit having participated in a cartel or abused a dominant position. However, during the course of a dawn raid, the company cannot claim that certain documents are out of reach to the Commission inspectors on the ground that the documents contain incriminating information.

There is really nothing indicating that the Swedish rules give companies a broader protection against self-incrimination. In the preparatory works to a recently adopted act on the duty to provide information in, i.a., sector inquiries, the privilege against self-incrimination was discussed, and the discussion relied completely on the case law of the CJEU also when it came to investigations relating to infringements of the Swedish competition rules.[20]

Although the privilege against self-incrimination is construed rather narrowly, the Act contains no express obligation on the part of the companies to cooperate with the SCA during a dawn raid, and there are no sanctions imposed for failure to do so. However, according to Chapter 5, Section 1 of the Act, the SCA can order an undertaking to supply information, documents or other materials, and this provision may be held to apply also during dawn raids.

In practice, the fact that there is no explicit obligation to cooperate during dawn raids has not been a cause of concern to the SCA, and in a recent proposal to amend the Act in order to make enforcement more efficient, the legislator saw no point in amending the rules on dawn raids in this respect.[21]

[19] See http://www.government.se/content/1/c6/02/78/08/6ece30b5.pdf.

[20] Proposition 2009/10:218, Ny lag om uppgiftsskyldighet i fråga om marknads- och konkurrensförhållanden.

[21] SOU 2013:16, *Effektivare konkurrenstillsyn*, at p. 228.

14.2.4.3 Right to Be Heard and Access to the File

As for the right to be heard, Section 14 of the Administrative Procedure Act provides that “Any applicant, appellant or other party who wants to make an oral statement in a matter concerning the exercise of public power in relation to someone shall be afforded an opportunity to do so, provided that the due progress of the work so permits”.

During the course of a competition case, there will be a number of formal and informal contacts between the SCA and the companies under investigation. A party that wants to make oral statements will be able to do so.

As for the question of access to the file, Swedish rules on transparency are comparatively far-reaching, as public bodies need to abide by the principle of public access. Under this principle, the general public is to be guaranteed an unimpeded view of the activities pursued by the government and local authorities. Chapter 2, Section 1 of the Freedom of the Press Act provides the right to free access to official documents in order to encourage the free exchange of opinion and the availability of comprehensive information.

The right to access may be restricted only under certain, specified, circumstances. For parties to a competition case, the restrictions are even fewer. A party in a case or matter before a court or other authority is in principle entitled to see all information in the case or matter. It is only in exceptional cases that something can be kept secret from a party. Judgments and decisions must always be provided to the parties. If information that is subject to secrecy is provided to a party, a reservation may be made when the information is provided.

Section 16 of the Administrative Procedure Act[22] thus stipulates: *An applicant, appellant or other party is entitled to have access to the material that has been brought into the matter, provided that the matter concerns the exercise of public power in relation to someone. This right of access to information applies with the restrictions prescribed by Chapter 10, Section 3 of the Public Access to Information and Secrecy Act (2009:400).*

The wording of the Article suggests that the right of access applies with the restrictions prescribed by Chapter 10, Section 3 of the Public Access to Information and Secrecy Act.

The latter provision stipulates that a party’s right to access may be circumscribed if, in the interest of the public or a private party, it is of utmost importance that certain information contained in the requested material is not disclosed. In such case, the authority will have to inform the requesting party in some other way of the document’s content in order to ensure that the party is granted the information necessary to be able to protect his/her rights without disclosing the secret information.

Not only shall a party have a right of access to the file; the SCA may not decide on a matter before having informed the company of all information provided to the SCA by others, as Section 17 of the Administrative Procedure Act stipulates: *No*

[22] *Sw. Förvaltningslagen* (SFS 1986:223).

matter may be determined without the applicant, the appellant or any other party having been informed about any information that has been brought into the matter by someone other than himself and having been given an opportunity to respond to it, provided that the matter concerns the exercise of public power in relation to someone. These rights apply at all times, and a waiver to the rights may thus not be a precondition to the proceedings or conclusion of a transactional solution.

With regard to leniency applications in particular, applications and corporate statements will be considered confidential according to Chapter 30, Sections 1 and/or 3 of the Public Access to Information and Secrecy Act (2009:400). A party to a competition case will thus not be able to request access to such applications/statements made by other parties to the proceeding.

14.2.4.4 Right to an Impartial Judge

Neither the voluntary commitment nor the fine order will or need to be approved by a judge. However, when a commitment is combined with a periodic penalty payment, the decision to eventually impose such fine will be made by the Stockholm District Court.

14.2.4.5 Right to a Trial

Companies that make a voluntary commitment or accept a fine order do so in order to avoid a trial. There will obviously not be a trial in such cases unless the company fails to abide by the commitment or the provisions in the second paragraph of Chapter 3, Section 4 apply (listing the situations where a fine order may be set aside).

When it comes to leniency, this procedure does not affect the company’s right to a trial *as such* (save of course for the company that has been granted immunity).

The fine will eventually be imposed by the court. This being said, a leniency application or an application for the reduction of fines will of course contain an admission of guilt, and the companies will have to provide the SCA with all the evidence they have in their possession and will also have to cooperate actively with the SCA during the course of the investigation. This will by necessity have an effect on the trial, as the SCA will not have to prove its case against the leniency applicant (or rather, the leniency applicant has already done the job of the SCA).

It is, however, important to keep in mind that under the Swedish system, it is the court that eventually sets the fine. The parties are free to dispute the SCA’s view on what constitutes a fair “basic amount”. The fact that the SCA has agreed to grant a 25 or 50 % reduction does not mean that the final amount of the fine is fixed. The company may still argue before the court that the fine (before reduction) is too high with regard to the nature, scope or duration of the infringement or the company’s level of involvement and that it should thus be set at a lower level.

14.2.4.6 *Ne Bis In Idem*

The principle of *ne bis in idem* applies in Sweden, although the recent case of *Åkerberg Fransson*—where the ECJ declared that the Swedish system under which anyone providing false information to the tax authorities risked both tax surcharges and imprisonment failed to respect the principle of *ne bis in idem*—has certainly stirred up a lot of commotion among lawyers here in Sweden, as to the meaning of the principle and whether it is respected in the Swedish system.[23]

In a recent matter still pending before the Stockholm District Court, the defendant claimed that the case should be dismissed due to infringement of the principle of *ne bis in idem*. In January 2014, the Stockholm City District Court handed down its judgment deciding that the SCA's action proposing that a fine of SEK 340,000 be imposed on *Swedavia* (a state-owned company that owns and operates *Stockholm Arlanda Airport*) for the alleged abuse of its dominant position was not contrary to the principle of *ne bis in idem* even though the Swedish Market Court had already in a previous, unrelated, procedure examined the same conduct of *Swedavia*.

In November 2011, the Market Court found *Swedavia* to have abused its dominant position. In June 2013, the SCA brought an action before the Stockholm District Court requesting the court to impose a fine of SEK 340,000 on *Swedavia* for the same abusive behaviour. *Swedavia* claimed that the SCA's claim was inadmissible due to the *ne bis in idem* principle. The Stockholm District Court rejected *Swedavia*'s claim as the legal proceedings in the Market Court are not criminal in nature and thus found the SCA's claim admissible. The substantive review of the SCA's claim is still ongoing.

Furthermore, given the decentralised structure of the EU antitrust enforcement system, there is of course also the risk—at least in theory—that the Swedish authorities will impose sanctions on infringement of Article 101 or 102 TFEU that is/has been or will be investigated also by other authorities throughout the EU. Although the CJEU does not deem such practice to conflict with the principle of *ne bis in idem*, there are those that are critical against such order.[24] However, that discussion is beyond the scope of this contribution.

14.2.5 Rights of Third Parties

14.2.5.1 Right to Be Heard and Access to the File

According to the principle of public access, third parties are entitled to access the file. However, in their capacity of third parties, they will not get access to confidential information.

As for the right to be heard, only parties to a matter pending before an authority has such right under the Administrative Procedure Act. In practice, however, anyone being able to contribute to the SCA's investigation will have a possibility to have at least informal contacts with the case handlers.

[23] Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson* [2013]. Not yet reported. The case concerned the application of the principle of *ne bis in idem* to certain penalties related to tax evasion.

[24] See, *e.g.*, W. Devroe in General Principles of EU Law and European Private Law, "How General Should General Principles Be? Ne bis in Idem in EU Competition Law", Wolters Kluwer 2013.

14.2.5.2 Right to Trial

Chapter 7, Section 1 of the Act lists a number of decisions that may be appealed. This list is exhaustive. It is expressly stated that no appeals may be made against other decisions than those listed.

Decisions to accept voluntary commitments, grant immunity from or reduction of fines or issue fine orders are not among the ones listed in the provision. No appeals may thus be made against such measures, and third parties do not have a right to a trial in regard to transactional resolutions.

It should be noted, however, that if the SCA decides not to take *any* action at all, there is then a possibility for third parties affected by an infringement to do so. If a company files a complaint with the SCA, arguing that a competitor or supplier acts in violation of the Act, and the SCA decides not to act upon such complaint, the company may then take matters to court under Chapter 3, Section 2 of the Act, which stipulates: *If the Swedish Competition Authority decides in a particular case not to impose such an obligation pursuant to Article 1, the Market Court may do so at the request of an undertaking that is affected by the infringement. Such a right to legal action, however, does not exist if the decision of the Swedish Competition Authority is based on Article 13 of the Council Regulation (EC) No 1/2003*.

14.2.5.3 Principle of Legitimate Expectations and of Good Faith

The SCA is bound by the principle of good administration laid down in Article 41 of the Charter when applying the EU rules. Furthermore, the Administrative Procedure Act regulates the authority's actions. See Sect. 14.2.2.1 above.

14.2.5.4 Confidentiality and Publicity of the Transactional Resolutions

Leniency applications, corporate statements made in relation to such applications and the like are confidential. They will thus not be disclosed to third parties. However, decisions to accept voluntary commitments are not confidential and are posted on the SCA's website.[25]

14.3 Merger Control

Under Chapter 4, Section 1 of the Act, a concentration that must be notified or has been voluntarily notified can be prohibited if the concentration is liable to significantly impede the existence or development of effective competition in the country as a whole, or a substantial part thereof, and if a prohibition can be issued without significantly setting aside national security or essential supply interests. The competition test corresponds to the SIEC test of the EU Merger Regulation.

If it is sufficient to eliminate the adverse effects of a concentration, a party to a concentration, instead of being subject to a prohibition, may instead be required

[25] See, *e.g.*, http://www.kkv.se/upload/Filer/Konkurrens/2009/Beslut/08-0346.pdf.

1. to divest an undertaking, or a part of an undertaking, or
2. to take some other measure having a favourable effect on competition.[26]

Just as under the antitrust rules, undertakings may also voluntarily make commitments to the Competition Authority and the commitment may be made subject to a penalty of a fine.[27]

14.3.1 Negotiation of Remedies

Decisions by the SCA in concentration cases are sometimes made after the parties to a concentration have given voluntary commitments. In order for a commitment to be effective, it shall eliminate the anti-competitive effects identified from the planned concentration.

It wasn't until the Act entered into force in November 2008 that the SCA was given express powers to accept voluntary commitments also in relation to concentrations. The authority had done it on many occasions under the old competition act, but it was not until then that the possibility was explicitly laid down in the competition rules.

Thus Chapter 4, Section 4 of the Act now stipulates: *If a question has arisen whether there will be a prohibition pursuant to Article 1 or an obligation pursuant to Article 2, a commitment from a party to the concentration may lead the Swedish Competition Authority to leave the case without any further actions.*

It is the notifying party that shall take the initiative to propose a voluntary commitment, and such commitment may be accepted at an early stage of the investigation. It is sufficient that *a question has arisen whether there will be a prohibition*. The SCA need not have *established* that the concentration will lead to SIEC.

The SCA may and does accept both structural and non-structural commitments. Structural commitments are often easier to verify and have more enduring effects on the market, whereas non-structural remedies are usually less interventionist and therefore preferable from the merging parties' point of view. A non-structural commitment may be limited in time.

The formulation of structural commitments specifies activities which are to be divested, the time period within which the divestment should take place and the requirements which are imposed on the buyer with respect to competitiveness, competence and financial solidity. Deadlines for divestment are normally confidential with respect to third parties and are normally no longer than 1 or 2 years.

In the formulation of non-structural commitments, account is taken of issues concerning the applicable period, follow-up and dissemination of information to third parties. When formulating commitments of a non-structural nature, clarity is

[26] Chapter 4, Section 2 of the Act.

[27] Chapter 4, Section 4 of the Act.

of great importance since in many cases it will be necessary to monitor and follow these up over a longer period than is the case for structural commitments. Under certain conditions, it is essential that third parties are made aware of the contents of a commitment.

The examination of concentration cases usually involves short deadlines. It is thus important to consider at as early a stage as possible in the examination process whether a commitment might be required. Any commitments issued must, however, be put in relation to and help to reduce the anti-competitive effects identified by the competition authority in its examination of the concentration.

Like commitments in antitrust cases, commitments relating to concentrations shall be combined with a periodic penalty payment in order to make sure that the parties adhere to their commitments. Such a decision takes effect immediately unless otherwise decided.[28]

14.4 Impact on Transactional Outcome and on Market Intervention

There are no obvious risks of over or under deterrence under the Swedish system, partly due to the SCA's limited powers when it comes to imposing sanctions.

14.5 Conclusions and Recommendations

Many of the due process concerns expressed against the EU system are not relevant to the Swedish system, as it has been structured differently, circumscribing the powers of the SCA in order to guarantee a judicial review of both inspections and the imposition of sanctions. The proceedings before the court are adversarial, and the courts will usually not defer to the SCA's findings but will instead carry out a thorough examination of both law and facts.

The limited powers of the SCA will also have an effect on the incentives of a company to accept or propose transactional resolutions. If it is not the competition authority that imposes sanctions, then a company may be more inclined to take matters to court. If on the other hand, the competition authority has such powers and hints that it is about to impose a substantial fine, a company may be more inclined to accept a settlement and reduction of the fine even though it considers that part of the authority's case is not that solid.

Still, the Swedish system is not flawless, and there are a number of issues that may be of concern from a due process perspective. The ones that are debated at the moment are all related to the evidence gathered by the SCA in competition cases.

[28] Chapter 6, Section 1 of the Act.

As stated previously, the decision to carry out a dawn raid is made by the Stockholm District Court. There is thus an ex-ante control of inspection decisions. However, the ex-post control may not be as effective. Much indicates that the ex-post control of inspection decisions and of measures taken on their basis do not meet the standards set by the European Court of Human Rights ("the Strasbourg court").

In cases such as *Ravon*,[29] *Canal Plus*[30] and *Primagaz*,[31] the Strasbourg court has explicitly declared that, in order for the requirements in Article 6(1) of the ECHR to be met,[32] companies targeted by a dawn raid must be *guaranteed an effective a posteriori review* (in law and in fact) not only of the inspection decision as such but also of any measures taken on its basis.

In Sweden, it is a fact that as the law now stands, there is no such guarantee.

In 2010, the SCA assisted its Dutch counterpart in a dawn raid at the premises of the pharmaceutical company AstraZeneca. During the course of the dawn raid, the inspectors wished to take copy images of the hard drives for review at the authority. AstraZeneca agreed to the taking of copy images but refused to let the SCA bring them back to the authority for review. The company appealed the SCA's decision to the Market Court. The court did not grant leave to appeal, simply stating that the challenged measure constituted an implementing measure.[33]

Clearly, the situation, as it now stands, is not in line with the case law of the Strasbourg court. There should be a possibility also to have implementing measures reviewed by an impartial tribunal, and the rules governing these procedures are now being revised.

Not only did the case of AstraZeneca highlight the lack of effective ex-post control; it also touched upon another controversial issue from a due process perspective. There is currently an ongoing and much-heated debate with regard to the SCA's practice to take copy images of the companies' hard drives and bring these back to the authority for review. Companies, practitioners and others claim that this practice fails to respect fundamental rights, such as the right to the defence, as well as the principle of proportionality. The right to go through documents and books is broader than the right to make copies of such documents or files. Only documents directly related to the subject matter of the inspection should be copied, and at no time may documents containing trade secrets or covered by legal professional privilege be copied (or reviewed for that matter).

The SCA's procedure in relation to dawn raid is currently under review by the legislator, and the SCA has declared that, until the matter has been solved, it will no

[29] Ravon v. France, judgment of 21 February 2008, Application no. 18497/03.

[30] Société Canal Plus ao v. France, judgment of 21 December 2010, Application no 29408/08.

[31] Compagnie des Gaz de Pétrole Primagaz v. France, judgment of 21 December 2010, Application no 29613/08.

[32] The right to a fair trial.

[33] Decision of the Market Court, A 5/10.

longer bring copy images back to the authority if the company in question raises any objections against such action.

Finally, the fact that the SCA's evidence gathering practices are up for debate makes it important to draw the attention also to the fact that in Sweden, the rules on evidence allowed in court differ from many other jurisdictions.

For an outsider, it may seem awkward that Swedish courts shall accept evidence no matter how it has been obtained or collected by the party relying on it. Under Swedish law, parties are free to refer to whatever evidence they are able to produce, even unlawfully obtained evidence, and the courts are free to evaluate such evidence. This of course makes the issue of the procedures governing the SCA's evidence gathering even more pertinent. In a competition proceeding where a company considers that the SCA has obtained evidence in an unlawful manner, it may thus not request the court to disregard such evidence.

Although the rules on evidence gathering and review of inspection decisions are not directly related to the issue of transactional resolutions, the fact that the SCA has gathered evidence that it might not have been able to, had there been effective procedural safeguards in place, may of course affect a company's incentive to file a leniency application or its willingness to accept a fine order or propose a voluntary commitment.

Switzerland

15

Daniel Emch, David Neuenschwander, and Alisa Burkhard

15.1 Introduction

Transactional resolutions in Switzerland are part of a dynamic field characterized by constant conflicts and compromises—a constant balancing act between authorities' possible actions in accordance with administrative law, benefits in the areas of fact-finding, and the efficient handling of actual or potential proceedings.

Although Swiss administrative law is familiar with the administrative contract as an instrument of cooperation between the state and undertakings, state action traditionally takes the form of rulings and decisions (*Verfügung*). From a constitutional point of view, the use of contractual and negotiation elements by the state is not unproblematic. Settlements between undertakings and the competition authority can be problematic with regard to the principles of legality, legal equality and the legal protection of third parties, as well as the inquisitorial principle (*Untersuchungsgrundsatz*). On the other hand, settlements can also lead to considerable benefits, such as more efficient and flexible resolution of cartel investigations with lower administrative effort and reduced appeals. If the fairness principle is respected during negotiations and not misguided by the mere threat of a higher fine if an undertaking refuses to settle, settlements can also lead to higher levels of acceptance by the undertakings involved.

On European Union level, the subject is addressed in Regulation 1/2003. First, commitment decisions were adopted on the basis of Article 9 in order to bring

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suspicious behavior to an end. More recently—in June 2008—settlement decisions were introduced for cartel cases.

In Switzerland, the Federal Act on Cartels and other Restraints of Competition (the "CartA") of 1995 established the institution of the amicable settlement as it continues to exist today.

The partial revision of the CartA in 2003[1] was hailed as a paradigm shift in Swiss competition law. In addition, by implementing direct sanctions for certain restraints of competition, it has also influenced transactional resolutions. Furthermore, the revision introduced new instruments, such as a leniency program and opposition proceedings (*Widerspruchsverfahren*), which promise to aid the enforceability of competition law.

Unlike in other jurisdictions, in Switzerland, the different forms of transactional resolutions in antitrust proceedings do have a legal basis in the CartA. Therefore, conflicts with due process and the fundamental rights of the parties are less severe—at least in principle.

15.2 Transactional Resolutions

15.2.1 Overview of Transactional Proceedings

The Swiss CartA provides for different cooperation procedures that enable the undertakings involved to escape or reduce sanctions or to avoid harmful decisions (such as the prohibition of a concentration). These options are available at various stages of an investigation:

1. During a *preliminary investigation* (agreement and abuse of dominance cases), the Secretariat of the Competition Commission (the "Secretariat") may propose or negotiate measures to eliminate or prevent restraints of competition (Article 26 CartA) (see Sect. 15.2.1.1 below).
2. Once a *formal investigation* (agreement and abuse of dominance cases) is initiated and the Secretariat considers that a restraint of competition is unlawful, it may propose or negotiate an *amicable settlement* concerning ways to eliminate the restraint with undertakings involved (see Sect. 15.2.1.2 below).
3. If an undertaking assists in the discovery and elimination of a restraint of competition, a sanction may be waived entirely or in part (leniency program, Article 49a CartA). Although it is recognized that the program is available in vertical and horizontal agreement cases, it is not yet clear whether or to what extent this is the case in abuse of dominance investigations (see Sect. 15.2.1.3 below).
4. Transactional elements also exist in the *merger control procedure*. Here, the Swiss Competition Commission (the "ComCo") may require the undertakings concerned to make binding proposals as to how effective competition may be

[1] In force per 1 April 2004.

restored. Such commitments are then subject to negotiations between competition authorities and the undertakings involved.

15.2.1.1 Commitments During the Preliminary Investigation (Article 26 CartA)

According to Article 26 para. 2 CartA, the Secretariat may propose measures to eliminate or prevent restraints of competition during its preliminary investigation. This offers the Secretariat an informal, fast, and cost-efficient opportunity to address and resolve an issue relevant to competition law without having to open a formal investigation.

Cooperation with competition authorities at such an early stage in proceedings can also prove beneficial for the undertakings involved. By exercising good negotiation tactics and adapting their behavior, a formal investigation, and thus the threat of sanctions, can be avoided.

The main focal point of negotiations between the Secretariat and the undertakings is the modification of future competition-related behavior. The parties may enter into an amicable agreement cementing the commitments made by the undertaking. The agreement can be concluded in orally or in writing and is *not subject to approval by ComCo*. Accordingly, the binding effect of such an agreement does not exceed the party's obligation to act in good faith.[2]

Due to the informal nature of the preliminary investigation, the parties do not have access to the file, which can be problematic if a party has to accept critical commitments and to bear the costs of the procedure.

15.2.1.2 Amicable Settlements During Formal Investigations (Article 29 CartA)

Compared to the commitments during the preliminary investigation (Article 26 CartA), amicable settlements during the main investigation (Article 29 CartA) are a more formal mode of amicable settlement only available at that particular stage. If the Secretariat considers a restraint of competition to be unlawful, it may propose an amicable settlement agreement concerning ways to eliminate the restraint to the undertakings involved. Any such agreement has to be made in writing and is *only valid and binding following formal approval by ComCo*.

The content of an amicable settlement can be any measure helping to eliminate a potential restraint of competition according to Articles 5 and 7 CartA (agreements and abuse of dominance cases). It can encompass prohibited actions, as well as actions still permitted and in compliance with competition law. The legal qualification and the admissibility or inadmissibility of a past action and the related sanctions are not negotiable. However, in practice, the undertakings negotiate maximum sanctions with the Secretariat. If ComCo exceeds the agreed maximum sanction in its approval decision, the settlement agreement is no longer binding.

[2] B. Zirlick and Ch. Tagmann, paragraph 11 to Article 29 CartA. In: Amstutz, Reinert (eds). Basler Kommentar Kartellgesetz, Helbing Lichtenhahn 2010.

Even after an undertaking and the Secretariat agree on a modification of conduct, ComCo still has the possibility and even the duty to make further inquiries, reject or accept the agreement, and impose a different sanction than agreed on with the Secretariat.

The violation of an amicable settlement is subject to the sanctions set out in Article 50 CartA.

Table 15.1 shows the amicable agreements concluded under Article 29 CartA between 1997 and 2013.

As Table 15.1 shows, the quantity, content, and importance of amicable settlements did not change following revision of the CartA in 2003. The introduction of direct sanctions, however, provided undertakings with an additional incentive to negotiate, as amicable settlements usually include a reduction of the fine (usually up to 20 %).

15.2.1.3 Leniency Program

The leniency program in Article 49a para. 2 CartA is designed to help the competition authorities uncover cartels. Cooperation between undertakings and competition authorities under the leniency program facilitates the fact-finding procedures and is thus more time- and cost-efficient.

The Ordinance of 12 March 2004 on Sanctions Imposed for Unlawful Restraints of Competition (Cartel Act Sanctions Ordinance, CASO) lays down the conditions and the procedure for obtaining complete or partial immunity from sanctions. ComCo grants an undertaking full immunity from sanctions if it provides information that leads to the launch of an investigation or evidence that enables the competition authority to establish a "hardcore" infringement of competition law (Article 8 CASO). The sanction is reduced by up to 50 % if the undertaking voluntarily cooperates in proceedings and if it terminates its participation in the infringement of competition no later than at the time at which it submits evidence. The reduction is based on the importance of the undertaking's contribution to the success of the proceedings (Article 12 para. 2 CASO). ComCo can reduce the amount of the sanction by up to 80 % if an undertaking voluntarily provides information or submits evidence on further unlawful infringements of competition (Article 12 para. 3 CASO).

Eligibility for leniency does not depend on whether the authority has already launched proceedings or not. In principle, there is no specific deadline for the participants to come forward with a leniency application. However, immunity from a sanction is no longer granted if the competition authority already possesses sufficient evidence to prove the infringement. Undertakings should therefore apply for leniency at an early stage of the proceedings. Further "pressure" on the undertakings results from the fact that only the first applicant is eligible for full immunity (Article 8 para. 1 CASO). Whether an undertaking is granted full or only partial immunity may be a matter of minutes.[3]

[3] In the case RPW 2009/3, pp. 196ff—"Electrical Installation Companies Bern," the difference between the first applicant and the second applicant was only 75 min.

Table 15.1 Amicable agreements concluded under Article 29 CartA (1997–2013)

Case	Reference	Behavior	
Swisscom—Centrex	RPW 1998/3, pp. 377 ff	Article 7 CartA	
Prix des quotidiens tessinois (Prices of the Newspapers in the Canton of Ticino)	RPW 2000/1, pp. 16 ff	Article 5 para. 3 CartA	
Recommandations de prix pour les boissons servies dans la restauration romande (Price Recommendations for Drinks Served in Restaurants in the Romandie	RPW 2000/1, pp. 25 ff	Article 5 para. 3 CartA	
CGE	RPW 2001/1, pp. 110 ff	Article 5 para. 3 CartA	
SUMRA/Distribution de montres (SUMRA/Distribution of Watches)	RPW 2001/3 pp. 510 ff	Article 5 para. 3 CartA	
Systeme de distribution—Citroën (Distribution System—Citroën)	RPW 2002/3, pp. 455 ff	Article 5 paras. 1 and 2 CartA	
Fahrschule Graubünden (Driving School Canton of Graubünden)	RPW 2003/3, pp. 271 ff	Article 5 para. 3 CartA	
Vertrieb von Tierarztmitteln (Distribution of Veterinary Products)	RPW 2004/4, pp. 1040 ff	Article 5 paras. 1 and 2 CartA	
CoopForte	RPW 2005/1, pp. 146 ff	Article 7 CartA	
Kreditkarten –Interchange Fee (Credit Cards—Interchange Fee)	RPW 2006/1, pp. 65 ff	Article 5 para. 3 CartA	
Revision 2003 (effective as of April 01, 2004) adopting direct sanctions			**Sanction imposed?**
Flughafen Zürich AG (Unique) (Zurich Airport—Unique)	RPW 2006/4, pp. 625 ff	Article 7 CartA	✓
Richtlinien VSW (Guidelines of VSW)	RPW 2007/2, pp. 190 ff	Article 7 CartA	✗
Arzneimittelinformationen (Health Care Information)	RPW 2008/3, pp. 385 ss	Article 7 CartA	✓
Sécateurs et cisailles (Garden Shears and Hedge Trimmers)	RPW 2009/2, pp. 143 ff	Article 5 para. 4 CartA	✓
Elektroinstallationsbetriebe Bern (Electrical Installation Companies Bern)	RPW 2009/3, pp. 196 ff	Article 5 para. 3 CartA	✓
VM Interchange Fees II (Precautionary Measures)	RPW 2010/3, pp. 473 ff	Article 5 para. 3 CartA	(✗)
Baubeschläge für Fenster und Türen (Building Hardware and Construction Fittings for Windows and Window Doors)	RPW 2010/4, pp. 717 ff	Article 5 para. 3 CartA	✓
Behinderung des Online-Handels (Restriction of the Online Trade)	RPW 2011/3, pp. 372 ff	Article 7 CartA	✗
Swatch Group (Swatch Group—Suspension of Delivery, Precautionary Measures)	RPW 2011/3, pp.400 ff	Article 7 CartA	(✗)
Komponenten für Heiz-, Kühl- und Sanitäranlagen (Components for Heating, Cooling and Sanitary Facilities)	RPW 2012/3, pp. 540 ff	Article 5 para. 3 CartA	✓
Recommandations Immobilier (Recommendations for Real Estate Agents)	RPW 2012/3, pp. 657 ff	Article 5 para. 3 CartA	✓
Vertrieb von Musik (Distribution of Music)	RPW 2012/4, pp. 820 ff	Article 5 para. 3 CartA	✓
Spedition (Freight Forwarders)	RPW 2013/2, pp. 142 ff	Article 5 para. 3 CartA	✓
Swatch Group Lieferstopp (Swatch Group—Suspension of Delivery)		Article 7 CartA	✓

15.2.2 Discretionary Power of Competition Authorities

According to Article 29 CartA, the Secretariat may propose an amicable settlement to the undertakings involved. It is also generally recognized that an undertaking can take the same initiative.[4] Finally, ComCo can instruct the Secretariat to work toward an amicable settlement.[5]

Although Article 29 CartA states that the Secretariat is not obliged to propose an amicable settlement in every case, procedural efficiency indicates that the Secretariat has to at least signal its willingness to enter into negotiations.[6] If several undertakings are involved in a restraint of competition, the Secretariat has to evaluate whether negotiations are to be conducted independently for each undertaking or in a combined way that encompasses all the circumstances of the infringement in question.[7]

Following negotiations, the Secretariat prepares a proposal for an amicable settlement and consults with the undertakings involved. Once the agreement is signed, the Secretariat prepares a motion to ComCo, which includes the settlement agreement, as well as a draft of the decision. This motion is first sent to the undertakings for comments; it is then forwarded to ComCo.[8]

It is worth noting that the Secretariat's discretionary powers become more limited as an investigation advances. Whereas the Secretariat has discretionary power as to whether or not to open a formal investigation, it can only exercise discretion in exceptional cases in advanced stages of proceedings when it comes to determining the fine. The Secretariat's power to conclude settlements without determining that a violation of competition law has occurred has in general been sharply reduced since the introduction of sanctions in the CartA.[9]

15.2.2.1 Practical Approach

According to the inquisitorial principle, the burden of proof lies with the competition authorities. The State is also required to respect the principle of legality in all

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[4] S. Howald, Einvernehmliche Regelungen bei sanktionsbedrohten Verhaltensweisen im schweizerischen Kartellrecht, sic! 11/2012, p. 3; B. Zirlick and Ch. Tagmann, paragraph 70 to Article 29 CartA. In: Amstutz, Reinert (eds). Basler Kommentar Kartellgesetz, Helbing Lichtenhahn 2010.

[5] RPW 2007/2, p. 190 paras. 20 and 292—"Guidelines of the Association of Professional Swiss Advertising Companies VSW Regarding the Commissioning of Professional Agents."

[6] B. Zirlick and Ch. Tagmann, paragraph 73 to Article 29 CartA. In: Amstutz, Reinert (eds). Basler Kommentar Kartellgesetz, Helbing Lichtenhahn 2010.

[7] M. Tschudin, Die verhandelte Strafe, einvernehmliche Regelung neben kartellrechtlicher Sanktion, AJP 2013, p. 1020.

[8] Article 30 CartA; M. Tschudin, Die verhandelte Strafe, einvernehmliche Regelung neben kartellrechtlicher Sanktion, AJP 2013, p. 1020.

[9] P. Këllezi, Les accords amiables conclus avec les autorités de la concurrence et leurs implications pour les entreprises, in: F. Chabot (ed.), Développements récents en droit commercial III, CEDIDAC 2014, p. 101.

its actions. However, from a practical point of view, the competition authorities still have a broad margin of discretion to decide whether to open a formal investigation and whether to enter into an amicable agreement, as well as regarding what the content of a potential settlement agreement may be.

In the past, the competition authorities seemed to exceed the limits of their discretion in certain cases. In the “Garden Shears and Hedge Trimmers” case,[10] for instance, ComCo imposed a sanction upon an undertaking for a violation of Article 5 para. 4 CartA (vertical price fixing). In Swiss competition law, in order to be subject to sanction, the behavior of an undertaking has to *significantly restrict competition* in the relevant market. In the mentioned case, the market share of the undertakings involved was so small that the grounds for a sanction were doubtful. Despite this, the competition authorities concluded an amicable agreement with the parties and imposed a sanction.

At the stage of a *preliminary investigation*, some undertakings might be prepared to bear the costs of an investigation and to accept (unreasonable) commitments in order to avoid negative publicity and an expensive and time-consuming investigation.

15.2.3 Nature of the Legal Act Concluding, Approving, and Making Binding the Settlement

Swiss law prescribes a two-step process for amicable settlements. First, the agreement is concluded between the undertaking and the Secretariat (Article 29 para. 1 CartA). According to Article 29 para. 2, it then has to be formulated in writing and approved by ComCo.

The prevailing doctrine qualifies the amicable settlement between the undertaking and the Secretariat as a public law contract under the suspensive condition of approval by ComCo. In response to a motion from the Secretariat and after hearings with the undertakings involved, ComCo decides on the appropriate measures or on the approval of the amicable settlement in a ruling (Article 30 para. 1 CartA). This means that it can reject or accept the agreement, as well as suggest necessary changes.[11]

If ComCo approves the agreement, it usually includes the amicable settlement in the conclusion of its decision. The agreement is thus made binding, and a violation thereof is punishable according to Articles 50 and 54 CartA.[12] If ComCo rejects the Secretariat’s proposal, the suspensive condition remains unfulfilled, and the undertaking is not bound to the agreement.

[10] RPW 2009/2, pp. 143 ss—“Garden Shears and Hedge Trimmers.”

[11] B. Zirlick and Ch. Tagmann, paragraph 91 to Article 29 CartA. In: Amstutz, Reinert (eds). Basler Kommentar Kartellgesetz, Helbing Lichtenhahn 2010.

[12] RPW 2006/4, pp. 667 s.—“Unique Airport.”

ComCo cannot amend an amicable settlement by itself, even if only details are concerned. Any changes are subject to the consent of the undertaking involved. If ComCO considers that an amendment is necessary, it has to refer back to the Secretariat, instructing it to work out a different agreement or to resume the investigation without an amicable settlement.[13]

15.2.3.1 Legal Consequences for the Parties

Since an amicable settlement has to pass through a two-step process, negotiations with the Secretariat must be distinguished from approval by ComCo.

The amicable agreement between the undertaking and the Secretariat may include any measure that helps to eliminate or prevent restraints of competition. By obliging the undertaking to halt or adapt certain behavior or by defining an admissible scope of action *for the future,* it aims to restore lawful conditions. The parties can agree on what behavior is considered lawful and where the limits of what is legally permissible are exceeded.[14] As mentioned above, the legal qualification and admissibility or the inadmissibility of a past practice and the potential sanction connected to the practice cannot be part of the agreement.

In practice, however, the Secretariat requests a certain maximum sanction when submitting the agreement to ComCo for approval. The agreement on a specific maximum sanction between the Secretariat and the undertaking is usually situated in the preliminary remarks of an amicable agreement.

Because ComCo has, to date, always stayed within the limits of the sanction suggested by the Secretariat, the legal impact of the suggested maximum sanction has never been tested. The maximum sanction should not be underestimated, as it plays a very important role in negotiations with the Secretariat. This practice is problematic, as the CartA does not provide any legal basis for negotiations regarding the possible sanction. On the other hand, it is the result of the needs of the undertakings involved in cartel or abuse of dominance investigations. No undertaking would agree to an agreement that is missing one of the most important practical elements of a settlement—the amount of the sanction.

15.2.4 Fundamental and Procedural Rights of the Parties

15.2.4.1 Procedure

Competition law, as part of administrative law, is governed by the inquisitorial principle. The burden of proof for a restraint of competition basically lies with the State. In theory, proceedings leading to an amicable settlement should not be handled any differently in this regard, meaning that a sanction should only be

[13] B. Zirlick and Ch. Tagmann, paragraph 95 to Article 29 CartA. In: Amstutz, Reinert (eds). Basler Kommentar Kartellgesetz, Helbing Lichtenhahn 2010.

[14] S. Howald, Einvernehmliche Regelungen bei sanktionsbedrohten Verhaltensweisen im schweizerischen Kartellrecht, sic! 11/2012, p. 4.

imposed if the evidence gathered would allow the authorities to prove that an undertaking has engaged in unlawful behavior. In practice, however, standards (not the degree of proof but the amount of evidence gathered) may be lower in cases involving amicable settlement.[15]

In the field of competition law, the Federal Administrative Court previously ruled that a court may not impose excessively high requirements as to the credibility of evidence (degree of conviction). Accordingly, preponderant probability is sufficient and full proof is not necessary.[16] However, the reasoning supporting this opinion is hardly convincing, and the practice is to be considered problematic from a constitutional point of view. A very recent decision has made clear that even in cases where leniency applications and amicable settlements are involved, ComCo has to provide full evidence. Namely, the Federal Administrative Court has now ruled that several factors, but in particular the presumption of innocence, speak against a lowering of the standard of proof required. Because the constitutional principles of criminal law apply to the sanction pursuant to Article 49a CartA, the authorities must fully prove the infringement of competition law and may not base a sanction on statements made in a leniency application alone.[17]

15.2.4.2 Considerations When Entering into an Amicable Settlement or Making Use of the Leniency Program

The decision to enter into an amicable settlement or make use of the leniency program depends on the particular circumstances of the case at hand. Even if an undertaking believes that it has not violated competition law, it may still be tempted or even induced by the authorities to make use of these institutions.

Making use of a transactional resolution can prove very beneficial: first and foremost, the reduction in the amount of the sanction can be substantial. Participation in the leniency program can lead to full immunity from sanctions (Article 8 CASO), and entering into an amicable settlement is considered cooperative behavior by the authorities and can lead to a reduction of up to 40 %.[18] In ComCo's decisions so far, there have even been cases where the fine was waived in its entirety for proportionality reasons. Where a sanction was imposed, it was reduced by 15–25 % if a settlement agreement was entered into at the very beginning of proceedings and by up to 10 % if it was concluded relatively late in the process, namely after the Secretariat had presented its motion to the parties. In the preliminary stages of investigation, a modification of conduct on the relevant market may convince the authority not to launch a formal investigation.

[15] B. Zirlick and Ch. Tagmann, paragraph 49 to Article 29 CartA. In: Amstutz, Reinert (eds). Basler Kommentar Kartellgesetz, Helbing Lichtenhahn 2010.

[16] Judgment of the Federal Administrative Court of 12 February 2009, BVGE 2009/35, cpt 7.4.

[17] Judgment of the Federal Administrative Court of 23 September 2014, BVGE B-8430/2010, pts 5.4.26 ff; Decision of the Federal Administrative Court of 23 September 2014, BVGE B-8399/2010, pts 4.4.26 ff.

[18] Judgment of the Federal Administrative Court of 27 April 2010, B-2977–2007, pt 8.3.6.

In general, it can be said that cooperation is advisable when the facts are relatively clear and the probability of a fine is high. Also, where several undertakings are involved in a specific investigation, they may be more willing to settle or cooperate. Another incentive to settle lies in the fact that ComCo's decisions following settlements contain less reasoning and thus less detail, which can reduce the likelihood of follow-on civil claims. This is particularly true of settlements concluded during the preliminary investigation (Article 26 CartA). With a view to possible civil prosecution, particular attention should thus be paid to the wording of the settlement concluded with the Secretariat.[19]

On the other hand, if fact-finding is difficult and most of the legal questions remain inconclusive, the undertaking may be better off not making concessions in the form of an amicable settlement. It must be kept in mind, however, that where an undertaking rejects entering into settlement negotiations, the Secretariat is more likely to resort to more severe measures for fact-finding if the circumstances indicate that the undertaking could be involved in a restraint of competition.

15.2.4.3 Right Against Self-incrimination and Presumption of Innocence

As indicated above, competition law proceedings are governed by the inquisitorial principle, and the parties are under an extended duty to provide information. However, the duty to cooperate is limited by the right to refuse to testify as laid down in Article 16 of the Federal Act on Administrative Procedure (the "APA"), in connection with Article 42 of the Federal Act on Federal Civil Procedure. Namely, testimony can be refused if the truthful answer to a question asked could lead to criminal prosecution, to severe damage to the honour or to direct financial damages for the witness or persons close to him or her.

According to the heavily criticized practice of ComCo, when an undertaking involved in a restraint of competition intends to make use of the leniency program, it must make a *statement of guilt and specify in what form it has violated the Cartel Act (i.e. it has to provide a legal qualification of its behaviour)*. Entering into an amicable settlement, on the other hand, is not necessarily considered an admission of guilt regarding the alleged restraint of competition.[20] However, the competition authority does not seem to have developed a clear practice thus far.

The judgments of the Federal Administrative Court also vary. In a 2007 decision, the Federal Administrative Court stated that consent to a settlement and

[19] P. Këllezi, Les accords amiables conclus avec les autorités de la concurrence et leurs implications pour les entreprises, in: F. Chabot (ed.), Développements récents en droit commercial III, CEDIDAC 2014, pp. 100, 107.

[20] The legal qualification can also be influenced by the content of an amicable agreement: where an agreement specifically prohibits a certain type of conduct for the future, it is more likely that the court will assume an admission of guilt. On the other hand, when an agreement merely about future conduct in general is concluded, this is less likely to be considered as admission of guilt. See M. Tschudin, Die verhandelte Strafe, einvernehmliche Regelung neben kartellrechtlicher Sanktion, AJP 2013, pp. 1023 ff.

acceptance of a sanction could hardly be interpreted differently than an admission of guilt as to a restraint of competition, even if the undertaking had expressly rejected making such an admission in its correspondence and in the text of its agreement with the Secretariat.[21] In contrast, in a very recent case, the Federal Administrative Court did not find that cooperating with the competition authorities within the framework of a leniency application and subsequently appealing the decision before the judicial authorities constituted contradictory behavior. The court stated that the willingness of a party to cooperate with the authorities does not constitute an admission of guilt as such and that submitting a leniency application has no effect on a party's procedural rights.[22]

The presumption of innocence comprises the right of everyone to be presumed innocent until proven guilty. Applied to amicable settlement proceedings, this means that an undertaking can only be sanctioned if the evidence against it would allow a full conviction. However, in amicable settlement proceedings where ComCo expects that the undertakings involved will not appeal the agreement, the authority may be tempted to impose a sanction even if it is unclear whether the facts would eventually allow for a conviction.

15.2.4.4 Right To Be Heard and Access to the File

As a prerequisite to exercising its right to be heard, a party has to be granted access to the relevant files concerning its own case. According to established case law, competition law is subject to heightened requirements regarding the principle of access to the case file.[23]

Unclear is, however, at exactly what stage of the investigation the parties are to be granted access to the file. Even though Article 26 para. 3 CartA states that the parties do not have the right to access the file during the preliminary investigation, the competition authorities may still grant partial access if required by the circumstances of the case.[24] From the time the formal investigation is launched, the procedure is governed by the APA, which grants the parties a general right of full access to the file (Articles 26–28 APA). In practice, however, parties often do not have full access to the file while negotiating an amicable settlement. Especially in cases involving leniency applications, access to the file is usually restricted until the settlement agreement is concluded or until the Secretariat sends its draft motion to ComCo to the parties. Experience has shown that the Secretariat tends to request that parties implicated in proceedings first express their willingness to enter into settlement negotiations before they are granted access to the file. This request is

[21] Judgment of the Federal Administrative Court of 3 October 2007, B-2157/2006, pt 3.3.2.

[22] Judgment of the Federal Administrative Court of 23 September 2014, B-8404/2010, pt 4.9; judgment of the Federal Administrative Court of 23 September 2014,B-8430/2010, consideration 2.8.

[23] S. Bigler, paragraph 63 to Article 39 CartA. In: Amstutz, Reinert (eds). Basler Kommentar Kartellgesetz, Helbing Lichtenhahn 2010; RPW 2006/2, pp. 347 ff.

[24] B. Zirlick and Ch. Tagmann, paragraph 99 to Article 26 CartA. In: Amstutz, Reinert (eds). Basler Kommentar Kartellgesetz, Helbing Lichtenhahn 2010.

combined with the latent threat that any sanction will only be reduced by a smaller amount should the parties decide to enter into settlement negotiations at a later point in time. This practice is problematic from the point of view of the parties' procedural rights and should be abandoned in the future.

15.2.4.5 Right to Equal Treatment

The principle of equality before the law (Article 8 para. 1 and Article 29 para. 1 of the Federal Constitution) stipulates the right of every person to equal treatment in comparable circumstances and differing treatment in different circumstances. This principle fully applies to undertakings in competition law proceedings.[25]

Tensions may thus arise when two undertakings in very similar positions are treated differently. This is best shown through the example of the leniency program: Article 8 CASO stipulates the requirements for an undertaking to be granted complete immunity from a sanction. According to paragraph 4a, full immunity from a sanction can only granted if no other undertaking has already fulfilled the requirements for complete immunity. This means that no more than one applicant can ever benefit from full immunity—even if the second application is made just five minutes later.[26]

15.2.4.6 Right to an Impartial Judge

According to Article 30 para. 1 of the Federal Constitution and Article 6 para. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

In its recent "PubliGroupe" decision,[27] the Swiss Supreme Court ruled that sanctions under Article 49a CartA are criminal law sanctions in the sense of the ECHR. As a consequence, the parties must be granted all of the relevant minimal procedural safeguards, including access to an impartial judge.[28]

ComCo as an administrative commission does not meet the requirements set out in Article 6 ECHR. However, referring to the European Court of Human Rights' decision in the "Menarini" case, the Swiss Supreme Court has ruled that it is sufficient to grant access to a court in conformity with the guarantees of the ECHR in the appeals procedure. This decision is less than satisfactory for undertakings involved in sanctions procedures, as the latest rulings of the Federal

[25] S. Bigler, paragraph 21 to pre Articles 39–44 CartA. In: Amstutz, Reinert (eds). Basler Kommentar Kartellgesetz, Helbing Lichtenhahn 2010.

[26] RPW 2009/3, pp. 196 ff—"Electrical Installation Companies Bern." Several undertakings were involved in this case. In order to respect the principle of equal treatment, the competition authorities have to inform all of the parties involved about the leniency program.

[27] Judgment of the Swiss Supreme Court of 29 June 2012, BGE 139 I 72. This decision lead to a controversial discussion in the doctrine and was mostly criticized (see G. Brei, Kartellrechts-verfahren nach PubliGroupe – offene Fragen und praktische Probleme, SJZ 2014, pp. 177 ff).

[28] Judgment of the Swiss Supreme Court of 29 June 2012, BGE 139 I 72.

Administrative Court, which is the normal appeal instance in the field of competition law, show that it is rather reluctant to overturn ComCo's decisions.

15.2.4.7 Right to Trial

In some cases, the Secretariat asks undertakings involved in amicable settlement proceedings to waive their right to appeal under certain conditions or at least to declare their intention not to appeal Comco's decision.[29]

It is widely recognized that a waiver of the right to appeal is not legally binding. Still, the exact effects of such a waiver are controversial in the legal literature.[30] One condition of initiating an appeal is a legitimate interest in bringing proceedings. It is questionable whether a legitimate interest to appeal is given if an undertaking has entered into a settlement agreement and ComCo has respected the defined limits of such agreement in its decision. However, in very recent cases before the Federal Administrative Court, the court accepted to hear the appeals of companies that applied for leniency and entered into settlements with the competition authorities without questioning their interest to appeal. The court also noted that no inconsistent behavior was evident if a party cooperated with the authorities but subsequently appeals their decision.[31]

15.3 Merger Control

In Swiss merger control procedures, the thresholds for intervention by competition authorities are rather high. Prohibitions of concentrations are very rare; there has only been one case in Switzerland so far. However, in many cases, undertakings have offered to make commitments (obligations or conditions) similar to the commitments made during negotiation of an amicable settlement. By doing so, an undertaking risks offering more than the authorities could actually oblige it to do.

In an obiter dictum, the Swiss Supreme Court ruled that conditions and obligations cannot be part of an agreement between the parties. Instead, they have to be part of a formal decision by ComCo.[32] In practice, however, conditions and obligations are negotiated between the parties and the Secretariat.

[29] These conditions usually are that the ComCo approves the agreement and stays within the suggested sanctioning framework (M. Tschudin, Die verhandelte Strafe, einvernehmliche Regelung neben kartellrechtlicher Sanktion, AJP 2013, pp. 1025 s.; S. Howald, Einvernehmliche Regelungen bei sanktionsbedrohten Verhaltensweisen im schweizerischen Kartellrecht, sic! 11/2012, p. 5).

[30] M. Tschudin, Die verhandelte Strafe, einvernehmliche Regelung neben kartellrechtlicher Sanktion, AJP 2013, pp. 1025 s. with further references; P. Këllezi, Les accords amiables conclus avec les autorités de la concurrence et leurs implications pour les entreprises, in: F. Chabot (ed.), Développements récents en droit commercial III, CEDIDAC 2014, p. 117.

[31] Decision of the Federal Administrative Court of 23 September 2014, B-8404/2010, pt 4.9.

[32] RPW 2007/2, p. 329 para. 9—“Swissgrid.”

United Kingdom

16

Marc Israel

16.1 Introduction

In April 2014, a number of significant reforms to the UK competition law regime were introduced. These were given effect through the Enterprise and Regulatory Reform Act 2013 (**ERRA13**), which received Royal Assent on 25 April 2013.

The principal change for the UK competition regime has been the establishment of a new unified competition authority, the Competition & Markets Authority (**CMA**). The CMA was formally established in October 2013 and operated in "shadow form" prior to becoming fully operational on 1 April 2014 and assuming the competition functions of the Office of Fair Trading (**OFT**) and all the functions of the Competition Commission (**CC**). The OFT and CC have now been abolished.[1]

The CMA has a range of statutory powers to address competition issues.[2] These include the power under the Competition Act 1998 (**CA98**) to investigate undertakings or groups of undertakings suspected of infringing the UK and/or EU prohibitions against anti-competitive agreements and the abuse of a dominant position.[3] In addi-

[1] The various UK sectoral regulators—CAA (air traffic services), Monitor (healthcare sector), Ofcom (communications/post), Ofgem (and NIAUR in Northern Ireland) (electricity and gas), Ofwat (water and sewerage), ORR (rail)—will retain their concurrent competition powers.

[2] The CMA will also have powers to enforce a range of consumer protection legislation, and will also take on the CC's powers and duties in relation to the conduct of appeals regarding regulatory determinations.

[3] The UK equivalents of Article 101 TFEU and Article 102 TFEU are known, respectively, as the "Chapter I prohibition" and the "Chapter II prohibition".

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tion, under the Enterprise Act 2002 (**EA02**),[4] the CMA is able to investigate mergers (provided they meet the jurisdictional thresholds) and take action in respect of those that may give rise to a substantial lessening of competition and also has the ability to impose measures on the merging parties to protect competition pending the outcome of the CMA's investigation. Furthermore, under EA02, the CMA has the power to conduct market studies and market investigations into markets in which the CMA considers that competition may not be working effectively, with the ability, inter alia, to impose wide-ranging remedies to address any concerns that are identified. Finally, the CMA is also able to bring criminal proceedings against individuals who are suspected of having committed the cartel offence under section 188 EA02.[5]

On 22 January 2014 the CMA published a document setting out its vision, values and strategy. This sets out the CMA's mission to make markets work well in the interests of consumers, businesses and the economy, and its overall ambition is to be one of the leading competition authorities in the world. In order to achieve its overall ambition, the CMA has set itself five strategic goals: to deliver effective enforcement, to extend competition frontiers, to refocus consumer protection to develop integrated performance and to achieve professional excellence.[6]

The CMA is also expected to have regard to the Government's performance management framework, which sets out the performance that the Government expects of the CMA.[7] In summary, the Government expects the CMA to have a beneficial impact on consumers, on business behaviour and on productivity and growth in the economy and to make robust decisions and implement effective and proportionate remedies. In line with its overall mission, the CMA is expected, amongst other things, to increase the number of competition cases it deals with (compared to the OFT), make strong and effective use of all its competition tools across a range of projects and reduce the time taken for cases to reach conclusion.

At the same time, alongside the establishment of the CMA, a number of important changes to the UK competition regime were also introduced, including in relation to antitrust investigations, mergers and market investigations. These aim to strengthen the UK competition regime by giving the CMA new and enhanced investigation and enforcement powers and also to streamline its processes in order to improve the effectiveness and efficiency of the competition regime and to ensure that any burdens on business are no greater than those necessary and proportionate.

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[4] References in this paper are to the EA02 as amended by the ERRA13, unless otherwise stated.

[5] Prosecutions may only be brought by the CMA or the Serious Fraud Office or with the consent of the CMA. Prosecutions will generally be undertaken by the CMA. The settlement of criminal cases under the UK's competition regime is not considered in this paper.

[6] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274059/CMA13_Vision_and_Values_Strategy_document.pdf.

[7] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274146/bis-14-559-competition-and-markets-authority-performance-management-framework.pdf. In October 2013, the Government also published a non-binding ministerial statement of strategic priorities for the CMA, which include identifying markets where competition is not working well and tackling constraints on competition, defending fair competition and enforcing antitrust rules robustly, challenging governmental barriers to competition and delivering positive competition outcomes.

Against this background, there is no doubt that the various types of transactional resolutions that are available (such as "commitments", "undertakings-in-lieu", "voluntary assurances" and other forms of negotiated solutions) will be a valuable part of the CMA's toolkit. Transactional resolutions can be expected to assist the CMA in delivering effective and efficient competition enforcement.

However, the success of the available transactional resolution mechanisms (and parties' willingness to use them) will, to a large extent, depend on ensuring procedural fairness and transparency, as well as on safeguarding the fundamental rights of the parties involved. The CMA has published extensive guidance on its antitrust and merger investigation proceedings (including with regard to transactional resolutions), aiming to increase certainty and predictability, as well as to ensure fair treatment for the parties involved. Such predictability and fairness in decision-making processes is also fostered by transparency with respect to the substantive legal standards; policies, practices and procedures; the order and likely timetable of key stages in proceedings; and the process for appealing CMA decisions.

In the context of competition investigations in the UK, there is a certain degree of formal and informal interaction between the authorities and the parties involved in the proceedings. Such interaction enhances the parties' knowledge of the facts underpinning the investigation (and therefore the case they need to address) and allows them to consider the appropriateness of a settlement balanced against the CMA's theory of harm. For example, in CA98 cases, if the CMA is of the view that the conduct under investigation amounts to an infringement, it will issue a Statement of Objections (**SO**) in which it will set out its case against the parties and its proposed next steps and will also give the parties an opportunity to respond in writing and orally if they so wish. At the same time, the CMA will also give recipients of the SO access to the file in order to ensure that they can properly defend themselves against the allegation of having infringed competition law. At that stage, and even pre-SO, the CMA may also inform the parties that they can contact the CMA if they wish to enter into discussions on possible settlement—one of the key transactional resolution mechanisms available. Parties may also approach the CMA at any time to explore the possibility of resolving an investigation through a transactional resolution, and the different options are considered further below. Any type of transactional resolution is, however, voluntary, and the parties involved are under no obligation to settle or enter into any settlement discussions where these are offered by the CMA. In fact, even if a party decides to settle its case with the CMA, it still has the opportunity to appeal any subsequent infringement decision.[8] Conversely, parties do not have a right to settle and the

[8] This occurred in the OFT's tobacco products investigation (http://www.oft.gov.uk/news-and-updates/press/2010/39-10). A number of parties settled, two of which (Gallaher and Somerfield) then challenged the infringement decision. The appeals were ultimately dismissed; see further Sect. 16.2.3 below.

CMA has a wide discretion in deciding which cases are suitable for transactional resolution.

In merger investigations, the case against the parties will be set out in Phase 1 in an "issues letter" and subsequently in the CMA's decision and in "provisional findings" (**Provisional Findings**) in Phase 2. In Phase 1, the parties will have an opportunity to respond and consider (especially after seeing the CMA's decision) whether they wish to offer commitments to avoid an in-depth Phase 2 investigation.

In market studies and investigations, parties will also be presented with the CMA's views and will have an opportunity to comment and assess whether to offer commitments or assurances in order to address any CMA concerns if it is minded to initiate a Phase 2 investigation.

Transactional resolutions are available for all types of competition investigation in the UK. In this paper, we have sought to answer the various questions posed by the International Rapporteur[9] and have focussed on transactional resolutions in the context of (1) antitrust investigations, (2) merger control and (3) market studies and investigations.

16.2 CA98 Investigations

As noted above, the CMA is primarily responsible for the enforcement of the Chapter I (anti-competitive agreements and practices between undertakings) and Chapter II (abuse of a dominant position) prohibitions of the CA98, as well as Articles 101 and 102 TFEU.[10]

Although transactional resolutions of antitrust investigations have been possible for some time, parties and regulators have become increasingly willing to consider them over the past few years. In particular, by leading to a more effective and efficient use of resources, transactional resolutions can enable the CMA to undertake more high-impact projects and increase deterrence. Accordingly, a number of antitrust investigations in the UK have been resolved either informally or through some form of formal resolution process such as by accepting binding commitments or settlements.[11] Depending on the nature of the case, transactional resolution may

[9] Although this paper does not consider in any detail the rights of third parties, we consider that the relevant legislation and guidance, together with legal precedent, ensure that there are sufficient mechanisms to safeguard the legitimate interests of third parties in UK competition proceedings, for example, the ability to obtain "Formal Complainant" status in CA98 cases (which gives third parties the opportunity to become involved in key stages of an investigation), make representations on draft commitments, be consulted about the proposed scope of remedies in merger and market study/investigation cases and appeal against decisions made under the CA98 or the EA02.

[10] Certain sectoral regulators have concurrent jurisdiction to enforce the Chapter I and II prohibitions within their regulated sectors. The Chapter I and Chapter II prohibitions (and Articles 101 and 102 TFEU) may also be invoked in private litigation in the UK courts.

[11] Settlements have also been described as 'early resolution agreements'. However, in this paper the term 'settlement' will be used throughout.

result in the CMA closing its file without making a finding of infringement or leading to a reduced fine in the context of an infringement decision.

16.2.1 Informal Resolution

Not all antitrust investigations result in a finding that there has, or has not, been a breach of competition law. A number of antitrust investigations in the UK have been resolved informally, either because the authorities are satisfied that there has been no infringement or that the evidence is insufficient to reach a finding of infringement or because the parties have given certain voluntary assurances to address potential concerns.

In a number of cases, the OFT accepted voluntary assurances offered by parties under investigation, as a result of which the OFT closed its preliminary inquiry without opening a formal investigation or closed its formal investigation without making any finding of infringement.[12] Voluntary assurances are not legally binding, and companies may give them in order to avoid the time and expense of a formal investigation.

Although the CMA has yet to close an investigation by accepting voluntary assurances, Table 16.1 sets out details of cases in which the OFT accepted voluntary assurances.

16.2.2 Commitments

In certain cases, instead of continuing with its investigation and making an infringement decision, the CMA may be prepared to accept legally binding promises (or 'commitments') offered by the parties involved relating to their future conduct.[13]

The CMA is likely to consider it appropriate to accept commitments and bring its investigation to an end only in cases where the competition concerns are readily identifiable and will be fully addressed by the commitments offered and the proposed commitments can be implemented effectively and, if necessary, within a short period of time.[14] Commitments may be structural and/or behavioural (for example, modifying or ceasing specific conduct, terminating an exclusive arrangement or licensing specific IP). Commitments are generally adopted for a specified period of time, after which the parties which offered them are released from their obligations under the commitments. During the period in which commitments are in

[12] Voluntary assurances do not, however, preclude further investigation should further evidence of potential infringements become available.

[13] Section 31A CA98 gives the CMA the power to accept legally binding commitments.

[14] The CMA is very unlikely to accept commitments in cases involving secret cartels between competitors or a serious abuse of a dominant position. The CMA is also less likely to accept commitments if it would be difficult to monitor compliance with the commitments and their effectiveness.

Table 16.1 Cases in which the OFT accepted voluntary assurances

Case	Suspected infringement	Outcome	Year
NHS Hospital Trusts (http://www.oft.gov.uk/news-and-updates/press/2012/71-12)	Chapter I prohibition	Eight NHS Hospital Trusts gave voluntary assurances to the OFT that they would no longer exchange confidential pricing information and would provide further training to their staff on the importance of complying with competition law. As a result, the OFT closed its preliminary inquiry without opening a formal CA98 investigation.	2012
Street furniture advertising/ outdoor advertising (http://www.oft.gov.uk/news-and-updates/press/2012/39-12)	Chapter I prohibition	Clear Channel and JCDecaux, two of the major outdoor advertising companies in the UK, offered voluntary assurances and agreed to make changes to the way they enforce their street furniture advertising contracts (advertising on bus shelters and information panels) with Local Authorities. In the light of the assurances, the OFT closed its investigation without making any finding of infringement under CA98. Alongside the voluntary assurances given by Clear Channel and JCDecaux, the OFT also made certain non-binding best practice recommendations to Local Authorities in relation to their procurement of street furniture advertising.	2012
School Suppliers (http://www.oft.gov.uk/news-and-updates/press/2011/130-11)	Chapter I prohibition	A group of school suppliers in the public sector provided voluntary assurances in relation to the way in which they compete for business from schools in England. In the light of the assurances, the OFT closed its preliminary inquiry without opening a formal CA98 investigation.	2011
Bacardi-Martini (http://www.oft.gov.uk/news-and-updates/press/2003/pn_10-03)	Chapter II prohibition	Bacardi-Martini gave the OFT assurances that it would not enter into or maintain, certain types of exclusive distribution agreements. In the light of the assurances, the OFT closed its investigation without making a finding of any infringement of CA98.	2003

(continued)

Table 16.1 (continued)

Case	Suspected infringement	Outcome	Year
Robert Wiseman Dairies (http://www.investegate.co.uk/ArticlePrint.aspx?id=200109141115010117K)	Chapter II prohibition	In 2001 Robert Wiseman Dairies gave voluntary assurances concerning the sale of milk to certain customers in Scotland. Robert Wiseman Dairies was released from voluntary assurances in 2002 when the OFT decided to close the investigation on the basis that, although Robert Wiseman Dairies probably held a dominant position in the relevant market, the evidence was insufficient to lead to a finding of infringement.	2001

force, they may be reviewed in order to take account of any changes in circumstances which may mean they are no longer appropriate or necessary.

Commitments can be accepted by the CMA (at its complete discretion) at any time during the course of an investigation, until a decision on infringement is made. However, the CMA is unlikely to consider it appropriate to accept commitments at a very late stage in an investigation, for example after it has considered representations on an SO.[15]

The procedure followed by the CMA for negotiating and accepting commitments is set out in the *CMA Guidance and Rules of Procedure for Investigation Procedures under the CA98* (**CMA Guidance**). If a party informs the CMA that it would like to discuss the possibility of offering commitments, the CMA will consider whether commitments may be appropriate in the circumstances of the case. If so, due process is observed by the CMA sending the party a summary of its competition concerns which may then be discussed with the party concerned. If the CMA proposes to accept commitments offered by any party, it will consult those who are likely to be affected by them and will also give interested third parties the opportunity to make representations.[16] Any subsequent material modifications will, again, be subject to third party consultation (although the CMA may make non-material modifications without further consultation). Once accepted, binding commitments will be published by the CMA.

If an investigation is closed with commitments, the CMA will not reach any conclusion as to the legality or otherwise of the agreement or conduct in question. For the parties concerned, this removes the risk of a finding of infringement which third parties could use as the basis for bringing a "follow-on" private action in the High Court or Competition Appeal Tribunal (**CAT**), in which case the finding of infringement would be binding. Although third parties could bring legal

[15] Although the SO is never published in any form, a non-confidential version may be shared with interested third parties (e.g., a complainant).

[16] Third parties will be given at least 11 working days to comment.

proceedings following a commitment decision, in the absence of a finding by the CMA they would need to prove liability for the infringement, as well as the fact that the agreement or conduct had caused them loss and damage. Therefore, in addition to the benefits in terms of both time and cost to the parties (as well as the CMA) of resolving a case with commitments, there is an added benefit to the parties. This is because a transactional resolution through commitments can be expected to reduce the likelihood of private actions based on the agreement or conduct concerned.

Although the CMA has yet to close an investigation by accepting legally binding commitments, Table 16.2 sets out details of cases in which the OFT accepted binding commitments.

As noted above, whilst commitments are in force, the CMA may review their effectiveness from time to time and undertake such action as regards their variation or release as it deems appropriate. In cases where the parties fail to comply with their commitments, the CMA can apply to the court for an order requiring compliance. Commitments may be reviewed, and revoked or amended, if there has been a "material change of circumstances". The CMA may initiate a review of commitments itself or at the request of a party that had given the commitments.

16.2.3 Settlement Procedure

Until recently, there was no formal settlement procedure in the UK. However, despite this, in a number of CA98 cases the OFT reached settlements with one or more parties under investigation, prior to issuing an infringement decision. In fact, most infringement decisions reached by the OFT in recent years have been resolved through some sort of settlement (resulting in a reduction in the level of fines imposed) with at least some of the parties involved.

In all such cases, the terms of the settlement (formerly known as "early resolution agreements") included an admission of liability for the alleged infringement (s) and a commitment to co-operate fully with the OFT's investigation. In return, the OFT offered a reduction in the fines that would otherwise have been imposed. The CMA has not yet closed a case following settlement, but examples of settlements reached by the OFT are listed in Table 16.3.

On 1 April 2014, a more formal settlement procedure was introduced as part of the reform of the UK competition regime. The CMA Guidance sets out in detail the process to be followed by the CMA and settling parties during the course of settlement discussions. However, the new settlement procedure retains much of the flexibility of the procedure followed by the OFT and is expected to allow the CMA to achieve efficiencies, resulting in the earlier adoption of infringement decisions and/or resource savings.

Under its settlement procedure, the CMA can, at its discretion, consider settlement of any CA98 case (both Chapter I and Chapter II), provided the evidential standard for issuing an SO is met. In determining which cases are suitable for settlement, the CMA will take into consideration, amongst other factors, the stage at which a particular case is; the number of businesses involved in an investigation and the number of businesses interested in settlement; the number of alleged

Table 16.2 Cases in which the OFT accepted binding commitments

Case	Suspected infringement	Commitments	Year
Hotel Online Booking (http://www.oft.gov.uk/news-and-updates/press/2014/06-14)	Chapter I prohibition/ Article 101 TFEU	The OFT accepted commitments addressing concerns in relation to the online offering of room-only hotel accommodation bookings by online travel agencies. The OFT investigated agreements between each of Booking.com and Expedia, and InterContinental Hotels, under which online travel agents were restricted in terms of the travel agents' ability to offer discounts on room-only hotel bookings. The OFT accepted commitments which ensure that online travel agents will be able to offer discounts on headline room-only rates, as long as the customers fulfil certain requirements.	2014
Private Motor Insurance (http://www.oft.gov.uk/news-and-updates/press/2011/129-11)	Chapter I prohibition/ Article 101 TFEU	The OFT accepted commitments addressing concerns that arose out of the exchange of pricing information via the *WhatIf?* market analysis tool. The commitments require that any data less than 6 months old must be anonymised, aggregated and only provided if the prices in question had already been used in motor insurance policies sold by brokers.	2011
Associated Newspapers Ltd (http://www.oft.gov.uk/news-and-updates/press/2006/44-06)	Chapter I and Chapter II prohibitions	The OFT accepted commitments from Associated Newspapers Limited in relation to its exclusive distribution agreements with London Underground, Network Rail and other train operating companies, allowing competitors to distribute free weekend or evening newspapers at the stations in question and to use its distribution racks.	2006

(continued)

Table 16.2 (continued)

Case	Suspected infringement	Commitments	Year
TV Eye (http://www.oft.gov.uk/news-and-updates/press/2005/93-05)	Chapter I prohibition	TV Eye was a company owned by various broadcasters which sold advertising airtime. The OFT accepted commitments to address its concerns that the terms and conditions under which those broadcasters sold advertising airtime to media agencies infringed CA98 by unduly reducing the bargaining power of the media agencies.	2005
British Horseracing Board (http://www.oft.gov.uk/news-and-updates/press/2004/94-04)	Chapter I prohibition	The OFT accepted commitments from the British Horseracing Board (**BHB**) addressing its concerns about the running of British horse racing. The commitments included removing BHB's limits on the number of races per year, changes to how racecourses could bid for existing and new events and protections against the unfair pricing of access to BHB's racing database.	2004

infringements in the case; and the prospect of reaching settlement in a reasonable timeframe. However, parties involved in an investigation are under no obligation to settle or enter into any settlement discussions where these are offered by the CMA.

When a party approaches the CMA to discuss the possibility of exploring settlement (whether of its own initiative or at the invitation of the CMA), it is important to appreciate that the CMA will not make any assumptions about that party's liability from the fact that it is interested in engaging in, or actually engages in, settlement discussions. For those parties wishing to settle, the CMA Guidance provides that the following minimum (non-negotiable) requirements will be imposed on them if they decide to settle: first, a clear and unequivocal admission of liability in relation to the nature, scope and duration of the infringement[17]; second, the immediate termination of the infringing behaviour, if this has not already happened; third, confirmation in principle that the settling party will pay a penalty set at a maximum amount, including a settlement discount which will be capped at 20 % for settlement pre-SO and 10 % for settlement post-SO. The actual discount awarded will take account of the resource savings achieved in settling that

[17] The scope of the infringement will include as a minimum the material facts of the infringement as well as the legal characterisation of the infringement. An admission of the facts alone is not sufficient to constitute an admission of liability sufficient to form the basis of a settlement.

Table 16.3 Examples of settlements reached by the OFT

Case	Infringement	Settlement	Year
Care home medicine cartel (http://www.oft.gov.uk/news-and-updates/press/2013/82-13)	Chapter I prohibition	In December 2013, the OFT announced a settlement with Hamsard 3149 Limited (**Hamsard**) under which it agreed to pay a fine of GBP 387,856 in relation to a market-sharing agreement with Lloyds Pharmacy Limited (with which Hamsard's subsidiaries agreed not to supply prescription medicines to each other's existing care home customers). The settlement was agreed before the SO was issued, and a 40 % reduction was applied to the penalty. The OFT has stated that the reduced penalty reflected Hamsard's *admission and agreement to co-operate under the OFT's leniency policy and in light of the settlement*. However, only when the full decision is published will the reduction attributable to the settlement become known.	2013
Care home security suppliers (http://www.oft.gov.uk/news-and-updates/press/2013/81-13)	Chapter I prohibition	In December 2013, the OFT announced its decision that four providers of security systems to care homes had entered into a number of collusive tendering agreements. One of the companies, Owens Installations Limited, entered into a settlement agreement (before the SO was issued) as a result of which it received a 20 % reduction of its fine.	2013
Mercedes-Benz commercial vehicles (http://www.oft.gov.uk/news-and-updates/press/2013/16-13)	Chapter I prohibition	In February 2013, the OFT announced that it had concluded settlement agreements with Mercedes-Benz and three commercial vehicle dealers. A fourth dealer received immunity from penalties under the OFT's leniency policy. The companies admitted breach of the Chapter I prohibition in relation to the distribution of Mercedes-Benz commercial vehicles (trucks and vans) by dealers, who were mainly active in the North of	2013

(continued)

Table 16.3 (continued)

Case	Infringement	Settlement	Year
		England and parts of Wales and Scotland. The case involved three separate admitted infringements involving various different parties. The nature of the infringements varied, relating to market sharing, price co-ordination or the exchange of commercially sensitive information. The parties to the settlement agreement agreed to pay fines totalling GBP 2.6 million following the application of a reduction of 15 %. The settlement agreements were entered into after the SO was issued, and the 15 % reduction is to reflect the agreement to settle.	
Gaviscon (http://www.oft.gov.uk/news-and-updates/press/2010/106-10)	Chapter II prohibition/ Article 102	In April 2011, the OFT announced that it had issued a decision finding that Reckitt Benckiser had infringed the Chapter II prohibition and Article 102 and imposed a fine of GBP 10.2 million. The OFT found that Reckitt Benckiser had abused its dominant position by withdrawing and de-listing Gaviscon Original Liquid from the NHS prescription channel in 2005, following expiry of its patent but before the publication of the generic name for the drug. This meant that NHS prescriptions were subsequently issued for the patent-protected Gaviscon Advance rather than for generic alternatives to Gaviscon Original Liquid. The settlement involved Reckitt Benckiser admitting the infringement (post-SO) and agreeing to pay GBP 10.2 million, which reflected a 15 % reduction for settlement.	2010
Loan pricing (http://www.oft.gov.uk/news-and-updates/press/2010/34-10)	Chapter I prohibition	In March 2010, the OFT announced that the Royal Bank of Scotland had agreed to pay a fine of GBP 28.59 million following admissions that it had breached	2010

(continued)

Table 16.3 (continued)

Case	Infringement	Settlement	Year
		competition law by disclosing generic and specified confidential future pricing information to counterparts at Barclays Bank. The settlement was reached before the SO was issued and the OFT applied a 15 % reduction for early resolution, in addition to a 10 % reduction for co-operation with the investigation. Barclays was not fined as it had benefited from leniency.	
Tobacco products (http://www.oft.gov.uk/news-and-updates/press/2008/82-08)	Chapter I prohibition	The OFT reached an early resolution agreement with six of the parties (Asda, First Quench, Gallaher, One Stop Stores, Somerfield and TM Retail) involved in its investigation into alleged breaches of competition law with regard to the retail pricing of cigarettes (in particular, arrangements between cigarette manufacturers and retailers to link the retail prices of cigarettes to the prices of competing brands). Each of the parties admitted liability in respect of all the infringements alleged against it (receiving a significant reduction in the financial penalty that might otherwise have been imposed). The total fines imposed by the OFT on the six settling parties amounted to just under GBP 73 million. Settlement was reached after the SO had been issued and a 20 % reduction in penalties was applied for early resolution, in addition to the various leniency discounts granted to the settling parties. While the terms of the early resolution agreements entitled the parties to withdraw from them if, having seen the OFT's ultimate decision, they wished to appeal to the CAT, only Asda did so within the permitted time. Several other, non-settling, addressees of the OFT's decision, including	2008

(continued)

Table 16.3 (continued)

Case	Infringement	Settlement	Year
		Imperial Tobacco, appealed the OFT's decision. The decision was quashed after the OFT wished to support the decision on the basis of a refined case that was not set out in the decision. Subsequently, Gallaher and Somerfield applied to the CAT for permission to appeal out of time alleging that a late appeal was justified on the basis of *exceptional circumstances* and in Gallaher's case that it had been misled by the early resolution agreement. In a judgment of 27 March 2013, the CAT granted Gallaher and Somerfield permission to appeal out of time, finding that the early resolution agreement gave rise to a legitimate expectation that the OFT *had the wherewithal to make good the factual basis on which the Decision rested* and would be *able to defend (even if not necessarily successfully) its Decision on the merits*. However, on 7 April 2014, the Court of Appeal reversed this finding, concluding that the CAT's finding of a legitimate expectation was unjustifiable, that the main focus under the exceptional circumstances test should be on the reasons why the would-be appellants did not appeal in time, that the later events on the appeals by Imperial Tobacco and others were not exceptional circumstances justifying a late appeal by Gallaher and Somerfield and that the CAT's misapplication of the exceptional circumstances test was an error of law (thus justifying intervention by the Court of Appeal).	
Airline fuel surcharges (http://www.oft.gov.uk/news-and-updates/press/2012/33-12)	Chapter I prohibition	In April 2012, the OFT imposed a fine of GBP 58.5 million on British Airways (**BA**) (a further	2007

(continued)

Table 16.3 (continued)

Case	Infringement	Settlement	Year
		reduction from the fine of GBP 121.5 million originally agreed upon in the 2007 settlement between BA and the OFT) in relation to its co-ordination with Virgin Atlantic Airways with regard to fuel surcharge pricing on long-haul passenger flights to and from the UK (through the exchange of pricing and other commercially sensitive information). The reduction reflected a reassessment of the value added by BA's co-operation with the OFT and legal developments relating to penalty setting. The settlement was reached before the SO was issued and included a reduction of 20 % for early resolution.	
Dairy products (http://www.oft.gov.uk/news-and-updates/press/2011/89-11)	Chapter I prohibition	Following the OFT's investigation of collusion by supermarkets and dairy processors (by co-ordinating increases in the prices paid by consumers for certain dairy products in 2002 and/or 2003, with the supermarkets having indirectly exchanged retail pricing intentions with each other via dairy processors), a number of dairy processors and supermarkets (with the exception of Tesco) agreed to an early resolution following receipt of the SO. In return for their full co-operation and their admission of liability, the OFT imposed substantially reduced fines. Most parties who settled received a discount in the penalty of 35 %.	2007
Independent Schools (http://www.oft.gov.uk/news-and-updates/press/2006/88-06)	Chapter I prohibition	Following issuing an SO, the OFT agreed a settlement with a number of fee-paying independent schools in relation to an agreement operated by those schools whereby they illegally exchanged information relating to their intended fee increases and fee levels. The OFT imposed a	2006

(continued)

Table 16.3 (continued)

Case	Infringement	Settlement	Year
		fine of GBP 10,000 on most of the schools, and the schools also agreed to set up a fund totalling GBP 3 million for the benefit of those pupils who might have been affected by the infringing activity in question.	

particular case at that particular stage in the investigation. The CMA Guidance gives greater clarity to parties wishing to consider settlement. This is because whereas the maximum discount for settling before or after the SO was previously unclear (and applied inconsistently), that will no longer be the case.[18] This greater clarity is welcome as it enhances parties' rights by allowing them to weigh up in a more informed manner the advantages and potential disadvantages of settlement.

Following the conclusion of settlement discussions, if the CMA does not substantially reflect a settling party's admission either in the SO or in its final position before taking an infringement decision, the party that is proposing to settle will be given the opportunity to withdraw from the settlement procedure.[19] If the party does withdraw (or the settlement discussions are not successful), the case will revert to the usual administrative procedure, and any admissions made during the failed settlement discussions will not be disclosed to other parties to the investigation or, absent exceptional circumstances, to the CMA decision-makers in the case.

A settling party nevertheless retains the right to appeal the infringement decision to the CAT. However, if the party chooses to do so, the settlement discount set out in the infringement decision will no longer apply (and the CAT will have full jurisdiction to review the appropriate level of penalty). Following the *Tobacco Products* case, the CMA Guidance now explicitly states that unless the settling party itself successfully appeals the infringement decision, it must confirm that it accepts that the decision will remain final and binding as against it even if another addressee of the infringement decision successfully appeals the decision.

In order to achieve the CMA's objective of resolving the case efficiently, settling parties must also confirm that they accept a number of other conditions. Of particular relevance to the questions of due process and fundamental rights of the parties, the conditions include acceptance that there will be a streamlined

[18] For example, the CMA Guidance states that the discount for settlement post-SO will be 10 %. In some previous cases the settlement discount was as high or higher for post-SO settlement (e.g. 20 % in *Tobacco* and 30–35 % in *Dairy*) than for settlement pre-SO (e.g. 15 % in *Loan pricing* and 20 % in *Care home security*).

[19] The CMA retains the right to withdraw from the settlement procedure if the settling party, after having made its admission, fails to follow the requirements for settlement. In such circumstances, prior to withdrawing from the settlement process, the CMA will notify the settling party that it considers that it is not following the requirements of settlement and will give the party the opportunity to respond.

administrative process for the remainder of the investigation with limited access to file (for example, through access to key documents only and/or through the use of a 'confidentiality ring'), no written representations on the SO (except in relation to manifest factual inaccuracies) and no oral hearing.

In terms of due process, it is important to recognise that any decision to settle a case is made entirely by the party concerned (although the CMA must, of course, agree to settle the case). Furthermore, a decision to settle will be based on a party's full awareness of the requirements of settlement (which are clearly set out in the CMA Guidance), as well as the consequences of settling. Therefore, whilst settlement necessarily requires an admission of liability with the consequences, inter alia, that third parties can rely on such admission in subsequent private litigation, the settling party is likely to have assessed the strength of the evidence against it—especially in cases where settlement discussions commence post-SO. Given the requirement for a clear admission of liability, settlements are most likely to be considered by parties in cases in which they consider the evidence of which they are aware may be sufficient to lead to a finding of infringement. In cases in which the evidence is less clear, parties can be expected to be less willing to settle. Therefore, in practical terms, it may be the case that the settling party reaches a view that the CMA may be expected to make a finding of infringement, which has led the party to consider settlement. If so, a decision to settle is unlikely to materially affect the eventual ability of third parties to rely on a finding of infringement in private litigation; however, the settling party will have been able to secure a reduction in the fine that might otherwise have been imposed, as well as saving management time and cost resulting from the streamlined administrative procedure. Importantly, a decision to settle does not preclude a party from subsequently appealing the CMA's decision, which it may decide is appropriate following receipt of the CMA's reasoned decision. In such circumstances, the CMA will remain free to use the admissions made by the settling party and any documents, information or witness evidence provided by it (although admissions made in the context of failed settlement discussions will not).

16.2.4 Leniency Programme

While the transactional resolution instruments described above (such as the acceptance of commitments by the CMA and the formal settlement procedure) are distinct from the CMA's leniency policy, they are not always mutually exclusive. For example, it is possible for a leniency applicant to settle a CA98 case and therefore benefit from both leniency and settlement discounts.[20]

[20] In this respect, it should be noted that, under the CMA's new procedure, settlement discounts are capped at 20 %, partly to ensure that there is sufficient distinction between immunity and the discounts available to leniency applicants that also choose to settle with the CMA. In other words, in order to ensure that the settlement procedure (which applies after the CMA has begun investigating the case) does not disincentivise parties from seeking leniency (including applying for leniency before the CMA begins an investigation), the levels of reductions in fine must be sufficiently material.

Under the UK's leniency programme, as is the case in most antitrust regimes, companies can obtain immunity from fines if they are the first to report an infringement of the Chapter I prohibition and/or Article 101 TFEU.[21] The policy applies not only to horizontal arrangements (such as horizontal price fixing and market sharing) but also to vertical price fixing (i.e., retail price maintenance conduct). Details of the CMA's corporate leniency policy are set out in the recent OFT guidance on "Applications for leniency and no-action in cartel cases" (**Leniency Guidance**) published in July 2013, now adopted by the CMA.

The Leniency Guidance lists the following four types of leniency that are available under EA02. Firstly, there is 'Type A immunity' where a party is the first to apply for leniency and there is no pre-existing investigation. In these circumstances, the applicant may qualify for complete immunity from administrative fines, in which case its former and current directors and employees who co-operate will be granted guaranteed 'blanket' criminal immunity if the conduct is also potentially an infringement of section 188 EA02. Secondly, there is 'Type B immunity' where a party is the first to apply for leniency but there is a pre-existing investigation, in which case the applicant may, at the discretion of the CMA, qualify for complete immunity from financial penalties and for criminal immunity for its former and current directors and employees who co-operate (as under Type A).[22] Thirdly, there is 'Type B leniency' where a party is the first to apply for leniency but there is a pre-existing investigation and the CMA exercises its discretion not to offer Type B immunity to the applicant. In such circumstances, the applicant may still qualify for a reduction in fines of up to 100 %. Finally, there is 'Type C leniency', which applies when a party is not the first to approach the CMA (regardless of whether there is a pre-existing investigation) but can 'add significant value' to the CMA's investigation. In those circumstances, the CMA may, at its discretion, grant a reduction of up to 50 % in the level of financial penalty imposed. The value of any reduction granted will primarily depend on the evidence provided by the applicant compared with the information already in the CMA's possession at the time of the application.[23]

The CMA also operates a 'leniency plus' policy, whereby an applicant who already benefits from a reduction in financial penalty (but not immunity) under leniency in relation to one case, and then subsequently makes a distinct leniency application in relation to an unrelated matter and obtains immunity as a result, will be offered a small, additional increase in its leniency discount in the first case.

[21] In the UK, depending on the circumstances, immunity from criminal prosecution may also be possible.

[22] Whereas Type A immunity is available as of right if the necessary conditions are met, Type B immunity is discretionary. However, the Leniency Guidance states that although Type B does not offer guaranteed immunity, Type B applications made at an early stage of the CMA's investigation are more likely to result in the grant of corporate immunity and/or criminal immunity than late-stage Type B applications or Type C applications.

[23] Under Type C leniency, criminal immunity for implicated former and current directors and employees may be agreed on an individual basis with the CMA.

In order to benefit from leniency in respect of financial penalties, or immunity from criminal prosecution and subject to the limitations on availability as described above, an applicant must—as is the case in many other jurisdictions—meet certain conditions, each of which will apply throughout the application process and until final determination of any proceedings. The applicant must accept that it participated in anti-competitive activity, and, where relevant, individuals must admit participation in the cartel offence. The applicant must also provide the CMA with all the (non-legally privileged) information, documents and evidence available to it regarding the infringing activity. In addition, the applicant must maintain continuous and complete co-operation throughout the investigation and refrain from further participation in the infringing activity from the time of its disclosure to the CMA. And, finally, the applicant must not have taken steps to coerce another undertaking to take part in the infringing activity.

The condition for leniency that is most relevant to the International Rapporteur's questions is that the applicant must admit its participation in the infringing activity. In this respect, the issues concerning due process and the fundamental rights of the applicant are no different to those that are referred to above in Sect. 16.2.3 on settlements.

16.3 Merger Control

On 1 April 2014, new procedures relating to UK merger control came into effect, although the substantive features of the previous regime were retained.[24] In particular, the voluntary nature of the regime (i.e., the fact that parties are not obliged to seek CMA approval if a merger satisfies the jurisdictional thresholds) was preserved as was the two-phase decision-making process with the separation of decision-making responsibility at Phases 1 and 2 of an investigation. Although the two-phase decision-making process has been retained, the CMA is now responsible for both phases of the investigation.[25] In addition, whilst the substantive tests relating to mergers have not changed, there have been a number of material procedural changes (although these are outside the scope of this paper).

Remedies may be accepted by the CMA. These may be at Phase 1 as undertakings-in-lieu (**UILs**) of reference to an in-depth Phase 2 investigation or at Phase 2 as a solution to identified competition problems.

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[24] The new regime is intended, amongst other things, to make merger reviews faster and more efficient. See also *Mergers: Guidance on the CMA's jurisdiction and procedure* (**Mergers Guidance**), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270256/CMA2_Mergers_Guidance.pdf.

[25] Phase 1 decisions are formally taken by the CMA Board, while Phase 2 decisions are made by an inquiry group of at least three people, selected for each case from the independent expects appointed to the CMA's panel by the Secretary of State.

16.3.1 Phase 1

At Phase 1, the CMA is under a duty to identify those mergers which raise a realistic prospect of a substantial lessening of competition (**SLC**) and to refer such mergers to Phase 2 for an in-depth investigation.

However, the merging parties may have an opportunity to avoid that outcome by offering binding UILs to the CMA.[26] The CMA cannot impose remedies in Phase 1—it is up to the merging parties to offer UILs to the CMA in order to avoid a Phase 2 investigation. Such UILs must "remedy, mitigate or prevent" the SLC or any adverse effects identified in a clear-cut manner. The CMA will therefore typically expect UILs offered by parties to be structural, rather than behavioural, in nature. According to its Mergers Guidance, the CMA is highly unlikely to accept behavioural remedies at Phase 1.

In terms of the process for considering UILs, the acquiring party may take the initiative to propose suitable UILs to the CMA case team at any stage of the Phase 1 investigation or during pre-notification (i.e., the period in which confidential discussions may take place prior to formal notification).[27] Alternatively, the parties may choose to wait until they receive the CMA's decision to see if it concludes that the merger is likely to result in an SLC before raising the matter of UILs with the CMA case team.[28] A decision finding an SLC will set out the CMA's competition concerns and therefore provide the parties with sufficient information to assess the nature of those concerns and whether the parties are willing to offer UILs that would provide a clear-cut remedy to them.[29]

Once the CMA is satisfied that the UILs offered could be accepted as a suitable remedy, the CMA is required to publicly consult on the proposed UILs. For UILs in cases in which the CMA considers that an upfront buyer is required, the CMA will consult on the effectiveness of both the proposed remedy and the proposed purchaser. For cases with no upfront buyer, the CMA will consult on the proposed remedy only. Following necessary consultations (and any modifications to the UILs), the CMA will ask the parties to sign the final version of the UILs, which will then be formally accepted by the CMA. The CMA will announce publicly that it has formally accepted the UILs and will publish the final version of the UILs (as well as the SLC decision) on its website.

Parties offering UILs in Phase 1 do so only if they so wish and, following the procedural changes to the UK's merger control regime, are now able to do so after having seen the CMA's reasoned decision. As such, due process and the parties'

[26] UILs may be accepted by the CMA only where it has concluded that the test for referring the case to Phase 2 is met.

[27] Taking the initiative in this way will not impact on the prospect that the CMA ultimately determines that the test for a reference has not been met.

[28] This is one of the procedural reforms introduced into the UK merger control regime by ERRA13.

[29] Parties have up to 5 working days after receiving the CMA's reasons for its SLC decision to offer UILs.

fundamental rights appear to be well protected—and indeed enhanced as a result of the changes introduced by ERRA13. However, parties only have up to 5 working days to offer UILs after receiving the CMA's reasoned decision. Nonetheless, although no case has yet been resolved with UILs since the new procedures came into force, that timeframe should be sufficient without infringing due process or upon the parties' fundamental rights. This is because, whilst the parties may only have 5 working days to propose UILs, they will have engaged with the CMA for some time before receiving the decision (and will have seen an "issues letter").

16.3.2 Phase 2

At Phase 2, where the CMA finds that a relevant merger situation has resulted, or is expected to result, in an SLC, it is required to decide whether action should be taken to remedy, mitigate or prevent the SLC or any adverse effect resulting from the SLC.

The CMA is required to have regard to the need to achieve "as comprehensive a solution as is reasonable and practicable" to the SLC and any adverse effects resulting from it. In assessing possible remedies, the CMA seeks those that are effective in addressing the SLC and its adverse effects and selects the least costly and intrusive remedy that it considers to be effective, subject to the remedy not being disproportionate. The CMA has a choice between implementing remedies either by accepting undertakings that have been negotiated with the relevant merger parties or by exercising its statutory power to make an order.

The CMA remedies process is set out in detail in the new Mergers Guidance and in the Merger Remedies Guidelines[30] (which also explains how the CMA conducts its substantive assessment of remedies options). The Phase 2 remedies process and the extent of consultation with the relevant merger parties and other interested parties[31] can be summarised as follows. First, if an SLC has been identified, a notice of possible remedies (**Notice**) is published, usually at the same time as the summary of the CMA's Provisional Findings. The Notice acts as a formal starting point for discussion of remedies with the relevant parties, containing details of possible ways to address the SLC.[32] The Notice will invite comments by a given date from all interested parties on the possible remedies and will also invite parties to suggest

[30] *CC8*, published by the CC in November 2008, adopted by the CMA.

[31] During this process, all interested parties have the opportunity to provide their comments, which will be taken into account by the CMA.

[32] If parties wish to propose potential remedies in advance of publication of the Provisional Findings, details of the proposals should be provided in writing and may be discussed with the case team without prejudice to the Provisional Findings. For anticipated mergers, one possibility will be prohibition of the merger; for completed mergers (as the UK does not have a mandatory system of merger control requiring parties to seek and obtain clearance before a merger can be completed), remedies including the possibility of divestment of, inter alia, the acquired business will be considered.

alternatives. In addition, a remedies working paper (**Working Paper**), containing a detailed assessment of the different remedies options and setting out a provisional decision on remedies, will be sent to the main parties for comment following the response hearings.[33] Third parties may also be consulted about the proposed scope of the remedies, and the Working Paper may in some cases be published on the CMA's website. Following consultation with the parties on the Working Paper and any further discussions and meetings with the parties that the CMA considers necessary, the CMA takes its final decisions on both the competition issues and any remedies. The CMA will set out its final decision on remedies in its final report. If the CMA concludes that remedies are appropriate, the CMA can, as noted above, accept undertakings or exercise its statutory powers to make an order.[34] When a version of the undertakings has been provisionally agreed, on which the CMA is willing to consult publicly, the CMA will then publish a 'notice of intention to accept final undertakings' or a 'notice of intention to make an order', to which the agreed draft undertakings or order are annexed. A minimum consultation period (15 days for undertakings and 30 days for an order) must be provided for interested parties to comment. Subsequently, the CMA will decide whether any changes need to be made to the draft undertakings or order in light of responses to the consultation (if any material changes are required, a further minimum seven-day consultation period is required). The CMA then publishes a 'notice of acceptance of undertakings' or a 'notice of making an order'. At this point, its Phase 2 inquiry is finally determined.

In those cases in which an SLC is found and UILs are not offered, the parties' position is protected by their ability to seek a review of any Phase 2 decision imposing remedies. Applications for review were brought in a number of merger cases in which the CC determined (at the end of Phase 2) that remedies were required.[35]

[33] Following the Provisional Findings, response hearings will take place. These will generally be held with the main parties and potentially with key third parties (this could include potential buyers, customers or relevant economic regulators) likely to provide evidence or views useful for reaching a final decision on the competition questions and/or on remedies.

[34] The process of agreeing undertakings or making an order will involve informal consultation between the CMA and the main parties. Third parties may also be consulted where relevant. Parties will be asked to comment both on the substance of the draft undertakings or order and on any material which they consider to be confidential and which they would want to be excised from the published version.

[35] For example, *Stericycle International v CC* (2006); *Somerfield v CC* (2006); *Stagecoach Group v CC* (2010); *Groupe Eurotunnel v CC* (2013); *Ryanair v CC* (2014). In some cases, such as *Groupe Eurotunnel* and *Ryanair*, parties also challenged the CC's jurisdiction to investigate the merger, as well as its decision on remedies.

16.4 Market Studies and Investigations

Market studies and investigations are conducted under the EA02. They are used by the CMA (and other sectoral regulators)[36] to investigate markets in the UK where the CMA considers that competition may not be working effectively (and where an investigation under the CA98 may not be appropriate). Under EA02, the CMA may impose remedies to address any adverse effect on competition (**AEC**) that may be identified.[37]

On 1 April 2014, a number of changes to the market studies/investigations regime were introduced designed to make it faster and more efficient.[38] The CMA is now responsible for the conduct of both market studies and market investigations (whereas previously the OFT would conduct market studies and refer the market to the CC if it considered that a more detailed market investigation was warranted). In addition, shorter statutory time limits were introduced for both market studies and investigations and, to complement these, the CMA now has enhanced information gathering powers.

16.4.1 Market Studies

Market studies are examinations into the causes of why particular markets may not be working well, taking an overview of regulatory and other economic drivers and patterns of consumer and business behaviour. The CMA Board is responsible for key decisions relating to market studies and the making of market investigation references. The CMA must, within 12 months from commencement of a market study, publish a report setting out its findings and the action (if any) it proposes taking.

The principal outcomes of a market study are one or more of the following: a clean bill of health for the market, consumer-focused action (e.g., a CMA-led information campaign), recommendations to business (e.g., that businesses in the market develop a voluntary code of conduct or improve an existing one),

[36] Sectoral regulators have concurrent competition law powers in respect of market studies and investigations. In addition, the Financial Conduct Authority (FCA) can conduct market studies using its powers under the Financial Services and Markets Act 2000.

[37] Adverse effects on competition that do not involve either agreements between undertakings or abuses of dominance are outside the scope of CA98. Market investigation references are therefore likely to focus on competition problems arising from unco-ordinated parallel conduct by several firms or industry-wide features of a market in cases where the CMA does not have reasonable grounds to suspect the existence of anti-competitive agreements or dominance. They are in some respects similar to EU sector inquiries, except that the CMA has the power to impose remedies if considered appropriate even in the absence of any infringement of the Chapter 1 prohibition/ Article 101 TFEU or the Chapter 2 prohibition/Article 102 TFEU.

[38] An overview of the changes to the markets regime introduced by the ERRA13 is provided in the CMA guidance *Market Studies and Market Investigations: Supplemental guidance on the CMA's approach* (January 2014)—https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270354/CMA3_Markets_Guidance.pdf.

recommendations to Government (where the CMA concludes that changes to the law may be necessary), investigation and enforcement action under CA98 and a market investigation reference (essentially a more detailed Phase 2 investigation).

When the findings of a market study by the CMA give rise to reasonable grounds to suspect that a feature or combination of features of a market in the UK prevents, restricts or distorts competition and a market investigation reference appears to be an appropriate and proportionate response, the CMA is able to make such a reference.

However, in certain cases, the CMA may accept UILs instead of making a market investigation reference. In exercising this power, and in determining the scope of the UILs, the CMA must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to any AEC identified (and any detrimental effects on customers so far as they result or may be expected to result from such adverse effects). The CMA should also consider the effect of the remedy on any consumer benefits arising from the feature of the market that is causing the adverse effect on competition (for example, lower prices, higher quality, greater choice or greater innovation). Before accepting any UILs, the CMA is obliged to publish and consult on the terms of the proposed UILs.

However, according to published guidance on market investigation references,[39] UILs to avoid a market investigation will only be accepted rarely. This is principally for two reasons. First, during a market study the CMA is unlikely to be able to undertake a sufficiently detailed analysis of the likely anti-competitive effects of a particular market feature or to judge with any certainty whether particular UILs will be a suitable and robust remedy. Second, there are likely to be practical difficulties in trying to negotiate UILs with several parties in order to address industry-wide issues (and indeed issues that may be present in a number of different markets). Instead, UILs are most likely to be used by the CMA where an AEC can be addressed by a small number of firms, provided the CMA is confident that the UILs will achieve a comprehensive solution.

To date, UILs have been accepted only in two market studies, although voluntary assurances have been accepted in others. Table 16.4 sets out these cases.

Once UILs have been accepted to address a particular feature of the market, the CMA may not make a market investigation reference in relation to the same market for 12 months, unless the UILs have been breached or were based upon false or misleading information by the company(ies) giving them.

As with CA98 cases, a decision to offer UILs following a market study is voluntary and the parties will be able to engage with the CMA to understand the nature of its concerns before deciding whether to offer UILs. However, as noted above, the CMA is unlikely to consider that UILs are appropriate in many cases. Therefore, transactional resolution is more likely to be a feature of CA98 and merger cases than in market study or market investigation cases.

[39] http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft511.pdf.

Table 16.4 Voluntary assurances accepted by the OFT

Case	Outcome	Year
Extended warranties on domestic electrical goods (http://www.oft.gov.uk/news-and-updates/press/2012/53-12)	The OFT accepted UILs from Dixons, Comet and Argos (the major extended warranty providers) aimed at helping consumers make more informed purchasing decisions and enabling them to shop around more easily. The UILs involved setting up an independent price comparison website for extended warranties; providing clearer information in stores about pricing and the availability of alternative suppliers; providing clearer pricing, especially of monthly rolling contracts; and conducting regular 'mystery shopping' to assess information being provided by staff.	2012
Travel money (http://www.oft.gov.uk/news-and-updates/press/2011/138-11)	Following an investigation, the OFT found that bank charges for purchasing foreign currency and using debit and credit cards abroad were confusing to customers. Various banks agreed to remove charges for using cards abroad, to give clearer information about such charges and to display amounts charged more clearly on statements.	2011
Off-grid energy (http://www.oft.gov.uk/news-and-updates/press/2011/112-11)	Following an investigation, the OFT concluded that there was effective competition in the provision of off-grid energy (for example, heating oil, solar panels and LPG). However, during the market study, the OFT took action (under consumer protection legislation) against certain heating oil companies and price comparison websites, which then gave undertakings the chance to improve transparency and thereby reduce the likelihood of consumers being misled.	2011
Isle of Wight Ferry Services (http://www.oft.gov.uk/news-and-updates/press/2009/124a-09)	The OFT decided not to refer the market to the CC on the basis of limited evidence of consumer detriment, yet parties subject to the study offered certain voluntary assurances to introduce measures to improve communication with, and improve services to, ferry passengers.	2009
Postal franking machines (http://www.oft.gov.uk/news-and-updates/press/2005/110-05)	The OFT accepted UILs from Royal Mail and the two leading suppliers of postal franking machines in relation to the supply of postal franking machines and their ink cartridges and the provision of related maintenance and inspection services.	2005

16.4.2 Market Investigations

If a market investigation reference is made, the CMA is required to undertake a detailed examination into whether there is an AEC in the market(s) concerned and, if so, decide what remedial action may be appropriate. A market investigation must be completed and a report published within 18 months of the date of reference.[40]

The CMA's approach to the issue of whether there is an AEC is set out in detail in the guidelines published by the CC in April 2013 (now adopted by the CMA).[41] According to the guidelines, the CMA will look at three main issues: (1) the main characteristics of the market and the outcomes of the competitive process, (2) the boundaries of the relevant market within which competition may be harmed (market definition) and (3) the features which may harm competition in the relevant market (the competitive assessment).

If, following its market investigation, the CMA finds an AEC, it is required to consider whether remedies are appropriate. If the CMA decides to take action itself to remedy, mitigate or prevent an AEC, it has the choice of accepting undertakings from the relevant parties and/or of making an order. The CMA must accept final undertakings or make a final order within 6 months of the date of publication of the market investigation report. This 6-month period includes a period of formal public consultation.

The CMA's decision as to whether to implement remedies by means of accepting undertakings or making an order is determined on a case-by-case basis. It primarily depends on the scope of the CMA's order-making powers (and whether the remedy it is considering falls within those powers)[42] and on practical issues such as the number of parties concerned and their willingness to negotiate and agree to undertakings.

In practice, because market investigations are likely to be market-wide rather than focused on the conduct of one firm, it is usually more practical to implement remedies by order rather than through undertakings so as to avoid the likely delay and complexity of negotiating undertakings with several parties. For example, in *Home credit (2011)* and *Payment protection insurance (2011)*, the remedies imposed by the CC were implemented by means of orders as they applied to a large number of parties. By contrast, in *Classified directory advertising services (2007)*, the remedies applied to only one party and undertakings were preferred. In other cases, for example in *Rolling stock (2009)* and *Supply of groceries (2009)*. some measures were implemented by means of orders, while others were implemented through undertakings.

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[40] This period can be extended by up to a further 6 months if the CMA considers that there are special reasons why the investigation cannot be completed and the report published within 18 months.

[41] Guidelines for market investigations CC3 (revised)—http://www.competition-commission.org.uk/assets/competitioncommission/docs/2013/publications/cc3_revised_.pdf.

[42] The content of any orders made by the CMA is limited by the EA02, whereas the subject matter of an undertaking is not similarly limited.

In *BAA airports (2009)*, and more recently in *Aggregates, cement and ready-mix concrete (2014)* and *Private healthcare (2014)*, the CC (and in the latter case the CMA) invoked its divestiture powers in a market investigation context.[43]

Following a market study, parties may be willing to offer UILs to avoid a long and detailed market investigation, notwithstanding the likelihood that the CMA may be willing to accept them. However, once a Phase 2 investigation begins, there is little, or no, incentive for parties to a market investigation reference to offer remedies to resolve the investigation. Also, unlike CA98 cases in which fines can be imposed, settling a market investigation will not reduce or avoid a penalty or the sanction that the CMA might otherwise impose. Therefore, whilst due process and fundamental rights are important to ensure that a market investigation is conducted properly and that the parties are aware of the case and evidence against them, these questions are less relevant in the context of settling such investigations.

However, it should be noted that parties to a market investigation may seek a review of a decision by the CMA to impose remedies. The remedies determined by the CC in several market investigation cases have been challenged.[44]

16.4.3 Conclusion

In the UK, the transactional resolution of competition law cases is well established, and such resolution processes are a valuable part of the investigation and enforcement process. Following the recent reforms to the UK competition regime and the creation of the CMA, it is expected that the continued (and enhanced) availability of these transactional resolution processes will be welcomed by parties subject to investigation. This is because they offer flexibility to those parties that are willing to explore settlement, whilst all types of settlement remain wholly voluntary. In addition, the transactional resolution of competition cases seeks to ensure that due process and the parties' rights are respected.

It is clear that there are benefits in settling competition disputes, both for settling parties and the CMA. These include resource savings and faster resolution of proceedings and, for the CMA, the ability to focus on other cases and/or more high-impact enforcement activity. However, it should be recognised that there are

[43] In 2009, in *BAA airports*, the CC required BAA to divest its airports at Gatwick, Stansted and either Glasgow or Edinburgh. In January 2014, in *Aggregates, cement and ready-mix concrete*, the CC ordered, inter alia, Lafarge Tarmac to divest a cement plant and, if required by the purchaser, a number of ready-mix concrete plants and Hanson to divest one of its ground-granulated blast-furnace slag production facilities. In April 2014, in *Private healthcare*, the CMA (in a case inherited from the CC) required the divestment by HCA International of two hospitals in central London.

[44] For example, *Supply of groceries* (see *Tesco PLC v CC*—http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/groceries-market-investigation-and-remittal) and *Payment protection insurance* (see *Barclays Bank PLC v CC*—http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/ppi-market-investigation-and-remittal).

certain risks associated with settlement if the procedure is not used appropriately. The principal risks are a potential weakening of the deterrent effects of enforcement, as well as increasing the unpredictability of competition law, if more cases are settled—especially through commitments as a result of which the CMA will not reach any conclusion as to the legality or otherwise of the agreement or conduct concerned. This may lead to a dearth of decisions, particularly in CA98 cases that raise novel points that have either not previously been considered or considered many years ago before the development of the digital economy.[45] In such cases, a reasoned decision (including a non-infringement decision if the CMA ultimately concludes that the law has not been broken) may provide greater clarity and benefit in the longer term.

Consequently, when considering whether to exercise its discretion to conclude a case through transactional resolution, the CMA should carefully assess the benefits of so doing against the potential risks. This is to ensure that the value of transactional resolutions as an enforcement tool, which is a welcome development of the UK competition regime, is not diminished.

[45] For example, the *Hotel Online Booking* case raised issues about the discounting of room-only hotel accommodation booked through online travel agents (**OTA**) which, arguably, may have been better suited to have been concluded with a reasoned decision (whether an infringement, or non-infringement, decision). In fact, this case is now subject to an appeal to the CAT by a third party OTA. It is the first CA98 commitment decision that has been appealed, and the judgment which is due later this year is awaited with interest.

United States of America 17

Emilio E. Varanini

17.1 Introduction and Executive Summary[1]

The United States has a federalist system in which the powers of our federal or national government, though quite broad, are enumerated, defined, and in important ways limited. The powers of the governments of the American States, which have a residual sovereign status,[2] are numerous and indefinite, a point that shows up most strongly in the fact that they, unlike the federal government, possess a so-called general police power to legislate on any subject.[3] Accordingly, not only can the federal government enforce federal antitrust law, but also the American States can and do enforce both federal antitrust law as well as their own state antitrust law.[4]

Insofar as Question A asks about the practices regarding, and rights concerning, antitrust settlements in the United States, any discussion of such settlements must occur against this federalist backdrop. Moreover, insofar as enforcement of federal antitrust law is concerned, there are two federal agencies charged with enforcing it: the United States Department of Justice and the Federal Trade Commission. The U.S. Group of the LIDC hopes that the multijurisdictional and multiactor

[1] The expression of views by the national reporter herein, while they have been endorsed by the U. S. Group of the LIDC, do not reflect the views of his office or any other body in which he holds a position.

[2] *See, e.g., Alden v. Maine*, 527 U.S. 706, 715 (1999).

[3] *See, e.g., National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2577 (2012).

[4] *California v. American Stores*, 495 U.S. 271, 283–84 (1990); *California v. ARC America*, 490 U.S. 93, 101–02 (1989).

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nature of antitrust enforcement in the United States makes our answer to the question before the LIDC Congress on settlements both interesting and informative for our colleagues.

In sum, antitrust settlements in the United States by government enforcers fall into one of the following categories:

1. criminal plea agreements involving the United States Department of Justice;[5]
2. civil conduct and merger settlements involving the United States Department of Justice;
3. civil conduct and merger settlements involving the Federal Trade Commission;
4. non-*parens patriae* settlements involving the American States; and
5. *parens patriae* settlements involving the American States.[6]

Regarding both state and federal laws, substantial deference is given by the courts to the Executive Power, i.e., federal agencies and state attorneys general enforcing antitrust law on the presumption that executive agencies are acting in the public interest. This Executive Power is embedded in the United States Constitution and in cases interpreting that Constitution, but it does, as in the case of the American States, precede the Constitution and dates back to the time when the American States were colonies of the United Kingdom. Giving the Executive substantial deference in its investigatory and enforcement functions has flowed from the constitutional structure involving the balance of executive, legislative, and judicial powers in our federal and in our state constitutions. It also flows from the practical considerations involved in entering into antitrust settlements in trying to serve the public interest through balancing multiple policy objectives.

But deference is not abdication. There is the due process interest in ensuring that hearings on antitrust settlements are public, comments may be offered, and ultimately in some form the courts have to approve of entry of the settlement, no matter how deferential their review may be. Generally speaking, American process on the review of antitrust settlements falling into one of the above-enumerated categories comports with due process, though it is not always a perfect fit. Though those interests are most acute where criminal antitrust settlements and state *parens* settlements may be concerned, here, too, American process on the review of such settlements generally comports with due process.

[5] This national reporter will not discuss state criminal plea agreements involving state antitrust statutes. A number of States either do not have criminal antitrust statutes or, like California, do have such statutes but often defer to federal criminal prosecutions of defendants for violation of federal antitrust law as a matter of law (*see* Cal. Pen. Code § 656) or as a matter of policy. In any event, the national reporter believes that the standards and processes for state criminal plea agreements are almost the same as their federal counterparts.

[6] There are isolated instances in which American States have brought class actions that they themselves have settled or have participated in joint *parens patriae*-class settlements. This report will not discuss class action settlements, or private settlements between companies, as being outside the scope of Question A.

That due process interest must be tempered to a very limited extent when a settlement is reached while an antitrust matter is still under investigation, i.e., before an actual case has been initiated. Executive agencies in the United States have investigatory powers—either using American grand juries or, in the civil context, wielding powers equivalent to the powers possessed by American grand juries—that are quite broad but require confidentiality in the gathering of information. In turn, that confidentiality requirement, for example, precludes defendants' access to the investigatory files of government enforcers, let alone third parties. Though this need for confidentiality lessens once litigation begins, such that defendants can use various discovery and motion devices to determine the Government's case against them, such concerns can continue to exist (but only as to certain very limited categories of information) vis-à-vis third parties.

The national reporter for the United States will discuss how these executive discretion and due process interests are balanced in the five enumerated types of antitrust settlements. In doing so, the national reporter will discuss due process concerns, either procedural or substantive, that have been raised as to one or more of these types of antitrust settlements. Generally speaking, the national reporter finds that none of these concerns are sufficient to trump the deference accorded on practical and constitutional grounds to executive agencies in bringing and settling antitrust cases. But there are a couple of categories of these antitrust settlements in which some limited tinkering with existing processes may be desirable on policy grounds.

Question A does not mention, nor does the international reporter, the issue of the extraterritorial effect of American antitrust settlements. The U.S. Group believes such an issue not only to be premature at this point but also to be tied into nonsettlement-related issues; as such, it would warrant closer attention at a future Congress. However, the U.S. Group offers by way of background the current state of the law on this subject in the United States as due process concerns have been raised in this area.

The national reporter and the U.S. Group applaud the forthcoming LIDC Congress in Turin for tackling the complex and intricate issues represented by antitrust settlements. Though the U.S. Group is not recommending, as a general matter, changes to the process and standards for U.S. antitrust settlements, its survey of U.S. practices on antitrust settlements leads it to offering suggestions to the LIDC Congress for its resolution on this question.

17.2 The Constitutional Role and Powers of the Executive Branches in the United States and Its American States as They Pertain to Antitrust Settlements

In the American republican system, there is a separation of powers among the Executive, Legislative, and Judicial Branches (e.g., the President, Congress, and the federal courts at the federal government level) embedded in our Constitution in which each branch enjoys a certain role and can wield certain powers.[7] All Executive Powers in the federal government are vested in the Executive Department, including for purposes of this report, the federal antitrust authorities, who are required "to take care that the Laws be faithfully executed."[8] As witnessed by the full investment of the pardon power in the Executive Department,[9] the Framers envisioned the Executive Branch having broad discretion on the disposal of cases.

Though the American States often have a divided Executive Branch in the sense that multiple executive officers will be elected directly by the People,[10] the power to act as chief law enforcement officer most often resides in a state's attorney general.[11] Insofar as a state's executive officer acts as the chief law enforcement officer, his or her role is in a state's system comparable to that enjoyed by the President, and the executive agencies through which he acts, in the federal system.[12] And similar points can be made as to whether drafters of state constitutions envisioned broad discretion being vested in the Executive in disposing cases based on the conferral of the state pardon power.[13]

In such a system, or any comparable system, the judiciary cannot dictate policy to federal executive or state prosecutorial agencies but rather is required to respect the policy choices between potentially competing views of the public interest engaged in by those agencies.[14] As our Supreme Court stated in the famous case of *Marbury v. Madison* establishing judicial review for compliance with constitutional mandates: "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the Executive, or executive officers, perform a duty

[7] General principles regarding the need for separation of powers between the Executive, Legislative, and Judicial Branches of Government as being essential to a free Constitution are discussed in such cases as *Nixon v. Administrator of General Services,* 433 U.S. 425, 441–43 (1977). A separation of powers also aids in securing liberty. *See, e.g., Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Similar separation of powers occurs under our state constitutions for similar reasons. *See, e.g., Southern California Edison Co. v. Public Utilities Comm'n*, 173 Cal.Rptr.3d 120, 143–44 (Cal. App. 2 Dist. 2014) (discussing California constitutional provisions and cases).

[8] *See* U.S. Const., Art. II, §§ 1, 3.

[9] *See* U.S. Const., Art. II, § 2, cl. 1.

[10] *E.g., Brown v. Chiang*, 132 Cal.Rptr.3d 48, 63–64, 69 (Cal. App. 3 Dist. 2011). Even when multiple executive officers may share executive powers under a State's law, "supreme" Executive Power may still be vested in the Governor, a State's equivalent of our federal government's President. *See, e.g., id.* at 69–70; *see also, e.g., Professional Engineers in Cal. Government v. Schwarzenegger*, 239 P.3d 1186, 1201(Cal. 2010).

[11] *E.g.,* Cal. Const. art. V, § 13 (California Attorney General represents the People of the State of California as the chief law enforcement officer). In contrast to the United States Attorney General, for example, who is appointed by the President and confirmed by Congress, the California Attorney General is directly elected by the People of the State of California.

[12] *See, e.g., Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666–67 (2013).

[13] *Cf. Brown*, 132 Cal.Rptr.3d at 70 (discussing and quoting *McCauley v. Brooks*, 16 Cal. 11 (1860)).

[14] *U.S. SEC v. Citigroup Global Markets, Inc. (Citigroup Global Markets I)*, 673 F.3d 158, 163–64 (2nd Cir. 2012).

in which they have a discretion."[15] Indeed, the Executive, unlike the judiciary, is directly accountable to the electorate, thus reinforcing the need for judicial deference.[16]

Our federal and state antitrust laws reflect this notion that state and federal executive agencies, charged with prosecuting antitrust violations, act in the public interest. For example, under federal antitrust laws, the federal government is deemed to be acting in the public interest when it seeks injunctive relief; accordingly, it need only show a violation of those laws for it to be entitled to injunctive relief.[17] In contrast, private litigants must show a threatened loss or damage, in addition to a violation of antitrust law, in order to seek injunctive relief.[18] Because the standards for seeking injunctive relief differ between the federal government on the one hand and private plaintiffs on the other, the ability of one of these plaintiffs to obtain injunctive relief does not bar the other from attempting to seek injunctive relief.[19] State antitrust laws can reflect this distinction as well.[20]

It is important in our system (and in other systems where a comparable choice has been made) that, as here, our federal and state legislative branches have ratified the wide scope of, and deference of the judicial branch to, the Executive's power to settle cases.[21] The power of any Executive Branch is at its acme when it acts in explicit or implicit agreement with the Legislative branch.[22] As the national reporter explains, such legislative ratification of executive discretion—insofar as antitrust settlements are concerned—has often occurred in our state and federal systems.

But practical reasons also rightly play a role in the deferential position taken by state and federal courts vis-à-vis settlements by the Executive. The courts are reluctant to second-guess the Executive in its setting of its cases because to do so puts the Executive in a very difficult situation: it must expend resources in litigating or continuing to litigate a case it believes should have been settled, or it must drop

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[15] *Marbury v. Madison,* 1 Cranch 137, 170 (1803).

[16] *See U.S. (SEC) v. Citigroup Global Markets (Citigroup Global Markets II)*, 752 F.3d 285, 296–97 (2nd Cir. 2014) (citing and discussing non-Security Exchange Commission cases).

[17] *United States v. Borden Co*., 347 U.S. 514, 519 (1954) (citing 15 U.S.C. § 25).

[18] *Id.* (citing 15 U.S.C. § 16).

[19] *Id.* at 518–20 (private plaintiffs' success in obtaining an injunction cannot bar federal government from requesting an injunction); *Howard Hess Dental Laboratories, Inc. v. Dentsply Int'l Inc*., 602 F.3d 237, 248–50 (3rd Cir. 2010) (federal government's success in obtaining injunction cannot bar private plaintiffs from requesting one but the required evidentiary showing from those plaintiffs must factor in the existence of the government injunction).

[20] *See, e.g.* Cal. Bus. & Prof. Code § 16754.5 (affording the California Attorney General a wider scope in the remedial court orders she may seek for violations of state antitrust law than private plaintiffs enjoy); *People v. Pacific Land Research Co*., 569 P.2d 125, 129–31 (Cal. 1977) (distinguishing the California Attorney General from private plaintiffs by noting that, when the California Attorney General seeks civil penalties, injunctive relief, and restitution, she is acting in a law enforcement capacity and in the public interest).

[21] *United States v. Microsoft (Microsoft I)*, 56 F.3d 1448, 1456 (D.C. Cir. 1995).

[22] *See, e.g., Youngstown Steel*, 343 U.S. at 635.

its case entirely, leaving antitrust defendants to continue anticompetitive practices unhindered.[23] The more second-guessing of settlements that the courts indulge themselves in, the more it disserves the ability of the Executive to settle future cases, with all of the burdens on the limited resources of our judicial system and our prosecutors that such a trend would carry.[24] In fact, so many factors can go into a decision to settle, such as the value of the proposed compromise, the likelihood of obtaining a better settlement, the prospects of doing better or faring worse after a trial, and the need for resources to continue litigation, that the *decision to settle*—as opposed to the settlement so achieved—is viewed as being immune from judicial review.[25] And the Executive remains politically accountable to the People of the United States for its exercise of discretion in a way that courts are not should the courts unreasonably second-guess that discretion on a settlement.[26] Insofar as the courts recognize these considerations, and others mentioned in the preceding paragraphs, they can ensure that the separation of powers among different branches still leads to a workable government.[27]

In the end, these considerations are not different insofar as a state executive, such as a state's attorney general, may be concerned.[28] Nor are these considerations any difference insofar as criminal settlements are concerned. The unreviewable discretion of government prosecutors to bring a case[29] would logically support the *decision to settle a criminal antitrust case*, as opposed to the settlement itself, to be judicially unreviewable.

Though, as explained in more detail below, giving the Executive wide deference on antitrust civil and criminal settlements fits our system, such wide deference should not involve complete deference.[30] Avoiding complete deference is important in avoiding arbitrary (i.e., flipping a coin) or inherently unreasonable actions (i.e., actions that are unreasonable after according every presumption and making every

[23] *Microsoft I,* 56 F.3d at 1456.

[24] *See Microsoft I*, 56 F.3d at 1456, 1459.

[25] *See Citigroup Global Markets I,* 673 F.3d at 164; *cf. Action on Safety and Health, et al. v. FTC*, 498 F.2d 757, 759, 761–63 (D.C. Cir. 1974) (court cannot order Federal Trade Commission to allow third party to intervene in their consent decree negotiations). The United States Supreme Court has found the analogous decision to refuse to bring an action based on a violation of law to present similar considerations and hence to be unreviewable by the courts as a presumptive matter. *See Heckler v. Chaney*, 470 U.S. 831, 831–32 (1985).

[26] *See Citigroup Global Markets II*, 752 F.3d at 296–97.

[27] *See, e.g., Youngstown Steel*, 343 U.S. at 635 (Jackson, J., concurring).

[28] *See Hollingsworth*, 133 S. Ct. at 2666–67 (set in the context of a refusal by the California Attorney General to pursue litigation defending the constitutionality of a state initiative barring same-sex marriage).

[29] *See Heckler*, 470 U.S. at 831 (citing and discussing cases going back to 1869).

[30] *See, e.g., Citigroup Global Markets I*, 673 F.3d at 168; *see also, e.g., Nixon*, 433 U.S. at 443 (noting that a separation of powers does not mean a complete division of authority between the branches and that each branch does not operate with complete independence); *Southern California Edison,* 173 Cal. Rptr. 3d at 144 (same).

assumption in favor of the government, including the need for forward-looking relief) when reviewed against the record provided.[31] It is important in ensuring public access to a hearing on entry of a settlement agreement and an opportunity for public comment. And it forces the government to be sufficiently clear in its goals, in the measures it proposes, and in the legal basis for its settlements,[32] all important goals as a matter of law and a matter of competition policy.[33]

17.3 Civil and Criminal Settlements Not Only Allow the Executive in the United States to Achieve Important Goals But Also Play a Key Contributing Role in the Development of Antitrust Law

Antitrust settlements in the American system are very common and, in the experience of the national reporter, can be initiated at any time in an investigative, trial, or appellate process by different actors such as federal or state government agencies, defendants, a court (once a case is filed), or by a special master or mediator appointed for the purpose of facilitating a settlement. Such settlements by federal and state antitrust enforcers, no matter how they were initiated and at what time they are executed, can have many benefits.

They can secure cooperation from key defendants, or individuals, without the help of which antitrust cases cannot be investigated or prosecuted.[34] They can allow

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[31] *See generally, e.g., Massachusetts et al. v. Microsoft (Microsoft II)*, 373 F.3d 1199, 1237–46 (D.C. Cir. 2004) (noting that the remedies contained in the consent decree between the federal government and the States had a number of innovative features designed to restore competition in the affected market, or even ensure competition in certain closely-related markets going forward, but did not go too far in favoring the defendant's competitors over the defendant); Daniel Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Columb. L. Rev. 583, 608, 648–51 (2004) (discussing how the FTC's enforcement of Section 5 in the area of privacy via the use of Federal Trade Commission consent decrees is not inherently arbitrary but rather has grown "incrementally" and "predictably"). The paradigm for an unreasonable antitrust settlement would be one in which a court was "exceptionally confident" that adverse antitrust consequences would result. *Microsoft I*, 56 F.3d at 1460.

[32] *Cf. e.g., Microsoft II*, 373 F.3d at 1242 (reviewing whether certain terms in the federal and certain States' consent decree with Microsoft were sufficiently clear, including one left purposefully undefined so that it could be forward-looking); Justin Whitesides, *The FTC's Competition Policy after the Intel Settlement*, 9 DePaul Bus. & Com. L.J. 555, 579–87 (2011) (making similar points in arguing for certain limits as to the Federal Trade Commission's use of Section 5).

[33] *Cf. e.g.,* William Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance*?, 16 Geo. Mason L. Rev. 903, 923–24 (2009) (discussing the process for assessing agency performance as a matter of competition policy).

[34] *See, e.g.,* Molly Kelley, *Settling for Settlement: The European Commission's New Cartel Settlement Procedure*, Wash. Univ. Global Studies L. Rev. 699, 700–02 (2010) (discussing amnesty or leniency programs for corporations that report to the government as to conduct violating antitrust laws); *see also, e.g.,* U.S. Department of Justice, Antitrust Division, Antitrust Division Manual, § III(F)(9) at III-95–103 (5th ed. last updated Mar. 2004) (describing the amnesty program of the United States Department of Justice).

the fine balancing of pro- and anticompetitive effects that can be involved with the conduct of enterprises that have, or threaten to acquire, market power even while ameliorating the worst of those anticompetitive effects. They can allow for the imposition of innovative or flexible antitrust remedies that can act to restore competition going forward[35] without the need for the kind of precedential finding of liability by a court or a jury that would expose companies to trebled damages.[36]

In this respect, these settlements can allow for *soft* lawmaking the use of consent decrees to set government expectations *over time* as to the legality of business conduct[37] as more experience is acquired as to the pro- and anticompetitive aspects of that conduct *without* the need for courts to determine—at what may be a premature stage—the legality of that conduct in what would constitute binding precedent.[38] As one example, the Federal Trade Commission adjudication of competition issues involving standard essential patents through a series of settlements—while controversial—has begun to set expectations as to the proper parameters of conduct involving standard essential patents while avoiding premature judicial findings that would constitute binding precedent as to that conduct.[39] As another example, the adjudication of vertical mergers in the telecommunications arena through a series of settlements has allowed the federal government to set expectations as to the parameters both of where it will have concerns over potential anticompetitive effects of those mergers and of what remedies it will expect to be imposed.[40] This latter use of settlements to address vertical merger concerns is

[35] *Cf. e.g., Microsoft II*, 373 F.3d at 1242 (reviewing whether certain terms in the federal and certain States' posttrial consent decree with Microsoft were sufficiently clear, including one left purposefully undefined so that it could be forward-looking).

[36] *See, e.g.,* Whitesides, *The FTC's Competition Policy after the Intel Settlement*, *supra,* 9 DePaul Bus. & Com. L.J. at 586–87 (making that point as to the FTC's general use of Section 5); Thomas Dahdouh, *Section 5 and its Critics: Just Who Are the Radicals Here?*, 20 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 1, 3–4, 24 (2011) (same regarding unfair competition); *see also, e.g.,* Margaret Zwisler & Amanda Reeves, *Antitrust Judgments in Bench Trials as Evidence: The Unintended Consequences of Section 5(a)*, Sedona Conf. J. 113, 113–14, 120 (Fall. 2013) (discussing the difference between a trial judgment obtained by the United States Department of Justice on the one hand and a settlement on the other hand as admissible prima facie evidence in follow-on class actions).

[37] *Cf.* Solove, *The FTC and the New Common Law of Privacy*, *supra,* 114 Columb. L. Rev. at 585–90, 599–600 (noting that a robust "common law" of privacy that gives a wealth of guidance to businesses on the application of Section 5 to privacy issues has now developed through FTC settlements but also noting that, initially, the Federal Trade Commission preferred self-regulation by online companies because of a legitimate fear that regulation would stifle online activity).

[38] *Cf., e.g.,* Whitesides, *The FTC's Competition Policy after the Intel Settlement*, *supra,* 9 DePaul Bus. & Com. L.J. at 586–87 (2011) (making similar, though not identical, general points as to the Federal Trade Commission's use of Section 5); Dahdouh, *Section 5 and its Critics: Just Who Are the Radicals Here?*, *supra,* 20 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. at 14–23 (same regarding unfair competition).

[39] *See, e.g.,* Kovacic, Rating *the Competition Agencies: What Constitutes Good Performance*?, *supra*, 16 Geo. Mason L. Rev. at 909–11.

[40] *See* American Bar Association, Telecom Antitrust Handbook, Ch. 2 Mergers, at 63–64, 136–37, 140–43 (2d ed. 2013).

important: requiring judicial decisions on this type of mergers risks, in the absence of an economic consensus or sufficient experience with these mergers, either unduly chilling what generally are procompetitive mergers or unduly limiting any recognition of circumstances in which anticompetitive effects may be present.[41] It also risks judicial decisions, following a rapid trial, involving an all-or-nothing approach, i.e., asset divestiture or approval of the mergers, when conduct-based remedies—that are potentially complex and may require extensive negotiation—may strike a more appropriate balance.[42]

Finally, settlements allow for the economical and efficient management of government and judicial resources alike. This is an important goal given the length and complexity of antitrust cases, as well as the burdens imposed by discovery in the American system.[43]

The pervasive use of settlements in antitrust cases by federal and state government enforcers has not gone unchallenged by commentators, though those commentators seem to focus almost exclusively on the pervasive use of consent decrees by the Federal Trade Commission. However, when parsed more closely, the views of these commentators revolve more around their dissatisfaction with the perceived vagueness of Section 5 of the Federal Trade Commission Act (hereinafter "Section 5") and Section 5's supposed failure to provide *fair notice* of what conduct is prohibited within its ambit.[44] Set against that backdrop, these commentators evince a preference that the Federal Trade Commission engage in straightforward rulemaking under appropriate administrative processes in lieu of using *only* settlements and more informal statements to provide such notice. Though the

[41] *See id.* at 136–37, 140–43.

[42] *See id.* at 136–37, 144, 145, 146–47, 149–50, 154–56, 156–60.

[43] *See, e.g.,* Solove, *The FTC and the New Common Law of Privacy*, *supra*, 114 Columb. L. Rev. at 611–13 (discussing why companies enter into Federal Trade Commission settlements); *cf. In re Processed Egg Prods. Antitrust Litig*., 284 F.R.D. 278, 297–301 (E.D. Pa. 2012) (discussing these points as supporting an early antitrust settlement in class case).

[44] *Compare, e.g.,* Solove, *The FTC and the New Common Law of Privacy*, *supra*, 114 Columb. L. Rev. at 599–600, 604–05, 606–07, 608, 621–23, 625–26, 627–49, 651 (noting that a robust "common law" of privacy that gives a wealth of guidance to businesses on the application of Section 5 to privacy issues has developed through Federal Trade Commission settlements and as such provides such fair notice); Dahdouh, *Section 5 and its Critics: Just Who Are the Radicals Here?*, *supra,* 20 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. at 4–23 (same regarding unfair competition based on text, legislative history, and case law) *with, e.g.,* Gregory Stegmaier & Wendell Bartnick, *Another Round in the Chamber: FTC Data Security Requirements and the Fair Use Doctrine*, J. Internet L., 1, 17–19, 23–25, 28–29 (Nov. 2013) (reaching opposite conclusion on application of Section 5 to data security and calling for rulemaking).

national reporter has doubts that such a preference is constitutionally required or necessarily wise,[45] the national reporter observes that this debate is rooted in the particularities of certain uses of Section 5, which is an unfair competition statute; it does not pertain to the fundamental underlying question here about when, under what circumstances, and affording what type of processes antitrust settlements should be reviewed. Thus, this *de facto* debate over the parameters of Section 5 does not, in the view of the national reporter, impact directly the issues regarding antitrust settlements raised by Question A.

It may, however, suggest that some sort of judicial review of the entry of Federal Trade Commission antitrust settlements may be warranted. On the one hand, any judicial review of a Section 5 settlement must account for the fact that Section 5 was expressly designed to be flexible to be able to address business conduct that the government should find, with time and experience; that could have market-wide anticompetitive effects; or that the government views as being incipient, i.e., one that, if completed, would have anticompetitive effects. In this respect, it would need to take fair account of the fact that Section 5 can reach conduct that does not violate federal antitrust law.[46] On the other hand, some sort of judicial review of the entry of Federal Trade Commission settlements that imposed ongoing obligations or conditions on defendants would require the Federal Trade Commission to delineate more formally its view of the parameters of Section 5 over time without suffering through a rulemaking process that is more formal and protracted than that faced by other executive agencies.[47] If there were to be some sort of judicial review, it

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[45] The Federal Trade Commission's Section 5 is no less precise than federal antitrust law with its general standard of reasonableness. The development of the common law, prosecutorial guidelines, and informal statements by government officials has been thought to be sufficient to flesh out the parameters of this reasonableness standard under federal antitrust law in supplying fair notice to enterprises without the need for formal rulemaking. Accordingly, the same could apply for Section 5. *Cf. e.g.,* Whitesides, *The FTC's Competition Policy after the Intel Settlement*, *supra,* 9 DePaul Bus. & Com. L.J. at 555–57, 559–60, 561–63, 574–89, 621–23, 625–26, 627–49 (discussing the parameters of Section 5 pertaining to privacy based on its text, legislative history, case law, and scope of Federal Trade Commission settlements in suggesting how Section 5 should be applied going forward); Dahdouh, *Section 5 and its Critics: Just Who Are the Radicals Here?*, *supra,* 20 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. at 4–23 (same regarding unfair competition based on text, legislative history, and case law).

[46] *See* Whitesides, *The FTC's Competition Policy after the Intel Settlement*, *supra,* 9 DePaul Bus. & Com. L.J. at 555–57, 559–60 (discussing the Federal Trade Commission settlement with Intel as an expansion of the Federal Trade Commission's Section 5 authority beyond the scope of federal antitrust law);, *Section 5 and its Critics: Just Who Are the Radicals Here?*, *supra,* 20 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. at 16–23 (describing FTC cases regarding unfair competition); Kovacic, *Rating the Competition Authorities, supra,* 16 Geo. Mason L. Rev. at 911–12, 913–14 (describing Federal Trade Commission cases brought under the Bush Administration).

[47] *See, e.g.,* Solove, *The FTC and the New Common Law of Privacy*, *supra*, 114 Columb. L. Rev. at 620–21 (noting that the protracted nature of the Federal Trade Commission's own rulemaking processes do not make rulemaking an option for the Federal Trade Commission).

would, of necessity, need to be quite deferential given the constitutional and policy interests at stake.[48]

A second set of concerns has recently emerged, arising out of the 2008 Great Recession, around the thesis that continued prosecutions should be preferred to settlements where those settlements do not include admissions of fact. The idea is a simple one: corporations escape their just desserts in terms of government action, and any follow-on private action seeking damages, when they are allowed to settle cases against them without ever having admitted wrongdoing.

However, as a matter of law, in contrast to entry of criminal antitrust settlements, entry of civil settlements does not require civil defendants to admit to the truth of a government agency's allegations.[49] The reasons for that, pertaining not only to the legality of not requiring admissions of fact but also to the wisdom of that rule, are simple:

> Trials are primarily about the truth. Consent decrees [settlements with court orders] are primarily about pragmatism.[50] "Consent decrees are compromises in which the parties give up something they might have won in litigation and waive their rights to litigation."[51] . . . Consent decrees provide the parties with a means to manage risk.[52] "The numerous factors that affect a litigant's decision whether to compromise or litigate it to the end include the value of the particular compromise, the perceived likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt."[53] These assessments are uniquely for the litigant to make.[54]

The decision of the government not to require admissions from settling defendants in civil cases is similar to the decision of the government not to bring a case for a violation of law. In that regard, the United States Supreme Court has found the decision not to bring a case to be presumptively unreviewable because it often involves a balancing of a number of factors within an executive agency's expertise such as allocating priorities, determining the chances of success, and expending limited resources.[55] Consequently, absent facts that suggest fraud or collusion, a simple review of a government agency's allegations in its complaint, as supported

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[48] *Cf. id.* at 613 (when the Federal Trade Commission conducts an administrative adjudication under its processes, the courts must give substantial deference to its interpretation of Section 5).

[49] *See U.S. (SEC) v. Citigroup Global Markets (Citigroup Global Markets II)*, 752 F.3d 285, 295 (2nd Cir. 2014).

[50] *Id.* at 295.

[51] *Id.* (quoting *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235 (1975) [antitrust settlement].); *FTC v. Circa Direct LLC*, 2012 WL 3987610, *3-7, No. 11–2172 RMB/AMD (D.N.J. Sept. 11, 2012).

[52] *Citigroup Global Markets II,* 752 F.3d at 295.

[53] *Id.* (quoting *Citigroup Global Markets I,* 673 F.3d at 164).

[54] *Ibid*. The Federal Trade Commission, for example, typically does not require admissions from a defendant that a law has been violated. *See* 1 Fed. Trade Comm. § 12:6 (2013).

[55] *Heckler*, 470 U.S. at 831–32.

by factual submissions of the government, suffices for judicial review of the proposed settlement even if a defendant has not admitted those allegations.[56] But, as a practical matter, federal and state government enforcers have, in the experience of the national reporter, begun to contemplate extracting admissions of liability from defendants as a condition to entering into certain civil settlements.

17.4 Criminal and Civil Investigatory and Trial Processes in the United States, Including the Right of Access of Defendants and Third Parties

Federal prosecutors of criminal antitrust violations most often use grand juries, comprised of panels of ordinary citizens, which have the power to investigate cases by issuing subpoenas for evidence and testimony.[57] They have wide scope in conducting their investigations.[58] The proceedings of grand juries are secret, and disclosure by grand jurors or prosecutors of evidence, deliberation, or voting may be punished by contempt of court.[59] When criminal charges are brought, the transcript of the entire proceeding is available to defendants in any ensuing criminal proceedings but not to others, including plaintiffs in any follow-on civil

[56] *See Citigroup Global Markets I*, 673 F.3d at 295–96.

[57] *See, e.g.,* U.S. Department of Justice, Antitrust Division, Antitrust Division Manual, §§ III(E)(1)(b), (F)(1), (F)(4) at III-46, III-82, III-85–88 (5th ed. last updated Mar. 2004).

[58] *See, e.g., United States v. R. Enters., Inc.*, 498 U.S. 292, 300–01 (1991). It is important to note that, as part of the wide scope that federal and state prosecutors enjoy at this stage, corporations (as opposed to individuals as long as those individuals are not in a corporate capacity) cannot assert the Fifth Amendment as a basis for refusing to testify or provide information. *Wilson v. United States,* 221 U.S. 361, 374–75 (1911); *United States v. Richardson,* 469 F.2d 349, 350 (10th Cir. 1972) ("privilege against self-incrimination cannot be invoked by a [Subchapter S] corporate officer to prevent disclosure of corporate records which might incriminate him even though the corporation is a mere alter ego of its owner"); *United States v. Mid-West Business Forms, Inc.,* 474 F.2d 722, 723 (8th Cir. 1973) (privilege against self-incrimination not available to officer of Subchapter S corporation to prevent disclosure of corporate records); *United States v. Silverman,* 359 F.Supp. 1113, 1114 (N.D. Ill. 1973) (officer-shareholder of subchapter S corporation could not invoke constitutional privilege against self-incrimination as bar to compliance with IRS subpoena directing him to appear before special agent and produce corporate records and documents*); Naporano v. United States,* 834 F.Supp. 694, 701 n. 12 (D.N.J. 1993) ("S Corporations are prohibited from invoking the Fifth Amendment privilege against self-incrimination to prevent the disclosure of corporate records which might incriminate a shareholder"). However, an individual who is a corporate officer cannot be compelled to produce his or her private papers. *See, e.g., Wilson*, 221 U.S. at 377. In contrast to such incorporated entities, an individual, or an unincorporated solo proprietorship run by that individual, does have such rights. *Braswell v. United States*, 487 U.S. 99, 104–05 (1988). Partnerships fall into the category of corporations, however, and not sole proprietorships. *Id.* at 107–08 (explaining "The test . . . is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." (internal citations and quotation marks omitted).)

[59] *See, e.g.,* Fed. R. Crim. P. 6(e).

proceedings for federal or state antitrust violations.[60] However, based on the national reporter's own experience, plaintiffs in civil proceedings are often able to secure access to the documents and other evidence, though not the witness testimony, provided to the grand jury through the consent of defendants provided the confidentiality of those materials is guaranteed via a protective order. The reason why confidentiality is important to grand jury proceedings is that they protect members of the grand jury from outside defendants, protect against perjury and subordination of perjury of government witnesses, protect the reputation of innocent defendants, and assure the confidentiality of witnesses.[61]

Federal and state enforcers conduct *civil* investigations of potential antitrust violations that can involve the service of investigative subpoenas and interrogatories, as well as compelling the testimony of witnesses.[62] The conduct of civil investigations using these tools has been analogized to grand jury proceedings in the American system.[63] Nonpublic information provided in these investigations is considered confidential and generally exempt from disclosure to defendants or third parties.[64] In fact, guaranteeing confidentiality is considered to be of such importance that, under the laws of some states, violations of confidentiality by prosecutors can be punished as a misdemeanor and disqualify them from acting in any official capacity.[65]

According confidentiality to civil investigatory proceedings in the United States does not mean that defendants have no access whatsoever. It has been the experience of the national reporter in working on state and federal antitrust investigations that there is an exchange of information on a general level between defendants and government officials in discussing the government's theories of, and evidence concerning, a case.[66]

However, if a settlement is reached between the government and a defendant while a case is in the investigative stage, the experience of the national reporter has

[60] *See* Fed. R. Crim. P. 6(e); *see also In the Matter of the Application of the United States for an Order,* 936 F.Supp. 357, 359 (E.D. La. 1996) (citing cases).

[61] *See, e.g., Application of the United States for an Order*, 936 F.Supp. at 358 (citing authorities).

[62] *See, e.g., United States v. Morton Salt Co.*, 338 U.S. 632, 635–36, 641–43, 652 (1950); *FTC v. Turner*, 609 F.2d 743, 744 (5th Cir. 1980); 15 U.S.C. §§ 1311–1314; Cal. Gov. Code § 11180 et seq. The associated government investigative files are also secret unless documents in those file end up being somehow lodged with the court. *See, e.g., United States v. Loughner*, 807 F.Supp.2d 828, 831, 833–36 (D. Az. 2011) (citing cases). Such a rule comports with due process (and does not violate the First Amendment to the U.S. Constitution) because it protects a defendant's constitutional right to a fair trial by avoiding a trial of the defendant in the press rather than in court. *Id.*

[63] *See, e.g., Morton Salt Co.*, 338 U.S. at 641–43, 652; *Associated Container Transp. (Australia) Ltd. v. United States*, 705 F.2d 53, 58 (2d Cir. 1983); *Turner,* 609 F.2d at 744; *Brovelli v. Sup. Ct.*, 15 Cal. Rptr. 630 (Cal. 1961).

[64] *See, e.g., FTC v. Texaco, Inc.*, 555 F.2d 862, 884–85 & n. 62 (D.C. Cir. 1977); *FTC v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 969–70, 974 (D.C. Cir. 1980); 15 U.S.C. § 1313; 1 Fed. Trade Comm. § 12:6 (2013); Cal. Gov. Code §§ 6254(f), 11183.

[65] Cal. Gov. Code § 11183.

[66] *Accord* U.S. Department of Justice, Antitrust Division, Antitrust Division Manual, § III(G)(1)(b) at III-111 (5th ed. last updated Mar. 2004); *see also id.* § III(G)(2)(c) at III-118 (discussing criminal investigations).

been that the access of a defendant, and any third party objectors or interveners represented by counsel, to information developed in the investigation will be limited to that information presented to a court in order to justify a settlement.[67] Access by outside parties to that information may be limited to the extent that this information is confidential.[68]

Information developed in the course of these civil investigations can be used by the United States Department of Justice or state prosecutors in bringing civil cases[69] or by the Federal Trade Commission in bringing cases of its own. This means that, absent a settlement during the investigation itself, a civil investigation is not the "main" event in American processes; rather, the trial is.[70]

Accordingly, based on the national reporter's experience, once a civil case is filed, defendants can and do obtain information developed in the investigation to the extent that it has been used (e.g., in drafting the civil complaint setting out the government's case) or will be used in the proceedings leading up to and including trial. And defendants, of course, do have access to the information developed by the federal and state antitrust agencies in preparing their cases through trial through the discovery processes.[71] Insofar as third parties are concerned, pretrial and trial

[67] This observation does not apply to the Federal Trade Commission consent decree process since information, as such, does not have to be presented to the court although there is a public comment process as discussed *infra*.

[68] *See NBC Subsidiary v. Sup. Ct.*, 998 P.2d 337, 363 n. 34 (Cal. 1999); *County of Orange v. Sup. Ct.*, 94 Cal.Rptr.2d 261, 264–65 (Cal. App. 4 Dist. 2000); 1 Fed. Trade Comm. § 12:6 (2013); *cf. Loughner*, 807 F.Supp.2d at 831, 833–36 (discussing criminal trials in noting that there was a strong interest in keeping government investigative files confidential to ensure that there was a fair trial).

[69] *See, e.g.,* 15 U.S.C. 1313(d)(1); Cal. Gov. Code § 11181(h).

[70] *See O'Sullivan v. Boerckel*, 526 U.S. 838, 854 (1999); *McFarland v. Scott*, 514 U.S. 849, 859 (1994); *Highlands Ins. Co. v. Nat'l Fire Ins. Co. of Pittsburgh*, 27 F.3d 1027, 1032 (5th Cir. 1994).

[71] Even after a case is filed, federal and state government entities will continue to use discovery to develop that case. Their power to use such civil discovery tools as subpoenas for the production of documents or for the taking of testimony are nearly as broad as their investigatory powers. *See, e.g., In re Urethane Antitrust Litig.*, 261 F.R.D. 570, 572–75 (D. Kan. 2009) (discussing breadth of discovery in civil antitrust proceedings as being even broader than in other civil proceedings and as including the ability to request information from defendants on foreign sales, foreign commerce, and foreign price-fixing meetings). As is the case during investigations, corporations (or individuals acting on behalf of the corporation in a corporate capacity) cannot assert a Fifth Amendment right against self-incrimination. However, if an individual (e.g., an ex-employee of a defendant) should assert his or her Fifth Amendment right to refuse to provide information, federal courts may allow in *civil* proceeding for an adverse inference to be drawn against a defendant from that individual's assertion of that right. *See, e.g., In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 681 F.Supp.2d 141, 153 (D. Conn. 2009) (citing and discussing cases); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 622 F.Supp.2d 890, 907 (N.D. Cal. 2009) (same). Insofar as state civil proceedings are concerned, an adverse inference may not be drawn against a defendant from an invocation of a Fifth Amendment right by an individual such as an ex-employee in certain States such as California. *See, e.g., People v. Holloway*, 91 P.3d 164, 240 (Cal. 2004). But, in California, the California Attorney General can grant immunity to such a witness under state antitrust law (*see* Cal. Bus. & Prof. Code § 16758), thereby requiring the witness to testify notwithstanding such an invocation.

proceedings are presumptively open to them, but certain information may be kept confidential such as trade secrets.[72] This means that, insofar as government settlements are concerned, the longer in time it takes in pretrial proceedings until a settlement is reached, the more case information is available to defendants and third parties. But this fact does not mean that the American system discourages, let alone bars, early settlements. Quite to the contrary.[73]

17.5 Criminal Settlements

Criminal antitrust settlements can involve so-called amnesty applicants, who, by definition, must approach the federal government first, against whom a decision is made by the government not to prosecute them in exchange for the cooperation that they offer and deliver to the government.[74] Criminal antitrust settlements can also involve those defendants other than amnesty applicants who may receive a benefit, such as a fine reduction, in exchange for pleading guilty to criminal antitrust charges and offering cooperation.[75]

Insofar as amnesty applicants are concerned, the decision to confer such a status on a defendant does not involve a settlement against that defendant in the sense that an action has been initiated, even if for purposes of settlement, and then concluded.[76] Rather, if an amnesty applicant follows through on the promised and required cooperation, an action will never be initiated. Amnesty applicant processes represent the kind of no-action decisions on which executive decisions are unreviewable by the courts under our federal and state constitutions; they reside within that sphere of executive grace and discretion that should be accountable only to the public and not to those aggrieved third parties wishing to challenge a defendant's amnesty status.[77]

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[72] *See, e.g., Foltz v. State Farm Ins. Co.*, 331 F.3d 1122, 1131 (9th Cir. 2003); *NBC Subsidiary*, 998 P.2d at 359–61, 363 n. 34, 365; *see also, e.g.,* 28 C.F.R. § 50.9; H.R. Rep. No. 94–1343 at 2610 (1976).

[73] *See, e.g., In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 278, 297–301 (E.D. Pa. 2012); *see also In re Linerboard Antitrust Litig.*, 292 F.Supp.2d 631, 643 (E.D. Pa. 2003) (an early settlement with one of many defendants can "break the ice" and bring other defendants to the point of serious negotiations).

[74] *See, e.g.,* Antitrust Division Manual, *supra*, § III(F)(9) at III-95–103.

[75] *See, e.g., id.* § III(G)(1)(c)(ii) at III-123–124.

[76] *See, e.g.,* Plotkin, *Agent Settlement Reviewability, supra*, 82 Ford. L. Rev. at 1402 (citing *New York State Department of Law v. FCC*, 984 F.2d 1209, 1214 (D.C. Cir. 1993), in noting the distinction on this basis between settlements and no-action decisions).

[77] Congress has implicitly recognized and endorsed the Executive's use of an amnesty program by passing legislation that limits damages in civil proceedings to single (nontrebled) damages if certain preconditions are met. *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108–237, 118 STAT 661 (2004), amended by Pub. L. No. 111–90, 124 STAT 1275 (2010). This congressional recognition of executive discretion means, from a constitutional perspective, executive powers are at their acme in this area. *See Youngstown Steel*, 343 U.S. at 635 (Jackson, J., concurring).

Insofar as other defendants are concerned, criminal antitrust settlements involve so-called plea bargains, which are "negotiated agreement[s] between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, [usually] a more lenient sentence or a dismissal of other charges."[78] Courts interpret their terms like any contract or settlement agreement,[79] though there must be a valid factual basis for the plea[80]—i.e., through the statements of the defendant acknowledging guilt.[81] Moreover, plea agreements that involve the dismissal of any charges or a specific sentence may be rejected by the courts; plea agreements that involve only a promised sentencing recommendation to a court may not be rejected by a court on that ground, but the court can decline to follow that recommendation.[82] And hearings on plea agreements are typically open to the public,[83] specifically allowing victims a reasonable opportunity to be heard by the court.[84] Accordingly, plea agreements do not raise constitutional concerns of any kind, including due process.[85]

Typically, criminal settlements do not involve the recovery of damages for third parties. Rather, the recovery of those damages are left up to parallel civil proceedings that can involve private class actions, state attorney general *parens patriae* actions, or both.[86]

However, insofar as the amnesty applicant is concerned, it has a duty to cooperate with the prosecution of such parallel civil proceedings if it wishes for its civil exposure to be limited to single damages.[87] Further, it is the experience of the national reporter that an amnesty applicant will often settle early in a case with

[78] Dustin Plotnick, *Agency Settlement Reviewability*, 82 Ford. L. Rev. 1367, 1378 (2013) (citing and quoting Black's Law Dictionary 1270 (9th ed. 2009) (internal quotation marks omitted)); *cf., e.g., United States v. Robinson*, 924 F.2d 612, 613 (6th Cir. 1991) ("Plea agreements are contractual in nature. In interpreting and enforcing them, we are to use traditional principles of contract law.").

[79] *E.g., Robinson*, 924 F.2d at 613.

[80] *Libretti v. United States,* 516 U.S. 29, 28 (1995); Fed. R. Crim. P. 11(b)(3).

[81] *See, e.g.,* Stephen Freccero, *The Use and Effect of an Antitrust Guilty Plea in Subsequent Civil Litigation,* 23 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 136, 141 (2013)

[82] *See* Plotnick, *Agency Settlement Reviewability*, 82 Ford. L. Rev. at 1378 (internal citations omitted).

[83] *See, e.g., Oregonian Pub. Co. v. U.S. Dist. Court for the Dist. of Oregon*, 920 F.2d 1462, 1465–66 (9th Cir. 1990) (citing cases).

[84] 18 U.S.C. § 3771(a)(4).

[85] *See, e.g., Ashe v. Styles*, 67 F.3d 46, 51–52 (4th Cir. 1995) (citing cases for the proposition that, so long as government fulfills express or implied terms or promises, a plea agreement does not violate due process).

[86] *See, e.g.,* Amended Plea Agreement at ¶ 11, *United States v. Samsung SDI. Co., Ltd.*, No. CR 11-0162 (WHA) (N.D. Cal. May 17, 2011).

[87] *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 STAT 661 (2004), amended by Pub. L. No. 111-90, 124 STAT 1275 (2010).

plaintiffs, for what can be enormous reductions in the damages owed in exchange for providing cooperation, for the simple reason that plaintiffs know its cooperation is usually essential to the prosecution of their parallel civil actions. Moreover, insofar as other defendants may be concerned, if they have pled guilty to criminal antitrust violations, those plea agreements not only may be used as evidence of guilt but also may, in many circumstances depending upon the scope of the agreement and the factual statements made by a defendant in support, be used to estop or bar those defendants from contesting key issues relating to liability.[88]

17.6 Civil Conduct Settlements Involving the United States Department of Justice

Civil antitrust settlements by the United States Department of Justice are reviewed under the Tunney Act. Under that Act, the federal courts have to review those settlements to determine if they are in the public interest.[89] But this public interest review is a narrow one: the settlement is reviewed to determine if (1) any of the terms of the proposed court order are ambiguous, (2) if the method of enforcing the terms of the proposed court order are inadequate, (3) if third parties will be positively injured, or (4) if the settlement will make a "mockery" of the judiciary.[90] This review is limited in recognition that the government has broad discretion to bring cases in the first instance, let alone settle them,[91] and that it is the duty of the government to reconcile competing social and policy interests.[92] The proposed settlement need not be the best one possible, and the court must presume the terms to be reasonable though the court is not supposed to be a rubber stamp.[93] Moreover, the Tunney Act has never been interpreted as requiring a judicial admission of liability from a defendant as a precursor to judicial approval of a federal antitrust settlement. In fact, the Tunney Act does not allow courts to speculate as to the claims that the government could have brought, let alone why the government did not bring those claims,[94] nor does it allow the court to reject remedies set out in a proposed settlement merely because it believes other remedies may be preferable.[95]

[88] Freccero, *The Use and Effect of an Antitrust Guilty Plea in Subsequent Civil Litigation, supra*, 23 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. at 136–37, 141, 148–55 (discussing, among other things, Section 5(a) of the Clayton Act and case law interpreting that section).

[89] *See, e.g.,* John Bourdeau, William Danne, Eleanor Grossman, et al., *Monopolies et al.,* Am. Jur. 2d § 552 (May 2014).

[90] *See, e.g., Microsoft II*, 373 F.3d at 1234–36; *Monopolies, supra*, Am. Jur. 2d, § 552.

[91] *See, e.g., Microsoft II*, 373 F.3d at 1236–37.

[92] *See, e.g., Monopolies, supra*, Am. Jur. 2d § 552.

[93] *See, e.g., id.*

[94] *See, e.g., Microsoft I,* 56 F.3d at 1459.

[95] *Id.* at 1460.

Rather, a court can reject a proposed settlement only if it has "exceptional confidence" that the proposed remedies will result in adverse antitrust consequences.[96]

That being said, the courts do set hearings, do entertain public comments on the settlements (to which the United States Department of Justice must respond), can take testimony from witnesses, and can provide an opportunity for third parties, including associations, either to appear as *amicus curiae* or to intervene formally and present their perspective at the hearing.[97] However, a request to intervene formally does have to satisfy certain requirements, including most notably whether they have a case that involves a question of law or fact in common with the action being settled.[98] And there is a requirement for settling defendants to disclose to the court their oral or written communication, in connection with the proposed consent decree, with the United States Department of Justice.[99]

The Tunney Act thus fairly balances competing needs. On the one hand, there is the need, rooted in constitutional law and sound policy, to require the courts to give substantial deference to the Executive in confirming civil antitrust settlements. On the other hand, there is the need to meet due-process type of concerns as a competition policy matter, requiring the submission of justifications for the settlement, an opportunity for public comment, and some sort of nonrubber stamp form of judicial review.[100]

There is one final issue here: the interplay between civil antitrust settlements of the United States Department of Justice and any follow-on private rights of action.[101] Generally speaking, the terms of such a consent decree, as well as even evidence that such a decree exists, cannot be introduced into any follow-on private right of action if the government's case settles before trial.[102] This rule is designed to facilitate the government's ability to settle its cases, using its executive discre-

[96] *Id.*

[97] *See, e.g., Microsoft II*, 373 F.3d at 1236 (citing cases), 1238.

[98] *See, e.g., Microsoft II*, 373 F.3d at 1234; *Monopolies, supra,* Am. Jur. 2d § 552. There is also a requirement that intervention not delay or prejudice the action being settled. *See Microsoft II*, 373 F.3d at 1235–36.

[99] *See id.* at 1249. An example of the application of these principles can be found in *Microsoft II*, 373 F.3d at 1237–50.

[100] *Post*-entry, third parties cannot, as a constitutional matter, go to court to challenge enforcement decisions, or the lack thereof, under those consent decrees made by the United States Department of Justice before it actually files an enforcement action. *See Epic*, 844 F.Supp.2d at 103–06; *Alpine Inds.*, 40 F.Supp.2d at 942–43.

[101] As with its criminal antitrust plea agreements, the United States Department of Justice generally does not pursue damages in its civil antitrust settlements but rather leaves that up to any follow-on private actions.

[102] *See, e.g.,* Freccero, *The Use and Effect of an Antitrust Guilty Plea in Subsequent Civil Litigation*, *supra,* 23 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. at 136 (discussing section 5(a) of the Clayton Act); *see also, e.g., Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 555 F.Supp. 824, 826 (D. Md. 1983) (citing cases).

tion, without being hemmed in by collateral consequences in follow-on private actions for damages, if it should so choose.[103]

17.7 Civil Conduct Settlements Involving the United States Federal Trade Commission

Civil antitrust settlements involving the Federal Trade Commission follow a different path from civil antitrust settlements involving the United States Department of Justice. The Federal Trade Commission will negotiate a settlement that in nearly every case includes a consent decree, i.e., obligations and conditions imposed on a defendant for a period of time.[104] It will then submit a proposed settlement for public comment and, following submission of any comments within a 30-day period, will address those comments as part of its final approval, modification, or rejection of that consent decree.[105] Each of the individual five Commissioners may also write their own concurring or dissenting opinions as part of this process.[106]

Though the consent decree is a nonjudicial one that flows from executive discretion such that it does not require approval from a court,[107] the Federal Trade Commission has a range of remedies that it can resort to if there is a violation, including assessing civil penalties in the amount of $16,000 per violation and filing a lawsuit in court asking for injunctive relief and other equitable relief.[108] This latter provision does give the courts a role in Federal Trade Commission consent decrees, though it is not the same role that they play in Tunney Act proceedings involving settlements by the United States Department of Justice or in most, if not all, state antitrust settlements. In fact, the Federal Trade Commission has almost completely unfettered discretion in fashioning the scope of its consent decree with

[103] *See Metrix Warehouse, Inc.*, 555 F.Supp. at 826 (citing legislative history behind section 5(a) of the Clayton Act).

[104] *See, e.g.,* Solove, *The FTC and the New Common Law of Privacy*, *supra*, 114 Columb. L. Rev. at 610.

[105] *See, e.g.,* 1 Fed. Trade Comm., *supra,* § 12:6; Solove, *The FTC and the New Common Law of Privacy*, *supra*, 114 Columb. L. Rev. at 610, 623.

[106] *See, e.g.,* Solove, *The FTC and the New Common Law of Privacy*, *supra*, 114 Columb. L. Rev. at 623.

[107] *See Action for Safety and Health*, 498 F.2d at 762–63; *see also Epic v. FTC*, 844 F.Supp.2d 98, 103–06 (D.D.C. 2012), *sum. aff'd* 2012 WL 1155661 (D.C. Cir. 2012) (Federal Trade Commission cannot be compelled to bring court action to enforce Federal Trade Commission consent decree); *Alpine Inds. v. FTC*, 40 F.Supp.2d 938, 942–43 (E.D. Tenn. 1998) (court refused to construe Federal Trade Commission consent decree provisions, and thereby bar FTC from bringing an enforcement action, as the Federal Trade Commission has complete discretion over the initiation of enforcement proceedings). Put another way, settlement agreements are construed as contracts rather than as binding judicial precedent. 1 Fed. Trade Comm., *supra*, § 12:6.

[108] *See, e.g.,* Solove, *The FTC and the New Common Law of Privacy*, *supra*, 114 Columb. L. Rev. at 599–600, 604–05, 606–07, 608.

common provisions, including penalties, conduct bans, requirements for corrective action, reporting, and audit provisions.[109]

If, however, the Federal Trade Commission should file a case in court against a defendant, it is a different story. In settling a filed case in court, the Federal Trade Commission will seek court approval of any settlement and consent decree under a standard analogous to that involving civil settlement by other federal prosecutorial agencies, including the lack of any need for a judicial admission of liability from a defendant.[110]

It appears to be settled that prefiling Federal Trade Commission consent decrees under Section 5 are thus insulated from court review.[111] Given the opportunity for public comment prior to the Federal Trade Commission's final promulgation of a consent decree that accounts for those comments, the close tie of such a consent decree with a no-action decision of the kind that should be left to the Executive Branch, and the extremely limited effectiveness of such a consent decree in the absence of a Federal Trade Commission decision to go to court, such consent decrees do not present due process concerns.

But it is not free from all doubt as a matter of sound policy (if not constitutional law) that the *entry* of such consent decrees should not be subject even to that highly deferential review (e.g., for arbitrariness) applied by the courts to other forms of administrative agency actions.[112] For example, such review, even if highly deferential, could require additional, clearer, explanations by the Federal Trade Commission as to the fit between these consent decrees and its views of Section 5. This could help defuse criticism that the development of Section 5 is being accomplished in a vague or unreviewable manner without the drawbacks of imposing an inherently rigid straightjacket, such as would occur where the Federal Trade

[109] *E.g., id.* at 613–19.

[110] *See, e.g., Circa Direct LLC*, 2012 WL 3987610 at *3–7.

[111] *See Action for Safety and Health*, 498 F.2d at 762–63; *see also Epic*, 844 F.Supp.2d at 103–06; *Alpine Inds.*, 40 F.Supp.2d at 942–43.

[112] *See generally* Plotkin, *Agent Settlement Reviewability, supra*, 82 Ford. L. Rev. at 1370–71, 1394–1404 (federal agency settlements that do not involve court orders should not be regarded as being unreviewable but rather should be reviewed in the highly deferential manner applicable to other agency actions). The national reporter does not necessarily agree that arguments contained in this article should, or do, trump any countervailing arguments as a *constitutional matter* insofar as the review of any federal agency settlement is concerned, let alone Federal Trade Commission consent decrees. *See Epic*, 844 F.Supp.2d at 103–06; *Alpine Inds.*, 40 F.Supp.2d at 942–43. Nor can or should third parties be able to obtain an order requiring the Federal Trade Commission to enforce a consent decree, *Epic*, 844 F.Supp.2d at 103–06, or construing a Federal Trade Commission consent decree so that the Federal Trade Commission cannot initiate an enforcement action, *Alpine Inds.*, 40 F.Supp.2d at 942–43. The national reporter merely cites this article as a starting point for considering whether Federal Trade Commission consent decrees should, as a matter of sound policy, be subject to some form of highly deferential review by the courts before they take effect.

Commission to use its existing rulemaking powers, that would betray the congressional intent behind Section 5.[113]

There is one final issue: the interplay of Section 5 determinations, i.e., in the context of a Federal Trade Commission consent decree, with private rights of action. First, Congress refused to create a private right of action under Section 5 because Section 5 was designed to address conduct that a business may not have known beforehand would end up being prohibited under that section.[114] Second, Section 5 consent decrees have no preclusive effect even in parallel antitrust actions, i.e., they cannot be used to estop or bar defendants from contesting key liability issues in parallel antitrust actions under state or federal antitrust law that may be based on the same theories as those underlying the consent decrees in question.[115] Third, Section 5 consent decrees cannot be introduced into evidence.[116] By allowing the Federal Trade Commission to avoid being hemmed in by collateral consequences of its consent decrees in any parallel private antitrust actions, this set of rules not only facilitates the ability of the Federal Trade Commission to settle its cases using its executive discretion,[117] but it also helps the Federal Trade Commission to meet its forward-looking mission of remedying business conduct that could have market-wide anticompetitive effects or that may otherwise constitute incipient conduct that, if completed, would violate antitrust laws.[118]

[113] The Federal Trade Commission has, on at least one occasion, agreed to a settlement agreement that, in one aspect, did not involve entry of a consent decree. Fed. Trade Commission Stmt. at 3 n. 2, FTC File No. 111–0163, *In the Matter of Google, Inc.* (Jan. 3, 2013). The difference between such a settlement provision, which the Federal Trade Commission still views as being binding (*see id.*), and a consent decree appears to be that the Federal Trade Commission cannot impose civil penalties for violations of such a settlement provision. Insofar as this report is concerned, that distinction makes no difference to the report's findings or conclusions, regardless of the wisdom of entering into such settlements.

[114] Dahdouh, *Section 5 and its Critics: Just Who Are the Radicals Here?*, *supra,* 20 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. at 8–9. Whether, and under what circumstances, the Federal Trade Commission can or should be able to seek restitution is beyond the scope of this report.

[115] 15 U.S.C. §16.

[116] *See Metrix Warehouse, Inc.*, 555 F.Supp. at 826 (discussing consent decrees generally); *Damon Corp. v. Geheb*, 1982 WL 1927, *2, No. 80 C 1500 (N.D. Ill. Nov. 23, 1982) (discussing FTC consent decree).

[117] *See Metrix Warehouse, Inc.*, 555 F.Supp. at 826.

[118] *See* Dahdouh, *Section 5 and its Critics: Just Who Are the Radicals Here?*, *supra,* 20 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. at 3–4, 15–23.

17.8 Non-*Parens Patriae* Civil Antitrust Settlements Involving the American States

Though American States may have a split executive under which the Executive Power is split among multiple elected state offices with their attorneys general serving as the chief law enforcement officer for these States, they act in a manner similar to the federal executive and enjoy a similar measure of discretion. However, these state attorneys general can act either in a non-*parens patriae* capacity or in a *parens patriae* capacity, the latter of which is explained in the next section.

Acting in a non-*parens patriae* capacity involves either bringing a law enforcement action for a court order, civil fines, and restitution,[119] or bringing an action in a proprietary capacity on behalf of government agencies for a court order and damages.[120] Thus, non-*parens patriae* civil settlements of the American States can fall into two categories. They can involve only a payment of money to individual state agencies (though a monetary-only antitrust settlement of claims of state government agencies is unheard of in the national reporter's experience), or they can involve in some fashion a requested entry of a court order.[121]

At the onset, such settlements, like federal civil settlements, do not bind individuals or businesses such that the rights of those individuals or businesses are foreclosed. Thus, there should be no need for a review for adequacy of the settlement in addressing the interests of those parties.[122]

But the standard of review appears to be an open one. On the one hand, the standard of review of comparable federal civil settlements *outside of the antitrust context* appears to be a deferential one to determine if a settlement is fair and reasonable and, if, insofar as a request for a court order is concerned, entry of that

[119] *See, e.g.,* Cal. Bus. & Prof. Code § 17200 et seq.

[120] *See, e.g.,* Cal. Bus. & Prof. Code § 16750(b) & (c).

[121] There is the possibility that, though it tends to be strongly discouraged as a bipartisan policy matter in most American States, a State may enter into a settlement agreement that imposes duties or conditions on parties beyond the payment of funds with no consent decree or court order required or with such a decree or order being imposed *after* breach of the agreement is found. Assuming that the resulting dismissal of any such action does not require judicial approval (*but see* Cal Bus. & Prof. Code §16760 [judicial approval required before dismissing state antitrust action]); such an action does not defeat judicial review as breach of any such agreement can only be remedied via the bringing of an action in court for breach of contract. *See Walton v. Mueller*, 102 Cal. Rptr. 3d 605, 609–10 (Cal. App. 6 Dist. 2009). Whether such a policy choice otherwise serves the goals of public accountability and the proper use of public funds is beyond the scope of this report, though the national reporter notes that such settlements are often disclosed to the public such that enforcers may be held to politically account for them.

[122] *Citigroup Global Markets II*, 752 F.3d at 293–94. Insofar as proprietary claims are made under a state's antitrust law to recover damages for state or local government entities, a settlement of those claims may be binding such that a review for adequacy may be appropriate, though with an extra measure of deference given that a state executive must be almost conclusively presumed to be acting in the best interests of fellow state agencies and local government entities.

order would not disserve (or, to put it another way, injure) the public interest.[123] The assessment of fairness and reasonableness requires, at a minimum, that the courts examine the following criteria: (1) the basic legality of the settlement and court order, (2) whether the terms of the settlement and court order are clear, (3) whether the settlement and court order resolve the allegations of the complaint, and (4) whether the settlement is tainted by allegations, backed by evidence, of collusion or corruption.[124] Mere policy disagreement as to the policy interests involved may not suffice for a court to reject the proposed settlement and court order.[125] As discussed above, federal civil antitrust settlements by the United States Department of Justice are reviewed under similarly deferential processes and standards.

On the one hand, based on the experience of the national reporter, this deferential standard of nonantitrust federal civil settlements most closely encapsulates the review that many state courts do give for state civil *non-parens* settlements that involve a court order, though some States may choose to follow Tunney Act processes and standards. On the other hand, for those States that do not follow Tunney Act processes and standards, that review can be quite abbreviated. Entry of the proposed order may occur the same day that it is presented to the court without any sort of hearing being held; this abbreviated review can insulate these proposed orders from *any* meaningful scrutiny via the input of interested parties, which is a meaningful contrast even with the Federal Trade Commission's consent decree process discussed above. An overly abbreviated settlement process may create a problem for alleged controversial settlements in hindering a fully reasoned exposition as to how such settlements fit within the wide parameters of the law and the authority that government enforcers have to enter into such settlements in order to restore competition.[126]

17.9 *Parens Patriae* Settlements Involving the American States

In the American federalist system, the American States have "quasi-sovereign" powers, having surrendered only certain sovereign powers when they joined the Union.[127] The exercise of those quasi-sovereign powers can involve the American States representing their natural persons (and in a few States businesses) in what is

[123] *Id.* at 292–95.

[124] *See, e.g., Citigroup Global Markets II*, 752 F.3d at 294–95 (citing and discussing *non-SEC* cases).

[125] *See id.* at 297.

[126] *Cf. Circa Direct LLC*, *supra*, 2012 WL 3987610, *3–7, No. 11–2172 RMB/AMD (D.N.J. Sept. 11, 2012).

[127] *See Massachusetts v. EPA*, 549 U.S. 497, 518–21 (2007); *State of Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237–38 (1907).

called a *parens patriae* capacity.[128] The history and nature of the States' *parens* power is explained best in the following passage from a United States Supreme Court case:

> *Parens patriae* means literally "parent of the country." The *parens patriae* action has its roots in the common law concept of the "royal prerogative." The royal prerogative included the right or responsibility to take care of persons who are "legally unable, on account of mental incapacity, whether it proceed from 1st nonage: 2 idiocy; or 3 lunacy to take proper care of themselves and their property." At a fair early date, American courts recognized this common-law concept, but now in the form of a legislative prerogative. "This prerogative of legislative power is inherent in the Supreme Power of every State, whether that power is lodged in a royal person or in the legislature [and] is often a most beneficent function . . . often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves."[129]

In the American States, this *parens* capacity has morphed into the capacity to act when the State has a quasi-sovereign interest in the well-being of its population.[130] For example, if the health, safety, or economic interest of a State's citizens is threatened, the State can represent its citizens in a *parens* capacity.[131] This forms the basis for a State being able to sue on behalf of its citizens for a violation of antitrust law.[132] And, insofar as an American State brings a *parens patriae* claim on behalf of its residents for damages either under state antitrust law (if it has a state *parens* statute) or under federal antitrust law, the resolution of such a claim as part of an antitrust settlement may operate to preclude any such individuals from bringing their own claims under, respectively, state or federal antitrust law.[133]

Judicial review of *parens* settlements, in hearings generally open to the public, is typically required.[134] The standard of judicial review of such settlements involves the same type of determination as with private class action antitrust settlements: is the proposed settlement fair, reasonable, and adequate?[135]

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[128] *See, e.g.,* Cal. Bus. & Prof. Code § 16760; *see also, e.g.,* 15 U.S.C. § 15c (State Attorneys General have the power to file *parens patriae* actions under federal law).

[129] *Alfred L. Snapp et al. v. Puerto Rico ex. rel. Barez*, 458 U.S. 592, 601–02 (1982).

[130] *Id.* at 603.

[131] *Id.* at 602–08.

[132] H.R. Rep. No. 499, 94th Cong., 2d Sess. 6–7 (1975) (legislative history of 15 U.S.C. § 15c).

[133] *E.g.,* Cal. Bus. & Prof. Code § 16760 (b)(3); *see also* Order, *State of California et al. v. Philips Electronics Co. et al.,* A140908 (July 9, 2014) (order in possession of author) (requiring briefing on the merits of a *parens patriae* settlement by the California Attorney General because of the concern that such a settlement *could* operate to bar federal class action litigation involving alleged price fixing).

[134] *See, e.g.,* 15 U.S.C. § 15c; Cal. Bus. & Prof. Code § 16760(c).

[135] *See, e.g., In re Compact Disc Minimum Advertised Price Litigation*, 216 F.R.D. 197, 204, 206 (D. Me. 2003); *see also In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1374, 1384–1385 (D. Md. 1983).

Adding adequacy as part of the inquiry (as fairness and reasonableness can be part of the inquiry into non-*parens* civil antitrust settlements) makes sense given that *parens* settlements can bar the claims of individuals covered by the *parens* claim.[136] Addressing adequacy involves such considerations as the strength and weaknesses of the State's *parens* claim, as well as the total monetary and nonmonetary consideration obtained by the State in its *parens* settlement of that claim, though the courts are not, in reviewing the settlement, to retry the case in effect to see if the settlement was the best result possible.[137]

But, substantively, the judicial review of *parens* settlement involves a great deal of deference to the State.[138] This substantial deference is because of the following twin presumptions: that the State is in the best position to judge when a settlement is in the public interest[139] in weighing all of the policy considerations and that the State performs its duties in a regular manner.[140] And, as noted, judicial approval of *parens* settlements may be based on the value of nonmonetary considerations such as the strength of injunctive relief and cooperation that may be important to a state attorney general acting in the public interest.

Procedurally, the judicial review of *parens* settlements also involves an assessment of the sufficiency of the notice given by the State to its citizens so that its citizens, who would otherwise be bound to those settlements, could object or opt out.[141] While the assessment of the sufficiency of notice turns on whether that notice was reasonable under the circumstances, that standard is not a strict one under the due process clause.[142]

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[136] *See* Cal. Bus. & Prof. Code § 16760(b)(3).

[137] *See, e.g., In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. at 1384–86; *see also, e.g., In re Tableware Antitrust Litig.*, 484 F.Supp.2d 1078, 1080 (N.D. Cal. 2007). Significantly, "the fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disproved." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974). Conversely, nonmonetary relief such as cooperation and injunctive relief can be very important. *See, e.g., In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. at 1384–86; *Rebney v. Wells Fargo Bank*, 269 Cal.Rptr. 844, 857 (Cal. App. 1 Dist. 1990).

[138] *See, e.g., In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 380 (D.D.C. 2002).

[139] *See New York v. Reebok Int'l Ltd.,* 96 F.3d 44, 48 (2d Cir. 1996) (Attorneys General in *parens* actions are motivated by concern for the public interest); *In re Lorazepam*, 205 F.R.D. at 380 ("the Court may place greater weight on such opinion in addressing a settlement negotiated by government attorneys committed to protecting the public interest."); *In re Toys 'R' Us Antitrust Litig.*, 191 F.R.D. 347, 351 (E.D.N.Y. 2000) ("The participation of the State Attorneys General furnishes extra assurance that consumers' interests are protected.").

[140] *See, e.g.,* Cal. Evid. Code § 664.

[141] *See, e.g., Mullhane v. Central Hanover Bank & Trust Co.*, 339 U.S. 309, 314 (1950); *Grunin v. International House of Pancakes*, 513 F.3d 114, 120–121 (8th Cir. 1975); Cal. Bus. & Prof. Code § 16760(b)(1).

[142] *See, e.g., Mullhane*, 339 U.S. at 317–18 (1950) (under due process clause, notice by publication is sufficient where it is not reasonably possible or practical to give more adequate warning to absent beneficiaries); Cal. Bus. & Prof. Code § 16760(b)(1) (notice by publication is default form of notice). The national reporter is aware that, for *parens* settlements, notice can include publication on a government Web site, Internet ads, a press release, and use of e-mail lists.

In the final analysis, this process for approving antitrust *parens* settlements fairly balances competing needs much as does the Tunney Act. And, like the Tunney Act, this process fairly and comprehensively addresses due process concerns.

17.10 Extraterritorial Reach of American Antitrust Settlements

The Foreign Trade Antitrust Improvements Act of 1982[143] ("FTAIA") governs the foreign reach of federal antitrust law,[144] though whether it applies to state antitrust law as well is still an open question.[145] It applies equally to civil and criminal antitrust law[146] though, as a nonjurisdictional statute that does not restrict the courts' power to hear a case,[147] whether it could be asserted by a third party or an objector to bar an antitrust settlement is quite doubtful.[148]

The FTAIA bars the application of federal antitrust law to restraints involving trade or commerce with foreign nations unless those restraints involve import commerce into the United States or the restraint has a direct, substantial, and foreseeable effect on American commerce.[149] The FTAIA was designed to carve out the actions of American exporters and foreign companies so long as those activities only affected foreign (non-American) commerce.[150]

Import commerce includes transactions in which foreign companies target and sell price-fixed products to U.S. companies that import those products into the U.S. directly.[151] Thus, at the very least, a civil or criminal antitrust settlement that involves such import commerce is proper.

Furthermore, a civil or criminal antitrust settlement is proper even if it involves anticompetitive conduct overseas regarding foreign commerce where that conduct has a direct, substantial, and reasonably foreseeable effect on American commerce.[152] And, given that Congress enacted the FTAIA, a civil or criminal antitrust settlement that comports with it, even if it affects foreign commerce, would be supported with "the strongest of presumptions" with "the burden of persuasion

[143] 15 U.S.C. § 6a.

[144] *See, e.g., United States v. Hsiung et al.*, slip. op. at 3–4, No. 12–10514 (9th Cir. July 10, 2014).

[145] *See Amarel v. Connell*, 248 Cal. Rptr. 276, 283 (Cal. App. 3 Dist. 1988).

[146] *Hsiung*, slip op. at 3–4.

[147] *Hsiung*, slip op. at 25–28.

[148] *See Matsushita Elec. Inds. Co. Ltd. v. Epstein*, 516 U.S. 367, 374–79 (1996) (court can give preclusive effect to settlement even if settlement resolved claims over which court entering settlement had no jurisdiction).

[149] *Id.* slip op. at 24.

[150] *Id.* slip. op. at 25.

[151] *Id.* slip op. at 33–35, 41–42.

[152] *Id.* slip. op. at 39–41. Whether this exception covers overseas anticompetitive activity, such as price fixing, involving product components that are incorporated into products sold to U.S. citizens or U.S. corporations is open to dispute. *See, e.g., id.* at 41 & n. 9.

[resting] heavily upon any who would attack it."[153] In fact, such a settlement would not violate due process at least as long as there is more than a "slight and casual" connection between the United States and the anticompetitive activity in question.[154]

It has been the experience of the national reporter that antitrust settlements need to be able to reach foreign commerce where the underlying anticompetitive activity has a sufficient connection to a host country. "Domestic and foreign markets are interrelated and influence each other."[155] That the overcharges from anticompetitive acts on common products may go through several steps in a global supply chain before those overcharges are paid by U.S. citizens does not render those acts too indirect or remote.[156] And the extraterritorial application of antitrust laws based on such effects is widely accepted.[157]

17.11 Recommendations of U.S. Group on a Question A Regarding Antitrust Settlements

The U.S. Group is composed of current and former government enforcers, plaintiff and defense counsel, and legal commentators and scholars. After discussion and consideration of this Report and its findings, the U.S. Group recommends the following general suggestions for the LIDC Congress' Resolution on Question A:

1. Civil and criminal settlements, like civil and criminal prosecutions, are important tools in antitrust enforcement and should remain so;
2. Government antitrust agencies should continue to be given substantial deference in settling their criminal and civil antitrust cases;
3. The settlement of antitrust cases in the civil and criminal context performs valuable services in the public interest, including securing important cooperation and access to otherwise unobtainable information, obtaining monies for victims and/or fines without litigation (or continued litigation), addressing difficult questions involving the balancing of anti- and procompetitive effects, and exploring the frontiers of legal precedents and remedies in innovative ways. In

[153] *Youngstown Steel*, 343 U.S. at 636 (discussing the seizure of steel mills by the President).

[154] *AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1113 (9th Cir. 2013).

[155] *Metallgesellschaft AG v. Sumitomo Corp. of Am.*, 325 F.3d 826, 842 (7th Cir. 2003).

[156] *See Loeb Inds. v. Sumitomo Corp.*, 306 F.3d 469, 486–89 (7th Cir. 2002) (discussing the injury of copper wire producers from unlawful activity in the copper futures market); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F.Supp.2d 953, 964 (N.D. Cal. 2011) (discussing overcharges on LCD panels making their way from LCD manufacturers to American retail stores). However, this issue is now being litigated, albeit in the nonsettlement context, in front of the United States Court of Appeals for the Seventh Circuit in *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003 (7th Cir.).

[157] Floridan Wagner-von Papp, *Competition Law and Extraterritoriality*, in *Research Handbook on International Competition Law* 21, 57 (Ariel Ezrachi ed. 2012).

this respect, it is important that, although these settlements can serve as a body of law for judicial reference in contested cases, they do not bind the courts in the same manner as would case precedent, thus avoiding the need to make premature all-or-nothing choices that can hinder development of the law;

4. Insofar as the goal of more seeking civil admissions of liability, or more civil prosecutions, may be concerned, this is a goal that should be endorsed provided that it is made clear that this goal can be obtained through the public feedback process without the need for legal constraints;
5. Moreover, civil settlements are and remain valuable even without securing a civil admission of liability as a formal matter;
6. Settlements by government enforcers should involve a measure of formal judicial review, albeit a highly deferential one, with a publicly available government explanation of the settlement and its rationale (subject to protecting the confidentiality of certain information), a reasonable opportunity for public comment, and generally a public hearing;
    1. A process of formal judicial review of settlements while a case is still in the investigative stage should not require affording a formal right to defendants or third parties to access investigative files, at least for jurisdictions with an American-style system. Informal, but meaningful, sharing of theories, or decisions to prosecute, with defendants, consistent with the need to guarantee confidentiality, are a different matter;
    2. The U.S. Group applauds the European Union for affording a right of access for defendants to the antitrust investigatory files of the European Commission in civil proceedings once a statement of objections has issued. A comparable right for defendants in the United States should exist only at a comparable stage in American civil and criminal proceedings, namely the actual commencement of civil or criminal litigation; and
    3. The existing state of affairs for third parties should be maintained; third parties should not have access to investigative files. But they should have access to records filed in court proceedings, e.g., once a case commences or a precomplaint settlement is filed, subject only to the need to protect the confidentiality of certain information such as trade secrets, a need that should be narrowly interpreted and applied.

Part II

Online Exhaustion of IP Rights

International Report 18

Vincenzo Franceschelli

18.1 Foreword

The legitimate holder of an industrial property right loses his absolute right with the first sale (principle of exhaustion of IP rights). The first sale made by the holder of an industrial property right, or by a legitimate licensee, has as a consequence that that good may freely circulate, and the legitimate IP holder may not oppose the successive acts of reselling.

Recent decisions in Europe and in the Unites States[1] have brought the principle of exhaustion of IP rights in cyberspace to new attention.

The scope of this Report is to compare national laws in relation to the application of the principle of exhaustion of IP rights "as we know it" to the online industry.

18.2 Introduction

Industrial property rights are absolute rights. The legitimate holder of an IP right is entitled to the exclusive use thereof. The legitimate holder is also entitled to prevent all third parties from using his IP rights in the course of trade unless his consent is granted.

[1] CJEU case C-128/11, *UsedSoft GmbH v. Oracle International Corp* (not yet published) (hereafter the Oracle Case) examined in Sect. 18.6 of this Report; US Supreme Court n. 11-697 of 19 March 2013, *Kirtsaeng, dba Bluechristines99 v. John Wiley & Sons* and US Supreme Court n. 11-796 of 13 May 2013; *Bowman v. Monsanto Co* in 569 U.S. (2013), examined in Sect. 18.5.8.2 of this Report; and US District Court for the Southern District of New York, *Capitol Records LLC v. ReDigi Inc.* of March 30, 2013 in 934 F. SUPP. 2nd 640, further examined in Sect. 18.8.7 of this Report.

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But IP rights are based on the principle of territoriality. Each State grants its own IP titles that are effective within the territory of the State.

The use (or, if you wish, the abuse) of IP rights to prevent the import of "original" goods gave rise, in the course of time, to the "principle of exhaustion" of IP rights (referred to as first-sale doctrine in the United States).

Up to now, the principle of exhaustion has been applied, in each State, to material goods without particular problems. But the online industry has been booming over recent years. And the trade of immaterial goods (software, e-books, music, film, photo, tickets, services) has constantly increased. The Internet has no frontiers, and the digital platform is accessible everywhere.

This International Report was prepared on the basis of the National Reports that follow in the next chapters of this book.[2] I tried to avoid references to other materials, cases, or literature. I have avoided burdensome footnotes. Literature and cases may be found quoted directly in the National Reports. In some cases, data and references were transplanted directly and *verbatim*.

This Report aims at comparing and examining the reaction of national laws to the problem determined by the application of consolidated rules to the new phenomenon, in order to identify problems and suggest solutions.

18.3 Background

The question to what extent the principle of exhaustion applies to the online industry requires considering the underlying facts before examining the principle of exhaustion of IP rights in the online industry.

18.3.1 The Extraordinary Diffusion of the Internet

In recent years, the Internet—a global system of interconnected computer networks—had an extraordinary diffusion. Millions of people all over the world exchange ideas, opinions—and merchandise—through the Internet. In many countries access to the Internet has become a constitutional right.

[2] In chronological order, let me thank Francesca La Rocca (Italian Report); Paulo Parente Marques Mendes (Brazilian Report); Teodora Tsenova (Bulgarian Report); Adrien Alberini (Swiss Report); Jan Clinck and Benjamin Docquir (Belgian Report); Thomas Hoeren (German Report), Mary-Claude Mitchell, Jean-Louis Fourgoux, Rachel Nakache, and Tiphaine Delannoy (French Report); Max W. Mosing (Austrian Report); Zsófia Lendvai (Hungarian Report); Karin Pomaizlova (Czech Report); Bill Batchelor and Luca Montani (English Report); and Harumi KOJO (Japanese Report, not published).

18.3.2 The Internet as the Flywheel of E-Commerce

The Internet is not only an instrument for exchanging information, where freedom of speech, pluralism, culture, privacy are involved.

Cyberspace—based on the digital platform—is a new market, dominated by new and constantly evolving technologies. It has become the flywheel of e-commerce.[3]

18.3.3 Dematerialization and Entertainment Industries

In recent years, the convergence and the expansion of digital platforms have increased the dematerialization of goods. Many products are now present in the market in two forms: a traditional material form and a dematerialized form, based on bits and bytes. And there is an increasing demand of goods that are present in the market only in a dematerialized form.

In this evolving picture, the entertainment industry is becoming day by day more important and relevant from an economic standpoint.

18.3.4 Dematerialization of Distribution Channels

Dematerialized goods spread through dematerialized channels.

The expansion of digital platforms led to a competition between distribution channels for material and immaterial goods.

18.3.5 The Increasing Importance of IP

In the eighteenth century, wealth rested in land and agriculture.

In the nineteenth century, richness was based on the "brick and mortar" industry.

Nowadays, wealth is more and more based on IP. Industrial property rights are becoming more and more important—and legitimate holders of IP rights are more aggressive in defending their rights.

18.3.6 The Increasing Importance of Copyright

For more than 100 years, copyright—*droits d'auteur*, as we prefer to say in continental Europe—was associated with art and the protection of the artist—no matter whether they were writers, musicians, painters, or executer. The Berne

[3] Vincenzo Franceschelli, Digital platforms in a competition law context. A new function of competition law in the digital era, in Riv. dir. industriale, 2012, p. 289.

Convention (AD 1886[4] was devoted to the protection of "Literary and artistic works").

Then something happened ... when software was considered to be protected under copyright.

18.4 The Exhaustion Principle: From Parallel Import to Exhaustion

18.4.1 The Exhaustion Principle as We Know It

We could begin our quest by saying that the exhaustion of industrial property rights has a peculiarity: in its present structure, it owes its origins to the law of the European Community, and from EC Law, it has spread to the national laws of the Member States and has thus reached the juridical system of third countries.

But this is not all. The exhaustion principle opposes, and tempers, the traditional absolute nature of industrial property rights.

As we know, IP rights are based on four pillars—trademark, patent, copyright, and design—erected on the common stream of competition law.

According to classical principles, IP rights are absolute and have a territorial nature. Before the creation of a common market in Europe, an enterprise could use its national trademarks to oppose and stop the so-called parallel imports, by basing its legitimate claims on its national titles.

It is a practice—an abuse, from the standpoint of the political forces that worked for the creation of a common market—that the young community law wanted to oppose.

18.4.2 The Exhaustion in the Case Law of the Court of Justice

From these premises, the origin of the theory of IP exhaustion was elaborated by the Court of Justice in an array of decisions that, starting from the sixties, year after year, defined the principle.

The evolution of the case law is well known. The Grundig Consten case (1966),[5] the Parke Davis case (1968),[6] the Sirena case (1971),[7] and so on, in a "crescendo

[4] The Berne Convention for the Protection of Literary and Artistic Works was adopted on September 9, 1886, at Berne and entered into force on December 4, 1887. The Convention was completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, and amended on September 28, 1979.

[5] ECJ, joined cases C-56/64 and C-58/64, *Consten and Grundig v. Commission*, ECR 1966-299.

[6] ECJ, case C-24/67, *Parke, Davis & Company v. Probel and others*, ECR 1968-55 preliminary ruling on request of the Court of Appeal, The Hague, the Netherlands (1969).

[7] ECJ, case C-40/70, *Sirena Srl v. Eda Srl and others*, ECR, 1971-69.

rossiniano," up to the Deutsche Grammaphon case (1971),[8] which is considered, by many, as a leading case and a turning point.

And then new cases refined the concept of exhaustion as a legal institution.

18.4.3 Parallel Import

Our topic—of course—is not new. Before even discussing exhaustion theory, jurists and national courts long discussed if an agent with exclusive rights could, on the basis of its industrial property titles, stop the import of original products from a foreign country.[9] This is what usually happens—a foreign producer appoints an agent with the objective of expanding a national market and strengthening his position in that national market by granting an exclusive trademark license.

A resourceful and ingenious competitor buys original products abroad, usually at a lower price, and "forces his way," becoming a competitor of the licensee. The licensee tries to stop the import of the "original products" in what he considers to be his own exclusive market.

It is the issue of "parallel import in an exclusive zone" that, in years, has caused an impressive bibliography and a large number of cases.

18.4.4 The EU Theory of Exhaustion

The principle of exhaustion of IP rights as designed by EU Law, and as we know it, is as follows. The holder of an IP right loses its absolute right with the first sale in the EU territory. In other words, the first commercialization of a good in a territory of the European Union—or in the European Economic Area (hereafter "EEA")—made by the holder of an industrial property right, or by a legitimate licensee, has as a consequence that the goods may freely circulate in Europe, and the legitimate IP holder may not oppose the successive acts of reselling.[10]

Using the wording of the Centrafarm case: "It cannot be reconciled with the principles of free movement of goods under the provisions of the Treaty of Rome if a patentee exercises his rights under the legal provisions of one Member State to prevent marketing of a patented product in said State when the patented product has

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[8] ECJ, case C-78/70, *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co. KG*, ECR 1971-487. Reference for a preliminary ruling: Oberlandesgericht Hamburg—Germany, ECR–ECR 1971, p. 487. See Robert Plaisant, Une jurisprudence prétorienne. La Cour de Justice Européenne et la territorialité des droit de propriété intellectuelle, in Volume celebrativo del XXV anno della Rivista di Diritto Industriale, Milano, Giuffrè, 1977, p. 873.

[9] See Remo Franceschelli, Importazioni libere in zona di esclusiva, in Riv. dir. industriale, 1954, I, p. 97 and also in Studi riuniti di diritto industriale, Milano, Giuffrè, 1972, p. 719.

[10] The reluctance for clauses that limit the movement of goods after a sale is a general principle of law in Civil Law countries.

been brought into circulation in another Member State by the patentee or with his consent."[11]

Again, this is a good example of the function of the law as a system to solve conflicts: on the one side, the traditional principle of territoriality of IP rights and, on the other side, the aspiration to a common market in favor of international trade.[12]

The aim of the exhaustion theory is to strike a balance between the free movement of goods on the one hand and the proprietor's exercise of exclusive intellectual property rights to distribute his goods on the other hand. The holder of an IP right holds therefore the right to choose where, under which conditions, and at which price his goods are put on the market for the first time. No need to say that international exhaustion allows parallel imports.

The theory of exhaustion obviously improved in the course of time. In order to be applicable, various conditions have to be met. It requires the consent of the legitimate holder (consent that may be express or implied). And it also requires—if we may say—that the legitimate holder receives, with the first sale, a "reasonable" (or if you prefer, "appropriate") remuneration.

Depending on the jurisdiction concerned, one often distinguishes between national exhaustion and international exhaustion. In the European Union, the term "regional exhaustion" is frequently used. Regional exhaustion, in the EU Member States, means that IP rights are considered exhausted for the territory of the EEA when the product has been put on the market in any of the EEA Member States.

18.5 The Principle of Exhaustion in the EU Member States and Outside the European Union

18.5.1 The Principle of Exhaustion in the National Law of the EU Member States

The national reports confirm that the principle of exhaustion is present in the legal system of various EU Member States.

In Italy, the principle of exhaustion is expressly enshrined in trademarks, patents, and designs (Article 5 of the Italian Intellectual Property Code[13]); it is

[11] ECJ, case C-15/74, *Centrafarm B.V. and Adriaan de Peijper v. Sterling Drug Inc*., ECR 1974-1147. Reference for a preliminary ruling: Hoge Raad—Netherlands, in ECR, 1974, p. 1148 and in 6 IIC 102 (1975).

[12] The French Report, Sect. 24.1—Introduction—refers to the exhaustion of rights as a balance between free movement of goods (for which the Court of Justice of the European Union guarantees respect) and the monopoly of exploitation granted to the holder of an intellectual property right.

[13] For a comment on Article 5 of the Italian Intellectual Property Code, see Selvaggia Segantini, L'esaurimento, in Massimo Scuffi – Mario Franzosi, Diritto industriale italiano, Vol. I, Diritto sostanziale, Torino, CEDAM, 2014, p. 51.

present in the Copyright Act (Articles 16.2 and 17 of the Italian Copyright Act, respectively on the economic rights of communication to the public and distribution).[14]

In Bulgaria, the approach undertaken by the legislators regarding IP rights is that each type of IP right is regulated in a separate statutory act. Therefore, there is no single definition of exhaustion of IP rights and depending on the type of IP rights the rules of exhaustion may vary.[15] In Belgium, the principle of exhaustion is enshrined in Article 1, §1, par. 6 of the Belgian Copyright Act (which implements Article 4 (2) InfoSoc Directive).[16]

In Germany, the principle of exhaustion of IP Rights is either particularly stated or at least recognized as a leading principle; in this regard, sections 17(2) and 69c (3) second sentence of the Copyright Act, section 24 Trademark Act, section 48 Design Patent Act shall be mentioned. In contrast, the German Patent Law lacks an explicit legal basis for the principle of exhaustion; however, its existence is not questioned. The German Supreme Court (BGH) has repeatedly acknowledged the exhaustion principle as a precautionary principle for the entire IP law.[17]

In France, the rule of exhaustion of rights, enshrined in different Community Directives, and clarified through the case law of the Court of Justice, was integrated within its legislation, by providing a specific provision for each intellectual property right (copyrights and related rights, trademarks, drawings and designs, patents, databases, software), in the course of the transposition of related Directives.[18]

In Austria, section 16 Austrian Copyright Act provides that the author of a work has the exclusive right to the first distribution of (copies of) his work[19]; section 10b Austrian Trademark Act states that the trademark right shall not entitle the proprietor to prohibit a third party from using the trademark in relation to (the concrete) goods which have been put on the market within the EEA under that trademark by

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[14] See the Italian Report, Sect. 27.1. In Italian literature, see Adriano Vanzetti – Vincenzo Di Cataldo, Manuale di diritto industriale, 6 ed., Milano, Giuffrè, 2009, p. 290. on trademarks, see Giuseppe SENA, Il diritto dei marchi, 4 ed., Milano, Giuffrè, 2007, p. 142, and previously Paolo Auteri, Territorialità del diritto di marchio e circolazione di prodotti "originali," in Studi di diritto industriale, Vol. 13. Milano, Giuffrè, 1973.

On patent, see Giuseppe Sena, I diritti sulle invenzioni e sui modelli di utilità, 4 ed., Milano, Giuffrè, 2011, p. 314, and previously Piergaetano Marchetti, Sull'esaurimento del brevetto d'invenzione, in Studi di diritto industriale, Vol. 16. Milano, Giuffrè, 1974.

[15] See the Bulgarian Report, Sect. 22.1.1. All of the Bulgarian statutory acts on industrial property provide for exhaustion of the respective rights as a consequence of the first placement on the market of the goods in question. Relevant rules are contained in the legislation on trademarks—Article 15 of the Law on Marks and Geographical Indications; industrial designs—Article 21 of the Law on Industrial Designs; patent and utility models—Article 20a of the Law on Patents and Registration of Utility Models; as well as on the topographies of integrated circuits—Article 18 of the Law on the Topographies of Integrated Circuits.

[16] See the Belgian Report, Sect. 20.2.2.

[17] See the German Report, Sect. 25.1.

[18] See the French Report, Sect. 24.1.

[19] See Austrian Report, Sect. 19.1.1.

the proprietor or with his consent[20]; section 5a Austrian Design Act states that the rights granted by a registered Austrian design shall not extend to acts concerning a product when the product is put on the market within the EEA by the right holder or with his consent.[21] No express rule exists for patent. It remains therefore unclear if a "general principle of exhaustion of IP rights" exists in Austria that is going beyond the above-reported exhaustion.

In Hungary, the rule of exhaustion of rights is present in various statutes: section 23 (5) of the Act No. LXXVI of 1999 on Copyright (Copyright Act), section 16 (1) of Trademark Act, Article 20 of the Act XXXIII of 1995 on the protection of inventions by patents (Patent Act), section 18 of Act No. XLVIII of 2001 on the Legal Protection of Designs (Design Act).[22]

In the Czech Republic, the exhaustion of the author's distribution rights is outlined in Article 14 paragraph 2 of the Author's Act; for trademarks, section 11 of the Czech Trademark Act No. 441/2003 Coll. provides that the proprietor of a trademark is not entitled to prohibit its use in relation to goods, which have been put on the market in the Czech Republic, in a Member State of the European Communities or in another Member State of the EEA under that trademark by the proprietor or with his consent.[23] It must also be noted that the new Czech Civil Code effective as of 1 January 2014 (Act no. 89/2012 Coll.) expressly extends to tangible and intangible things in legal sense, i.e. not only the ownership of tangible works can be transferred, but also the ownership of works in their intangible form. Thus, the Civil Code does not exclude in principle that the author's rights on digital works are exhausted when the works are sold over the Internet. As a consequence, the end user is allowed to download them onto the end user's device. However, as long as Article 14 para 2 of the Author's Act expressly provides only for exhaustion of rights vested in works expressed in a tangible form, the exhaustion of rights in digital works remains only a theoretical matter.

In the United Kingdom—although the exhaustion principle of intellectual property rights was not historically part of the English legal tradition—the exhaustion principle is now incorporated into English law in accordance with the EU legislation and case law.[24]

In Spain—even if we don't have a Spanish national report, we cannot forget our Spanish friend—the principle of exhaustion appears to be well known and applied.[25]

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[20] See Austrian Report, Sect. 19.1.2.

[21] See Austrian Report, Sect. 19.1.3.

[22] See Hungarian Report, Sect. 26.1.

[23] See Czech Report, Sects. 23.1 and 23.2.

[24] See English Report, Sect. 29.1. See also Lionel Bently – Brad Shermann, Intellectual Property Law, 3 ed., Oxford University Press, 2009, p. 12.

[25] See M. Lobato García-Miján, El agotamiento de los derechos de propiedad intelectual e industrial, in Anuario De Derecho Civil, Tomo XLIV, 1991, p. 554; Carmen Otero García-Castrillón, Importaciones paralelas, reimportaciones y agotamiento internacional de los derechos de patente con especial referencia a las patentes farmacéuticas, in Revista Española de Derecho Mercantil,

18.5.2 The Principle of Exhaustion in the Case Law of the EU Member States

The national reports confirm that the principle of exhaustion as designed by the EU case law is widely applied by the national courts of the EU Member States.

Italian case law unanimously recognizes the community exhaustion of rights, denying international exhaustion.[26]

In Bulgaria, although there is a very limited practice in cases related to exhaustion, a relevant decision was taken by the Supreme Court of Cassation[27] that expressly examined the principle of exhaustion of trademark rights under Article 15 of the Law on Marks and Geographical Indications (LMGI). In its decision, the SCC ruled that the principle of exhaustion of rights applies and has relevance with respect to genuine goods only.[28]

In Germany, the German Supreme Court (BGH) has repeatedly acknowledged the exhaustion principle as a precautionary principle for the entire IP law.[29] In France, a large number of decisions were reported to deal with the exhaustion principle.[30] In Austria, the principle of exhaustion within the EEA was applied even before it was explicitly mentioned in the Austrian Trade Mark Act.[31] In Hungary, among others, one particular leading case may be mentioned.[32] In England, various cases referred to the EU Court must be mentioned.[33]

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(242), 2001, p. 2009; Clara Isabel Cordero Álvarez, El agotamiento de los derechos de propiedad intelectual de patente y marcas, en materia de salud pública, a la luz de la OMC y la UE, in Saberes, 2005, (separata), p. 1.

[26] See, for example, among others, Supreme Court (Corte di Cassazione) 18 November 1998, n. 11603, in Rivista di diritto industriale (Riv. dir. ind.) 2000, II, p. 33; Court of Milan, 23 November 1998, id.; Court of Firenze, 10 July 2007, Giurisprudenza annotata di diritto industriale (Giur. ann. dir. ind.), 2007, p. 313; Court of Turin, 4 April 2006 (ord.), in Giur. ann. dir. ind, 2006, p. 732; Court of Bologna 19 July 2005 in Giur. ann. dir. ind, 2005, 988 et seq.; Court of Rome 23 February 2005, in Giur. ann. dir. ind., 2006, p. 289.

[27] Bulgarian Supreme Court, interpretive Decision No. 1/2009; “interpretive decisions” are binding upon the lower instance courts, as well as the panels of the Supreme Court.

[28] See Bulgarian Report, Sect. 22.1.4.2.

[29] See German Report, Sect. 25.1.1. Reference to Supreme Court (BGH), 7 November 1980—I ZR 24/79 (Kabelfernsehen in Abschattungsgebieten) = Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 1981, 413 (416); 27 February 1981—I ZR 186/78 (Schallplattenimport I) = GRUR 1981, 587 (589); 6 March 1986—I ZR 208/83 (Schallplattenvermietung) = GRUR 1986, 736 (737).

[30] See French Report, Sects. 24.2 and 24.3.2.1. Reference to Commercial Chamber of the Court of Cassation, 9 April 2002, No. 99/15428, Cass. Com., 20 February 2007, No. 05/11088; Cass. Com., 26 February 2008, No. 05/19087; Cass. Com., 7 April 2009, No. 08/13378; CA Paris, 15 June 2011, No. 2009/12305.

[31] See Austrian Report, Sect. 19.1.2. Reference to Austrian Supreme Court October 15, 1996, 4 Ob 2252/96x.

[32] See Hungarian Report, Sect. 26.1. Reference to *Unilever vs. V-Contact* case, Metropolitan Appellate Court case Nr 8.Pf.20.989/212 and Kúria Nr Pfv.IV.20.166/2013/9.

[33] See English Report, Sect. 29.2.

18.5.3 A First Conclusion: The Principle of Exhaustion as a General Principle of EU Industrial Property Laws

In conclusion, it is reasonable to state that the principle of exhaustion is a general principle of EU community law (. . . for material goods . . .) and, with various nuances, a general principle of the national law of the European Member States.

At present, the general principle is applied to material goods, and with reference to trademark and patents. In some cases, and with some exceptions, it is extended to copyright.

18.5.4 The Community "Non-exhaustion" Principle

Born in the territory of the European Union, and created to favor and defend the creation of a common market, the principle of exhaustion—at the moment—is not applied if the first sale is made by the legitimate holder outside the territory of the Union. Indeed, no "extra-community exhaustion," or, if you prefer, no "international exhaustion," currently exists.[34]

18.5.5 The Exhaustion Principle in EU Law (Regulations, Directives, and Conventions)

Once the principle of exhaustion was "elaborated" (or, if you prefer, established), the EU Law incorporated it in regulations, directives, and conventions.

For example, Article 7 n. 1 of the First Trademark Directive[35] states that "the trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent."

Article 13 of the Community Trademark Regulation states that "a Community trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent."[36]

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[34] See Cesare Galli, L'esaurimento internazionale, in Il Diritto Industriale (Dir. ind.) 2008, p. 369; Barbara Guidetti, L'esaurimento internazionale del marchio nella giurisprudenza italiana e comunitaria, in Riv. dir. ind. 2000, I, p. 45.

[35] Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, OJ L 40, p. 1. Article 7—Exhaustion of the rights conferred by a trade mark; § 2 states: "Paragraph 1 shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialization of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market."

[36] Council Regulation 207/2009 of 26 February 2009 on the Community trade mark, OJ L 78, p. 1. Article 13: "Exhaustion of the rights conferred by a Community trade mark. § 2 states: Paragraph 1 shall not apply where there exist legitimate reasons for the proprietor to oppose further

The Information Society Directive refers to this principle in paragraphs 28 and 29.[37] The Directive is a little old in relation to the high speed of technology, but it is still there.

18.5.6 The Exhaustion Principle in International Conventions with the Purpose of Favoring International Trade

The principle of exhaustion is mentioned in the TRIPs Agreement of 1994[38] and the WIPO Copyright Treaty (WCT) of 1996.[39]

According to Article 6 of TRIPs, signatories are free to regulate the question of exhaustion.

Article 6(2) of the WCT states that "nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author."

As a matter of fact, for many scholars the free movement of goods is the main justification for the principle of exhaustion. The principle of exhaustion is seen as a balance between the protection of international trade and the protection of the rights if the IP right holder.

18.5.7 The Exhaustion Principle in Copyright Law

As we have seen, the principle of exhaustion is theoretically accepted in copyright law—with some limits—as it is in other intellectual property laws notwithstanding the fact that the exhaustion of copyrights is mentioned neither in the Berne Convention of 1886, as amended in 1979,[40] nor in the Rome Convention of 1961.[41]

For example, in Austria—except for the right of distribution—other rights of exploitation based on the Austrian Copyright Act do not exhaust, even if the work

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commercialization of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market."

[37] Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167, p. 10.

[38] The TRIPs Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

[39] WIPO Copyright Treaty (WCT) adopted in Geneva on December 20, 1996. The Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works.

[40] See note No. 2.

[41] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done at Rome on October 26, 1961.

has been put in circulation within the EEA. The Austrian Copyright Act explicitly states that the rental right is not subject to the exhaustion of rights.[42] In Switzerland, although the Copyright Act contains an explicit provision on exhaustion, the author of a computer program keeps the exclusive rental right (Copyright Act, Article 10 (3).[43] In Hungary, under the Copyright Act the right of distribution exhausts, but not the right of rental or lending.[44] In the Czech Republic, the Czech Author's Act expressly provides in Article 18 paragraph 4 that by communication of the work to the public the author's right shall not be exhausted.[45]

Generally, the principle of exhaustion is applied in copyright with reference to material goods.

18.5.8 The Exhaustion Principle in Extracommunity Countries

Also in non-EU countries, there is a "trend" towards an extension of the exhaustion principle of IP rights.

18.5.8.1 Statutes

In the Swiss Confederation, for example, the principle of exhaustion is well known, although it is treated differently according to the different intellectual property rights. The Copyright Act contains an explicit provision on exhaustion (Article 12.1).[46] The Patent Act provides for a specific provision regarding exhaustion; the principle is that of regional exhaustion (Patent Act, Article 9a.1).[47]

In Brazil, the Brazilian Industrial Property Law[48] currently establishes a principle of national exhaustion of all IP rights. Basically, the holder of an IP right incorporated into a product cannot impede its use if the product was introduced in the national market by the holder himself or by someone authorized by him.[49] Trademarks, patents, and industrial designs are explicitly subject to national exhaustion rights, as per Articles 132, III and 43, IV of the Brazilian Industrial Property Law, respectively.

In Japan, the principle of patent exhaustion has long been recognized in practice and in academic theory. The Copyright Law of Japan has a specific provision which

[42] See Austrian Report, Sect. 19.1.1.

[43] See Swiss Report, Sect. 28.1.

[44] See Hungarian Report, Sect. 26.1.

[45] See Czech Report, Sect. 23.1.

[46] Article 12(1) of the Swiss Copyright Act states: "[w]here the author has transferred the rights to a copy of a work or has consented to such a transfer, these rights may subsequently be further transferred or the copy otherwise distributed."

[47] See Swiss Report, Sect. 28.1.

[48] Brazilian Federal Law No. 9,279/96.

[49] See Brazilian Report, Sect. 21.1.

acknowledges exhaustion of distribution rights. Section 26-2, subsection 2, paragraph 1 provides to the effect that once a tangible copy (i.e., a tangible media in which a copyrighted work is fixed) of a copyrighted work has been placed in commerce by a copyright owner or its licensee, the distribution right may not thereafter be enforced with respect to such tangible copy.[50]

In the United States (where jurists are more pragmatic), a similar principle is known as the "first sale doctrine." Even though we do not have a "US Report," several national reports refer to the American experience.[51] We may therefore report that the scope of application of the European notion of "exhaustion" is not identical to the notion of "first sale" in the United States. It must be noted that, traditionally, the first-sale doctrine applies only to goods manufactured in the United States. But recent developments show openness for an "international exhaustion."

According to the American literature, the "first sale doctrine" goes back to late eighteenth century. A US Supreme Court decision of 1873[52] stated that "in the essential nature of things, when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use." This case involved an attempt by the holder of a patent on a funeral casket lid to impose territorial restrictions on a purchaser's resale of caskets incorporating that lid. The Supreme Court held that the patent holder's control over the invention was exhausted with the first sale.

18.5.8.2 Case Law

With reference to case law, in Brazil the Superior Court of Justice[53] clearly stated that once authorized by the holder of the trademark, the entry of the original product on the national market cannot constitute unlawful parallel imports.

In the Swiss Confederation, among various cases related to exhaustion, one case in particular addressed the issue of copyright exhaustion in the context of online

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[50] See Japanese Report (not published), Sect. 1. The Japanese Patent Law, as well as Design Patent Law and Trademark Law, does not have a provision explicitly referring to exhaustion.

[51] See, among others, the English Report, Sect. 29.1.

[52] U.S. Supreme Court decision, *Adams v. Burke U.S.*, 84 U.S. 17 Wall. 453 (1873). The Syllabus states that "where a patentee has assigned his right to manufacture, sell, and use within a limited district an instrument, machine, or other manufactured product, a purchaser of such instrument or machine, when rightfully bought within the prescribed limits, acquires by such purchase the right to use it anywhere, without reference to other assignments of territorial rights by the same patentee. The right to the use of such machines or instruments stands on a different ground from the right to make and sell them, and inheres in the nature of a contract of purchase, which carries no implied limitation of the right of use within a given locality."

[53] Brazilian Superior Court of Justice, Special Appeals No. REsp 1207952/AM and REsp 609047/SP. See Brasilian Report, Sect. 21.1.

distribution: on 4 May 2011, the Zug Cantonal Tribunal[54] handed down a judgment pertaining to the exhaustion of the distribution right when the copy of a computer program is sold online. The court held that the transfer of a computer program for an unlimited period of time in consideration for a one-time payment qualifies as a transfer within the meaning of the distribution right when the copyright owner loses its rights to the transferred copy and is not entitled to recover it; this applies both to computer programs transferred with the tangible medium and online. The court also stated that it considers the rights to be exhausted in a software copy in general if there is no contractual obligation to return the software copy and the transferor does not retain any power over the particular software copy.

In Japan, the principle of exhaustion has been defined by the judgment of the Supreme Court of Japan of 2007[55] as follows: "When a patent owner or an entity licensed by the patent owner places a patented product in domestic commerce, the patent covering the patented product exhausts as having achieved its purpose, and it is no longer possible to enforce the patent against the acts of using, selling, leasing or otherwise disposing the patented product."

In the United States, recent cases[56] have shown new insight about the principle of exhaustion of IP rights.

[54] Zug Cantonal Tribunal of 4 May 2011, *Gebrauchtsoftware* case. See Swiss Report, Sect. 28.2.1.

[55] Supreme Court of Japan, Judgment of 1 July 2007, Case No. (o) 1988, 2005, the so-called BBS case. See Japanese Report (not published), Sect. 1.

[56] US Supreme Court, Judgment of 19 March 2013, case no. 11-697, *Kirtsaeng v. John Wiley & Sons, Inc.* in 568 U.S. (2013) and in 127 Harv. L. Rev., p. 348. The Syllabus states that "the "exclusive rights" that a copyright owner has "to distribute copies . . . of [a] copyrighted work," 17 U. S. C. §106 (3), are qualified by the application of several limitations set out in §§107 through 122, including the "first sale" doctrine, which provides that "the owner of a particular copy or phonorecord lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."

US Supreme Court, Judgment of 13 May 2013, case no. 11-796, *Bowman v. Monsanto Co* in 569 U.S. (2013). The Syllabus stated that "Patent exhaustion does not permit a farmer to reproduce patented seeds through planting and harvesting without the patent holder's permission. Under the patent exhaustion doctrine, the initial authorized sale terminates all patent rights to the patented item and confers on the purchaser, or any subsequent owner, the right to use or sell the thing, but the doctrine restricts the patentee's rights only as to the "particular article" sold. It leaves untouched the patentee's ability to prevent a buyer from making new copies."

In US District Court Southerner District of New York, Judgment of 30 March 2013, case no. 12-0095, *Capitol Records LLC v. ReDigi Inc.* in 934 F. SUPP. 2D 640, the District Court stated that the transfer of digital data from one storage medium to another constituted a violation of copyright because the copy was ultimately an unauthorized reproduction and therefore outside of the protection of the first-sale doctrine. See details in Sect. 18.8.7.

18.6 The Oracle Case

18.6.1 The Facts

This was, in a nutshell, the situation when the Court of Justice of the European Union was called to decide the Oracle case.[57]

The case dealt with a computer program.

Oracle Corporation is a U.S. computer technology corporation founded in 1977, headquartered in Silicon Valley. In other words, Oracle "produces" software.

UsedSoft is a German undertaking which markets licenses acquired from customers of Oracle. UsedSoft (*nomen [est] omen*), in other words, commercializes and sells "second hand" software,

As we may read in the Court decision, Oracle develops and distributes, in particular by downloading from the Internet, computer programs functioning as "client–server software." The customer downloads a copy of the program directly onto his computer from Oracle's website. The user's right for such a program, which is granted by a license agreement, includes the right to store a copy of the program permanently on a server and to allow up to 25 users to access it by downloading it to the main memory of their workstation computers. The license agreement gives the customer a nontransferable user right for an unlimited period, exclusively for his internal business purposes. On the basis of a maintenance agreement, updated versions of the software (updates) and programs for correcting faults (patches) can also be downloaded from Oracle's website.

Oracle brought proceedings against UsedSoft before the German courts, seeking an order for it to cease those practices. The German Supreme Court (Bundesgerichtshof) made a reference to the Court of Justice for it to interpret, in this context, the Directive on the legal protection of computer programs.

18.6.2 The European Court Decision

With the Oracle decision, the Court of Justice of the European Union stated that the principle of exhaustion of the distribution right applies not only where the copyright holder markets copies of his software on a material medium (CD-ROM or DVD) but also when he distributes them by means of downloads from his website.

The Court stated that "an author of software cannot oppose the resale of his 'used' licences allowing the use of his programs downloaded from the Internet. The exclusive right of distribution of a copy of a computer program covered by such a licence is exhausted on its first sale."

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[57] CJEU, case C-128/11, Judgment of 3 July 2012, *UsedSoft GmbH v. Oracle International Corp.* (not yet published), reference for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), concerning the interpretation of Articles 4(2) and 5(1) of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ 2009 L 111, p. 16, in Official Journal 2012/*C* 287/16.

The Court leaves no room for doubt on this point. It found "abundantly clear the intention of the European Union legislature to assimilate, for the purposes of the protection laid down by [the Software Directive], tangible and intangible copies of computer programs."[58] In contrast with what one might think, according to the Court, such interpretation is not in contradiction with the InfoSoc Directive, as the Software Directive is a *lex specialis*.[59]

Nevertheless, the decision of the Court offers no argument to sustain that also services can "exhaust." The right of distribution still does not relate to contracts for services.[60]

According to the Court, exhaustion thus only applies when a *sale* (or transfer of ownership) takes place. Without a sale, there is no exhaustion of the distribution right. Because a common definition of the notion of "sale" was lacking, the Court felt free to give a uniform and independent interpretation of this notion. According to the Court, "a sale is an agreement by which a person, in return for payment, transfers to another person his rights of ownership in an item of tangible or intangible property belonging to him."

A "sale" is thus an autonomous notion under the law of the European Union, which may include the distribution of a copy by download if (a) the right holder receives a payment in compensation for the granting of an unlimited usage right and (b) a transfer of ownership takes place. According to the Court, granting a license for an unlimited period of time equals such a transfer of ownership. Whether the transfer takes place by means of a tangible or intangible medium is of no importance for the qualification and does not bear on the fact that there is a "transfer of ownership." Nor does it make a difference how such "transfer" was qualified by the parties (as a "sales agreement" or a "license agreement"): the fact that "the downloading of a copy of a computer program and the conclusion of a user licence agreement for that copy form an indivisible whole (. . .) makes it no difference whether the copy of the computer program was made available to the customer by the right holder concerned by means of a download from the rightholder's website or by means of a material medium such as a CD-ROM or DVD. (. . .) Since an acquirer who downloads a copy of the program concerned by means of a material medium such as a CD-ROM or DVD and concludes a licence agreement for that copy receives the right to use the copy for an unlimited period in return for payment of a fee, it must be considered that those two operations likewise involve, in the case of the making available of a copy of the computer program concerned by means of a material medium such as a CD-ROM or DVD, the transfer of the right of ownership of that copy."

[58] *Oracle case*, pt. 58.

[59] *Oracle case*, pt. 56. This was later confirmed by CJEU, Judgment of 23 January 2014, case C-355/12, *Nintendo Co. Ltd, Nintendo of America Inc., Nintendo of Europe GmbH v. PC Box Srl and 9Net Srl*, (not yet published). See Sect. 18.7.6.

[60] *Oracle case*, pt. 66.

18.6.3 The Effects of the Oracle Decision. The Restrictive Construction

To say that the Oracle case raised some interest in the IP community and among the industrial property scholars is to underestimate the relevance and the effects of the decision.

The case disrupted traditional concepts, advanced the boundary of the exhaustion theory as known, and, of course, opened the door to a number of new and crucial problems.

What is new, in the Oracle case, is not that the exhaustion principle is applied to copyrighted work—this was known and accepted from a theoretical standpoint. What is new is that the principle of exhaustion is applied and applicable to an immaterial copyrighted work—a software program—where the "first sale" was made on the Internet.

A first approach—shared by many—is to limit the effects of the decision, observing that the Oracle case deals with software programs. In deciding the case, the European Court explicitly decided that this interpretation is not in contradiction with the InfoSoc Directive, as the Software Directive is a *lex specialis*.[61]

In other words, the principle of exhaustion, born with reference to trademarks and patents, does not apply to intellectual property in general. It applies to software programs, and that is the end of it.

This may be true but is not satisfactory. The case deserves some more reasoning and comments.

18.7 Beyond the Oracle Case

18.7.1 The Particular Nature of the "Exhausted" Good and the Increasing Importance of Electronic Commerce

What is really new—the novelty, in other words—is the nature of the "exhausted" good. It is useful to consider that the exhaustion theory originated and was developed with reference to material goods. In relation to an industrial system, that in traditional English is defined as "brick and mortar."[62]

The first critical point is therefore connected with the raising and the expansion—in the modern and contemporary world—of an "immaterial industry" that sells "immaterial goods" (software, games, e-books, music online, information,

[61] *Oracle case*, pt. 56.

This was later confirmed by CJEU, Judgment of 23 January 2014, case C-355/12, *Nintendo Co. Ltd, Nintendo of America Inc., Nintendo of Europe GmbH v. PC Box Srl and 9Net Srl*, Reference for a preliminary ruling: Tribunale di Milano—Italy, in ECR, 2014-..pt. 23. See Sect. 18.7.6.

[62] It appears that the expression "brick and mortar" goes back to Charles Dickens. It was first used in the book Little Dorrit (chapter 3).

movies, e-learning, e-tickets for planes, trains, and so on), an industry of immaterial goods that utilizes the digital platform as a distribution channel.

In other words, side by side with the traditional distribution channel, a new model is expanding, based on digital technology.

E-commerce data are impressive. The Europe B2C Ecommerce Report 2013[63] reports that, in 2013, 250 million Europeans are e-shopper. Ecommerce Europe estimates the share of the European Internet economy at 3.5 %.

But it is not only a question related to the Internet connection and wide band. The goods themselves are dematerializing. Hence, it is not only software but also books—e-books—music, film, photo, tickets, services.

18.7.2 Exhaustion and *Corpus Mysticum*

In the material world, the exhaustion principle succeeded in adapting itself to the traditional principle of industrial property.

Let's consider the classical example of a printed volume. The author—and the editor—has absolute rights on the novel. The book is sold. The *corpus mechanicum* changes hand and owner. But the author—and the editor—does not lose the right to the *corpus mysticum*, that immaterial tie that links the author to his work. The author retains, according to general principles, the printing monopoly and has the right to prevent any third party from printing or reproducing.

The *corpus mechanicum*, on the contrary, has an independent life. He who bought the book may, when he has finished reading it, resell it. And he who bought it "second hand" is the new legitimate owner and may do whatever he wants (but may not reprint it).

In a market analysis, we would say that this practice creates a "second market."

But what happens if the good is "immaterial"?

The author—and the editor—instead of publishing the novel on paper, tailoring a nice hardcover volume, publishes it as an e-book and sells it online.

The buyer downloads it on his tablet and reads it. When he has finished reading it, may the buyer sell it? And, in the same way, may the author—or the editor—prohibit the second sale or prevent that the second sale be consumed?

An intriguing question, we may say.

The Court of Justice, in the Oracle case, had to approach and answer this complicated question in relation to a software program and had to face the problem taking into consideration the reality of the new distributions channels, as well as the particular perspective of the consumer.

The reasoning of the Court is logical and, in a way, elegant. The legitimate buyer would stand in a different juridical position according to the type of sale: if he buys the software on a CD—as we have always done in the past—or if he downloads it directly. In the first case, applying the principle of exhaustion, he could sell the

[63] Data in https://www.ecommerce-europe.eu/facts-figures/free-light-reports.

CD. In the second case, he could not.[64] An unbearable discrimination. An unbearable contradiction within the politics of the "Digital Single Market."[65]

The Court furthermore considers, in particular, that "limiting the application of the principle of the exhaustion of the distribution right solely to copies of computer programs that are sold on a material medium would allow the copyright holder to control the resale of copies downloaded from the Internet and to demand further remuneration on the occasion of each new sale, even though the first sale of the copy had already enabled the rightholder to obtain appropriate remuneration. Such a restriction of the resale of copies of computer programs downloaded from the Internet would go beyond what is necessary to safeguard the specific subject-matter of the intellectual property concerned."

18.7.3 Exhaustion: Material Goods and "Dematerialized" Goods

The new principle—which is correct, in my opinion—nevertheless creates a second, and no less intriguing, problem because a "little" difference exists between the sale of a computer program on a tangible CD and the same sale through the Internet. And this "little difference" is caused by technological innovation that allows the perfect reproduction of the digital good, so that you may no longer distinguish the "original" from the "copy."

Let's go back to our previous example: the hardcover book. If I sell the bound book, I do not have the book anymore (lapalissian truth). If I sell the e-book (a harmonic ensemble of bits and bytes), a copy (or an original?) may remain on my tablet.

The same happens—says the Court of Justice—if I sell a computer program: the software may remain on my hard disk.

In the Oracle case, the Court found an impeccable solution from a juridical standpoint. The "copy" on the hard disk must be deleted at the very moment it is sold.

In fact the Court states that "an original acquirer of a tangible or intangible copy of a computer program for which the copyright holder's right of distribution is exhausted must make the copy downloaded onto his own computer unusable at the

[64] The example is quoted in the German Report, Sect. 25.3.3: Helmut Redeker, Das Konzept der digitalen Erschöpfung – Urheberrecht für die digitale Welt, in CR 2014, 73 (76) made up this very plausible example: "he questioned why the owner of a regular book that he bought online should be able to sell it afterwards and why on the opposite the owner of an eBook with the same content should not have the right resell the eBook."

[65] Creating a connected digital single market is one of the ten priorities of the European Digital Agenda, one of the seven pillars of the Europe 2020, presented by the European Commission: Communication from the Commission of 19 May 2010 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; see http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52010DC0245&from=EN.

time of resale. If he continued to use it, he would infringe the copyright holder's exclusive right of reproduction of his computer program."

And it adds: "In contrast to the exclusive right of distribution, the exclusive right of reproduction is not exhausted by the first sale." In other words: if you keep a copy (or the "original," if you prefer) onto your computer, you violate the right to the *corpus mysticum*.

18.7.4 Beyond the Oracle. To Delete the "Original"

That was for the "revolution" generated by the Oracle case.

But what are the future developments?

The first problem on which we may speculate is the order to "delete the original." The Court observes—and I share the point—that in the digital world it makes no sense to distinguish between copies and original. All "copies" are original. The order to "delete the original" is therefore legally correct. But if it is correct from an abstract legal standpoint; it creates nevertheless practical problems. An obligation corresponds to a right. And a right requires a legal instrument to control whether the obligation is fulfilled. How can the legitimate holder of the IP right verify compliance with the obligation to delete?

Theoretically, there are two possible solutions. The first is to grant access to the hard disk of the seller (but this possibility collides with the right of privacy). The second—which sounds like science fiction—consists in developing self-deleting mechanism that will activate itself the very moment the software is moved from one hard disk to cyberspace (but what if it is the legitimate buyer that moves the program from one computer to another?).

There is no point in taking a position on this issue. But the problem is there.

18.7.5 After Oracle. A French Case

A recent decision of the French Court of Cassation seems to expand the position of the Court of Justice in the Oracle case to the musical files distributed online.[66]

In this case,[67] the company Apple was proposing phonograms accessible online by downloading via its iTunes website. The Spedidam (a French collecting society) claimed that Apple had not asked the prior authorization of the artists in order to

[66] See French Report, Sect. 24.3.2.2: "More precisely, this solution infringes the fundamental principle of the copyright, the principle of specialty of the cession, laid down in article L. 131-3 of the Intellectual Property Code (L. 212-3 of the Intellectual Property Code for the related rights), according to which the rights holder must give its authorization for each exploitation of its work."

[67] Court of Cassation, Judgment of 11 September 2013, case no. 12/17794, in Bulletin 2013, I, no. 173. Full text in http://legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000027949106&fastReqId=1898703712&fastPos=1. See the French Report, Sect. 24.3.2.2. The Oracle case is dated 3 July 2012.

exploit their performance by downloading since they had authorized only the publication of their performance *under phonogram form published in order to be sold*. The first Civil Chamber, confirming the Court of Appeal decision,[68] considered that the qualification of phonogram was independent from the existence of a material support and because of this, the authorization given by the artists involved the making available by downloading.

18.7.6 After Oracle. Nintendo

In 2014, the Court of Justice of the European Union had to deal with another case that could interest our quest: the Nintendo v. PC Box case.[69] The case deals with the concept of "technological measures." The subject matter is videogames (and consoles).[70]

The Court of Justice of the European Union responded to a request from the Milan Court of First Instance (Tribunale di Milano) for a preliminary ruling on two questions regarding the scope of technological protection measures as articulated in Article 6 of Directive 2001/29/EC of the European Parliament (the "Copyright Directive").[71]

The European Court fixed a few interesting principles.

First, it gave a definition of a videogame as a subject matter protected by copyright: *verbatim*, "a videogame is 'a complex matter which does not only contain a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption.'

Second, it fixed a balance with reference to technological protection measures stating that: the Copyright Directive "must be interpreted as meaning that the concept of an 'effective technological measure', for the purposes of Article 6 (3) of that directive, is capable of covering technological measures comprising, principally, equipping not only the housing system containing the protected work, such as the videogame, with a recognition device in order to protect it against acts not authorized by the holder of any copyright, but also portable equipment or consoles intended to ensure access to those games and their use."[72]

[68] Paris Court of Appeal, Judgment of 7 March 2012.

[69] CJEU, case C-355/12, *Nintendo Co. Ltd, Nintendo of America Inc., Nintendo of Europe GmbH v. PC Box Srl and 9Net Srl*, (not yet published) Reference for a preliminary ruling: Tribunale di Milano—Italy, in ECR, 2014- pt. 23, in ICC, 2014, p. 591, and in Foro Italiano, 2014, IV, p. 200. The Nintendo case is examined in the German Report, Sect. 25.3.3; in the Belgian Report, Sect. 20.4.3.1; and in the English Report, n. 3.4.

[70] See the Belgian Report, Sect. 20.4.3.1.

[71] Nintendo is a Japanese multinational which produces video games.

[72] And continued: "It is for the national court to determine whether other measures or measures which are not installed in consoles could cause less interference with the activities of third parties or limitations to those activities, while still providing comparable protection of the rightholder's

Third, the Court made a distinction between computer programs and other works.[73]

18.7.7 Towards a Conclusion. Software Is a Subject Matter Protected by Copyright . . . or Not?

The Oracle case opens new perspectives and topics that go beyond the decision as such. Even if we accept the "restrictive" interpretation of the decision, and we limit its effects to computer programs, it is legitimate to speculate on future developments.

Even if regulated in Europe by a *lex specialis* (the software Directive), software is a subject matter protected by copyright. A choice that many of us did not—in due time—share, but that is now an unquestionable legal reality. If this is so, we may speculate in general terms and approach the topic of the exhaustion of copyright subject matter in the digital world. And consider the principle expressed in the Oracle case—the principle of exhaustion of an IP right with the first sale—as a general principle, applicable to industrial property rights and to intellectual property rights.

And therefore assume that the first sale of an intellectual work in the digital platform made by the legitimate holder of the intellectual property right—versus a "reasonable" remuneration"—determines that the digital good may freely circulate in Europe, without the right holder opposing the subsequent acts of resale.

A general principle that—according the various opinions—may be considered already present in community law—and this is also my personal opinion—or that should be left to the "wisdom" of the (national or community) legislator (as some time is done, when you do not know what to do).

rights. Accordingly, it is relevant to take account, inter alia, of the relative costs of different types of technological measures, of technological and practical aspects of their implementation, and of a comparison of the effectiveness of those different types of technological measures as regards the protection of the rightholder's rights, that effectiveness however not having to be absolute. That court must also examine the purpose of devices, products or components, which are capable of circumventing those technological measures. In that regard, the evidence of use which third parties actually make of them will, in the light of the circumstances at issue, be particularly relevant. The national court may, in particular, examine how often those devices, products or components are in fact used in disregard of copyright and how often they are used for purposes which do not infringe copyright."

[73] Verbatim: computer programs are protected "as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. For the purposes of this Directive, the term "computer programs" shall include their preparatory design material."

18.8 Law in the Cyberspace and the Exhaustion Principle

18.8.1 Going to the Merits. Doing Business in the Cyberspace

But what has caused this earthquake in the tranquil land of industrial property? The Internet. The Internet has become the new means of communication. Convergence leads this process, impacting regulations, in particular privacy law, copyright law, and providers' liability.[74]

But the Internet is at the base, the foundation of the digital platform, that is formed by the connection and the integration of previously separated platforms.

The "market"—in economic sense—is now formed by the sum of what previously were separated platforms.

According to Eurostat, the official statistics board of the European Union,[75] nearly 60 % of EU Internet users shop online. European e-commerce is booming. It has reached € 312 billion in 2012, with 19 % growth.

Eurostat reports that in 2012, 75 % of the respondents between 16 and 74 in the EU28 stated that they had used Internet in the past 12 months of which 60 % indicated that they had shopped online in the same period. Among the Member States, the most enthusiastic online shoppers were the British (82 % of the Internet users had shopped online), followed by the Danes and Swedes (both 79 %), the Germans (77 %), the Luxembourgians (73 %), and the Fins (72 %). The lowest rate of online shoppers were the Romanians (11 %), Bulgarians (17 %), and the Estonians and Italians (29 %).

The main common goods shopped online in Europe are clothes and sports goods (32 % in 2012 compared to 21 % in 2008). This was followed by books, magazines, or e-learning materials (23 % in 2012 compared to 19 % in 2008). Groceries represented a smaller share (9 % in 2012 compared to 6 % in 2008).

18.8.2 "Traditional Industry"/"Online Industry"

Notwithstanding the fact that e-commerce is booming everywhere, national legislation rarely regulates online industry in a different way than traditional industry.

With reference to our problem, we may classify industry in three classes or types:

industry that operates only in traditional way, without any links with the cyberspace (the present equivalent of the classical "brick and mortar" industry of the past), and

new industry that operates only on the digital platform.

[74] See, in an Italian prospective, Vincenzo Franceschelli, Convergenza. La "convergenza" nelle telecomunicazioni e il diritto d'autore nella società dell'informazione, Milano, Giuffrè, 2009.

[75] Data in http://www.ecommerce-europe.eu/news/2013/10/eurostat-releases-figures-on-online-shopping-in-europe.

But the majority of the industry is bivalent: it operates with the traditional distribution channels, but is also present on the Internet, and sells either through traditional distribution channels or through the Internet.

From the standpoint of the goods and services sold or furnished, we may—again—classify goods and services in three types:

goods that are traditionally produced and sold in a tangible form, and

goods that are produced and commercialized only in a digital form.

But an increasing number of goods are bivalent. And it may be produced and distributed in a material and in a digital form: books/ebooks, music on CD and in digit, and—we could continue—movies, plane tickets, photograph, etc.

18.8.3 The Increasing Relevance of Online Industry: Some Data

The increasing relevance of online industry is a "constant" in the national reports.

In France, nearly 34 million online users purchased on the Internet in 2013, and e-commerce in France generated revenues amounting to more than € 45 billion.[76] Concerning m-commerce, 4.6 million French consumers purchased through their mobile or their digital tablet in 2012, thus developing mobile payment (or "m-payment"), considered, by law, as a new instrument of payment. With reference to software, the sale of numeric files has widely exceeded the sale of physical support in the last few years.[77]

In Austria, eight out of ten Austrian households in 2013 were equipped with Internet access (81 %); in 80 % of all households, broadband connections were used, 59 % used fixed broadband connections via a line (e.g. cable, fiber), 48 % were mobile broadband over cellular network. In January 2013, 98 % of Austrian companies had 10 or more employees with access to the Internet; 86 % of all companies were present with a website on the Internet, although this depends on the company size as before. While almost all large enterprises (250 or more employees) have a web presence (98 %), medium-sized companies (50–249 employees) are 94 % and small enterprises (10–49 employees) are 84 %. In Austria in 2011, according to OECD definition, 14,449 companies with 92,474 employees and annual revenue of EUR 25.7 billion were in the "online industry." Despite the economic downturn of the past few years, all these figures have increased since 2009.[78]

In the Swiss Confederation, according to the Swiss Federal Statistical Office, the amount spent by Swiss consumers in relation to e-commerce in 2011 reached almost 5 billion Swiss francs; this shows a substantial increase over the past

[76] See the French Report, Sect. 24.4.

[77] See the French Report, Sect. 24.4.2.1.

[78] See the Austrian Report, Sect. 19.3.1.

years, and this trend is expected to continue in the future. With respect to software, purchases have been largely replaced by downloads from the Internet.[79]

In Italy AGCom, the Authority in charge of Supervising Communications, evaluates in 250 billion euros the yearly turnover connected with e-commerce.[80]

18.8.4 The Regulation of E-Commerce

The "mother of all regulation" of e-commerce is the 15-year-old Electronic Commerce Directive.[81] Obviously, in the Member States of the European Union, the Directive has influenced the definition of e-commerce itself.

In Italy, for example, the E-Commerce Directive has been implemented by the Legislative Decree 9 April 2003, n. 70.[82] In Belgium, the E-Commerce Directive was implemented with the Act of 11 March 2003 concerning certain procedural aspects of information society.[83] In France, the definition of e-commerce results from a transposition of the E-commerce Directive.[84] In Austria**,** the E-Commerce Directive was implemented with the E-Commerce Act. The Act applies to services that are rendered via electronic processing and storage systems. Furthermore, there are special provisions on distance selling contracts which are contained in Austrian Consumer Protection Acts.[85] In Hungary, the E-Commerce Directive has been implemented by the E-Commerce Act, which introduced specific provisions related

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[79] See the Swiss Report, Introduction and footnote 2, that refers to http://www.bfs.admin.ch/bfs/portal/fr/index/themen/16/04/key/approche_globale.indicator.30108.301.html?open=1#1.

[80] AGCom 2013 annual Report, p. 35, in http://www.agcom.it/relazioni-annuali.

[81] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) OJ 2000, L 178, p. 1. See AA. VV., *Commercio elettronico*, V. Franceschelli editor, Milano, Giuffrè, 2001.

[82] Furthermore, Directives 98/34CE and 98/48/EC were implemented with Law No. 317 of 21 June 1986, on the procedure of information in the field of technical standards and the regulations and rules on information society services, as amended by Legislative Decree, 23 November 2000, no. 427. See Italian Report Sect. 27.2. In Italian literature, see AA. VV., La tutela dei consumatori in Internet e nel commercio elettronico. Contratti—Responsabilità—Rimedi, Milano, Giuffrè, 2012.

[83] See the Belgian Report, Sect. 20.5, footnote 92.

[84] See the French Report, Sect. 24.4.1. E-commerce is defined in France as the economic activity by which an individual offers or provides goods and services at a distance, by means of electronic equipment. Some online activities, exercised for free, are also comprised within the e-commerce activity. This broad definition, which hinges on three criteria (activity, technology, and finality), can encompass future expansions of e-commerce. It allows the integration of new types of e-commerce as technology evolves: see the French Report, Sect. 24.4.1.2.

[85] See Austrian Report, Sect. 19.3.2. One specificity of the Austrian E-Commerce Act is a strong focus on the "Country-of-Origin Principle": it provides that in general the regulations apply where the service provider has its principal place of business. Consequently, a provider with a registered office in Austria must comply with the Austrian Trade Act and related regulations governing supply and distribution of goods and services. Once the Austrian requirements are met, however,

to the liability of the intermediary service providers, including the notice and takedown procedure applicable for content infringing IP rights.[86]

In other States, the definition is more complex. In Bulgaria, for example, legislation does not provide a specific definition for “on-line industry.” General rules related to e-commerce are contained in the Law on E-Commerce (LEC), which implements the Directive.[87] In Germany, the German legal system does not explicitly refer to the term e-commerce. However, the German legislature did respond to the issues that arose in the context of e-commerce. In particular, section 312e BGB (in the old version) was introduced, which was then retained by section 312g BGB (in the new version). These sections ensure the implementation of Articles 10 and 11 of Directive 2000/31/EC into German law. Therefore, section 312g BGB applies when an entrepreneur uses tele- and media services in order to conclude a contract for the supply of goods or services. This section has the purpose of defining the indispensable minimum in terms of a fair contract handling. Rather than defining the term e-commerce in accordance with the definition in Directive 2000/31/EC as information society services, the German legislator introduced the term “tele- and media services” at first; meanwhile, this term was replaced by the term “telemedia.”[88]

Brazilian law does not have a formal definition of e-commerce, nor does it make any legal attempts to define it. In case law, an explicit definition has not been provided, yet e-commerce is generally regarded as any transfer of property or rendering of services using the Internet as a medium. The online industry is not defined by law, nor is it regulated differently than traditional industry.[89]

Japanese law does not have a definite or accepted definition of online industry. Japan has an “E-Commerce Law”: its main focus is on the contractual aspects of the transactions made via the Internet, such as formation of contract, effect, etc., and it is not particularly relevant to IP rights. There are also several other laws which

the provider may—in general—also conduct its activities in other EU Member States without additional requirements.

[86] See Hungarian Report, Sect. 26.2. Furthermore, the “country of origin” principle implemented by the Hungarian E-Commerce Act may also be regarded as a peculiarity of the regulation of e-commerce with regard to traditional industry. This is because the principle sets out that the provisions of the E-Commerce Act falling within the scope of the coordinated fields do not apply to those service providers providing services directed towards the territory of Hungary who are established in another EEA Member State.

[87] See the Bulgarian Report, Sect. 22.2. The law defines “e-commerce” as provision of a service of the information society, where “information society service” is defined as a service, normally provided for remuneration, at a distance, by electronic means and at the individual request of the service recipient. In its broad definition, the concept of e-commerce comprises m-commerce and all other activities related to supply of goods or services through a digital platform or distance means of communication.

[88] See the German Report, Sect. 25.2.

[89] See the Brazilian Report Sect. 21.2.

regulate Internet commerce from the consumer's protection perspective, but they too give little relevance to IP rights.[90]

18.8.5 A Sale in the Cyberspace

In applying the exhaustion principle, it is clear that the determination of the place where the "first sale" occurs is of paramount relevance.

But where is the place of a sale in the cyberspace?

One Report suggested that the distinction between "active sale" and "passive sale," given by the so-called Block Exemption Regulation,[91] could be useful.[92] The Guidelines on Regulation No. 330/2010 distinguishes the "active" sales from the "passive" sale. The "active" sale is defined as "actively approaching individual customers by for instance direct mail, including the sending of unsolicited e-mails, or visits; or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the Internet or other promotions specifically targeted at that customer group or targeted at customers in that territory." Conversely, "passive" sales means "responding to unsolicited requests from individual customers including delivery of goods or services to such customers."[93]

18.8.6 The Developing of a "Secondary Market" for Digital Goods

The increasing trade on the digital platform has created a new phenomenon: a consistent "secondary market" for digital goods.

In France, for example, a commission was appointed to study the new issues that the development of a secondary market of the digital cultural goods could represent.[94]

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[90] See the Japanese Report (not published), Sect. 2.

[91] 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 L 102, p. 1.

[92] See the Italian Report, Sect. 27.5.1.

[93] Paragraph 51 of the Communication from the Commission—Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, OJ 2014, C 89, p. 3.

[94] In July 2013, the French Ministry of Culture and Communication charged the Artistic and Literary Property High Council, to put in place the Commission on the used digital market. This Commission has the mission to debate the question of the lawfulness of the "used digital cultural goods market" and of its economic impact on the primary market in order to ensure a fair compensation for the creators as much as an adequate level of financing of the creation. See the French Report Sect. 24.3.2.3.

Several scholars believe that the extension of the exhaustion principle to copyright is critical for the development of a "secondary market" for digital goods.

On the other hand, it is clear that a secondary market for digital goods competes directly with the primary market. As we have seen, there are no differences in cyberspace between the original and a "copy."

18.8.7 No "Secondary Market" for Digital Goods in the US According to the District Court for the Southern District of New York. And No "First Sale Doctrine" in Online Sale

The ReDigi case covers a dispute between Capitol Records, a major record label, and ReDigi, a company operating a website offering lawfully acquired digital music files at discounted prices.[95]

The Court decided that the "first sale doctrine" does not apply to online sale.[96]

It ruled that the transfer of digital data from one storage medium to another constituted a violation of copyright because the copy was ultimately an unauthorized reproduction and thus outside of the protection of the first-sale doctrine.

Hence, ReDigi was not authorized to allow listeners to use its platform to buy and sell "used" digital music tracks originally bought from Apple Inc's iTunes website. The decision was interpreted as a "blow" to online marketplaces for used digital goods.

Verbatim, the Court ruled that "[W]hen a user downloads a digital music file or digital sequence" to his "hard disk," the file is "reproduce[d]" on a new phonorecord within the meaning of the Copyright Act. Id.

This understanding is, of course, confirmed by the laws of physics. It is simply impossible that the same "material object" can be transferred over the Internet. Because the reproduction right is necessarily implicated when a copyrighted work is embodied in a new material object, and because digital music files must be embodied in a new material object following their transfer over the Internet, the Court determines that the embodiment of a digital music file on a new hard disk is a reproduction within the meaning of the Copyright Act [. . .].

Simply put, it is the creation of a new material object and not an additional material object that defines the reproduction right. The dictionary defines "reproduction" to mean, inter alia, "to produce again" or "to cause to exist again or anew." See Merriam-Webster Collegiate Edition 994 (10th ed. 1998) (emphasis added). Significantly, it is not defined as "to produce again while the original exists." Thus, the right "to reproduce the copyrighted work in . . . phonorecords" is implicated

[95] US District Court Southerner District of New York, Judgment of 30 March 2013, case no. 12-0095, *Capitol Records LLC v. ReDigi Inc.* in 934 F. SUPP. 2nd 640.

[96] It must be noted that in US law, a decision of a district court is not binding.

whenever a sound recording is fixed in a new material object, regardless of whether the sound recording remains fixed in the original material object."[97]

18.8.8 Future Developments in Exhaustion: Cloud Computing, Streaming, and Other "Modernities"

In cyberspace, facts and problems run faster than the law that tries to solve and regulate them. Streaming and cloud computing are good examples.

Streaming is the oldest of these "modernities." Streaming is a technique for transferring data so that it can be processed as a steady and continuous stream. If you watch a movie "in streaming," you do not download the entire movie. You watch the movie while it is performed. But where is the "first sale"? Does the showing of a copyrighted word—a movie, a song, an opera, a concert—in streaming "exhaust" the intellectual property right?

Cloud computing is even more complicated.

In information technology, cloud computing has been defined as the delivery of computing as a service rather than a product, whereby shared resources, software, and information are provided to computers and other devices as a utility over a network (typically the Internet).

In a nutshell, when you work on a cloud, your file is not on the hard disk of your computer; your file is elsewhere, in the memory of a distant server, in a foreign country, that may even change as you work.

Some "games providers" already use this system: you do not download the master program of your game. In order to play, you need the Internet, you need to be "wired" and connect yourself.

Again: if the master program remains "in the cloud" and we are not downloading it, what may we consider as the "first sale"?

18.9 Online Infringement of Intellectual Property Rights

18.9.1 Online Infringement of Intellectual Property Rights: National Answers on the Merits

In general, the national reports indicate that no State has a specific law or regulation that refers specifically to online infringements.

Online infringements, in other words, are dealt with by national courts as traditional IP infringements.

This does not mean that online infringements do not create, in several cases, particular problems, especially in the execution of the decision.

[97] Reference to the ReDigi case in the Swiss Report, Sect. 28.1, footnote 8 and Sect. 28.3.4.2; in the French Report, Sect. 24.3.2.3, and in the English Report, Sect. 29.3.

18.9.2 National Laws and Online Infringements

Italian law does not introduce new criterion to determine the existence of an infringement of intellectual property rights in the online industry. Therefore, the general rules provided by the Intellectual Property Code[98] shall apply. For online copyright infringements, the Authority in charge of Supervising Communications[99] has recently adopted particular measures based on the principle of "cease and desist."[100]

In Brazil, the concept of "on-line infringement" of an IP right does not essentially differ from a traditional infringement. Basically, the remedies available in case of an "on-line infringement are the same remedies available as for traditional infringements.[101]

The Bulgarian legislation does not differentiate between online infringement and traditional infringement of IP rights. Therefore, the same rules apply to IP rights infringement, irrespective of whether performed in the digital or traditional environment.[102] Further, no difference may be established in the approach of the Bulgarian courts to infringements performed online and offline.[103]

In the German legal system, there is no differentiation between infringements on the regular market versus the online market.[104]

In France, particular measures are in force for copyright. The High Authority promoting the distribution and protection of creative works on the Internet[105] ensures the protection of copyright on the electronic communication channels. It

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[98] The Italian Industrial Property Code (CPI) was issued under Legislative Decree No 131 of 13 August 2010—Amendments to the Legislative Decree No 30 of 10 February 2005, in accordance with Article 19 of Law No. 99 of 23 July 2009. The code unified into a single law various provisions. It introduced an organic set of rules regulating patents, trademarks, design, utility models, trade secrets, plant breeders' rights, semiconductor topographies, geographical indications, and denominations of origin, previously regulated by specific acts. It does not regulate copyright, which is still regulated by Law No. 633 of 22 April 1941, as amended.

[99] AGCom (Autorità per le garanzie nelle comunicazioni, Italian Communication Authority).

[100] See the Italian Report, Sect. 27.6.2.

Decision No. 680/13/CONS of 13 December 2013. The regulation introduces a specific procedure for requesting the removal of copyright-infringing contents on the Internet and on audiovisual media services. The copyright holder notifies AGCom of a possible infringement. The Authority can dismiss the petition if it considers the petition to be lacking of grounds or inadmissible, prima facie; otherwise, AGCom opens the proceeding and formally informs the Internet Service Provider (ISP). The ISP may spontaneously remove the content, thus putting an end to the proceeding, or resist. Upon expiration of a 5-day deadline, a collegial body will be in charge of the dismissal of the case or of the adoption of measures.

[101] See the Brazilian Report, Sect. 21.4.

[102] See the Bulgarian Report, Sect. 22.4.1.

[103] See the Bulgarian Report, Sect. 22.4.2.

[104] See the German Report, Sect. 25.4.

[105] Enacted by the Law No. 2009-669 of 12 July 2009 encouraging the display and the protection of the creation on Internet. The Authority is known as HADOPI, acronyms for Haute Autorité pour la diffusion des oeuvres et la protection des droits sur l'Internet.

is particularly active to pursue illegal downloads of music and/or movies and condemn this practice through a "graduated response."[106]

In Austria, the concept of "on-line infringement" of an IP right does not differ from a traditional infringement. Also from a pure procedural perspective, there is no difference between online or offline IP infringements.[107]

In Hungary, IP legislation does not differentiate between online and traditional infringement of IP rights.[108] The current forms of remedies available in IP proceedings have been established as a result of the implementation of EU Directive.[109] It should also be noted that the Hungarian E-Commerce Act[110] regulates a remedy available for IP right holders only in case of online infringements. This is the so-called notice and takedown procedure.

Japanese law does not have a concept of "on-line infringement" as opposed to "traditional infringement." Remedies available for a right holder against infringement are the same across various IP rights.[111]

18.9.3 Enforcing a Decision Against a Foreign Infringer

As we have seen, online infringements of intellectual property rights are dealt with by domestic courts as traditional IP infringements. Once a decision is issued, problems may arise at the time of enforcement, if the infringer is located in a foreign country. It is reasonable to say that the traditional problems connected with the enforcement of a decision abroad—always present in the practice of law—are exalted in the cyberworld.

For example, the Belgian report stresses that the enforceability against an infringer who has his headquarters in a non-Member State shall be more difficult and shall mainly depend upon the existence of an international treaty with the

[106] See the French Report, Sect. 24.5.1.2. The central component of the graduated response system is the warning messages, referred to as "recommendations," sent out by the Rights Protection Committee to Internet subscription holders who have failed to fulfill their duty to monitor their access to the Internet. See http://www.hadopi.fr/en/new-freedoms-new-responsibilities/graduated-response.

[107] See the Austrian Report, Sect. 19.4. However—stresses the Report—as tangible goods differ from intangible goods or services, the questions of infringement and remedies might differ.

[108] See the Hungarian Report, Sect. 26.4.

[109] The Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ 2004 L 157, p. 47.

[110] Act No. CVIII of 2001 on certain aspects of electronic commerce and information society services.

[111] See the Japanese Report (not published), Sect. 4.

country in which the headquarters can be found.[112] If no bilateral treaty exists, the rules of the Belgian code of international private law shall apply.[113]

18.10 Conclusion and LIDC Resolution

18.10.1 Conclusion

The present research has shown that the time has come to adapt the principle of exhaustion of IP rights to new technologies. It has also confirmed that technology goes faster than law, so that when the law does a step forward, a new problem arises. Streaming and cloud computing are good examples.

The majority of the national reports acknowledge the problem and highlight some crucial issues.

The first is that the principle of exhaustion of intellectual property rights was elaborated and developed at the time of the "brick and mortar" economy, when goods and services were mainly tangible and sold and distributed through material and traditional channels. This traditional approach was overturned by new technologies.

The second is that it is no longer possible to distinguish, as far as the principle of exhaustion is concerned, and also in general, between industrial property and intellectual property: copyright is expanding.

The third is that it is more and more difficult to separate and distinguish between traditional industry and online industry, as well as between material and immaterial goods and services. In other words, the tangible can also be offered in an "intangible" format, and therefore, sometimes, there is no such radical division between tangible and intangible: a novel can be sold in hardcover or as e-book, music and software on a CD or online, and so on. As a result, the different categories, tangible-intangible-online-offline, may be intertwined, and therefore no simple legal solution can be found.

Fourth, the general impression is that the traditional approach to the exhaustion principle is becoming obsolete.

Other issues could be raised.

The majority of the national reports are of the opinion that online infringement of intellectual property rights is normally dealt with through the ordinary rules of civil procedure and that there is no particular need for establishing new ones. The difficulties of enforcing decisions abroad against foreign online infringers in copyright cases are the ordinary ones, common in the legal praxis when a decision must be enforced against a foreign infringer.

[112] See the Belgian Report, Sect. 20.4.

[113] Articles 22–31 of the Belgian Act of 16 July 2004 concerning the Code of private international law.

In conclusion of this comparative analysis, based on the national reports, and on the debate held in Torino, it is reasonable to say that the extension of the principle of exhaustion of IP rights to the online industry is a hot and controversial issue. With reference to copyright, the principle is commonly accepted if referred to material goods. Problems arise if the principle of exhaustion is applied to dematerialized goods.

The extension of the principle of exhaustion of IP rights to immaterial goods (such as, for example e-books, music, movies, and others) distributed or sold on the digital platform is questionable and creates incertitude.

The overall goal of the principle of exhaustion must be therefore reconsidered.

Time are probably mature for a legislative intervention, which should take into account the increasing importance and diffusion of the Internet and, consequently, of e-commerce in its new forms. The legislative intervention should also take a position on the new forms of exploitation of immaterial goods, such as streaming and cloud computing, where a "sale," in the traditional sense, is not clearly detectable and identifiable.

18.10.2 LIDC Resolution

The broad and extensive discussion that was held in Torino on these topics led to the following shared Resolution:

Considering that:

1) The principle of exhaustion of intellectual property (IP) is a general principle that is applied under copyright law as well as other IP laws;
2) The extension of the principle of exhaustion to the entire on-line industry is a live and controversial issue; the principle is commonly accepted if applied to material goods but problems arise if the principle is applied to intangible products;
3) The national jurisdictions are not consistent in their approaches to on-line exhaustion; the type of on-line exhaustion (including the type of protected work) and the rationale for such exhaustion vary, in some instances, according to the current technology addressed;
4) On a technical level, downloaded copies are not necessarily comparable with copies stored on tangible media. The quality of downloaded copies does not deteriorate, as opposed to the quality of tangible (physical) copies. Moreover the possibility remains that the user of a downloaded copy continues to use that copy, even after he has further "distributed" the (intangible) copy.

The LIDC recommends that:

1) With regard to a possible legislative or judicial intervention, changes in the law should take into consideration the different interests of those concerned, especially the interests of the rightholders, of entrepreneurs in a possible second-

hand market and of "users". More particularly, the recognition of on-line exhaustion in relation to downloaded copies should take into consideration the specificities of the products concerned and their exploitation (books, computer programs, etc.) and the impact on the normal exploitation of the work. As far as the interests of users are concerned, particular attention should be paid to technical measures which make it impossible to circulate goods although the rights to them have been exhausted. Furthermore, the principle of equivalent treatment and – as far as possible – the principle of technical neutrality of law and free movement of goods should be taken into account;

2) If the legitimate first sale or other transfer of ownership of intangible copies of copyrighted works is subject to exhaustion, only the right of distribution should be exhausted and the conditions such as those mentioned by the recent cases of the European Court of Justice (as mentioned in the Usedsoft case) should be applied, which means that on-line exhaustion does not seem relevant to a non-perpetual license, such as rental or lease; on-line exhaustion cannot be considered in the context of services such as streaming and cloud computing in the way it has been applied in the context of downloading digital copies. Moreover, on a legal level, streaming does not involve the authorization for users of streaming services to use the work on a permanent and repeated basis.

Austria 19

Max W. Mosing

19.1 Exhaustion of IP Rights

Depending on the affected IP right, e.g. copyright, rights in trademarks, designs, patents, or plant variety, the corresponding Austrian Act[1] defines the "principle of exhaustion" in a slightly different way. The Austrian courts have not developed a "general principle of exhaustion all over the field of IP rights" but have applied the "principle of exhaustion" according to the exact wording of the corresponding Act.

As no "general principle of exhaustion all over the field of IP rights" exists in Austria, the "principle of exhaustion" in Austria has to be presented according to the different Acts being applied on the regarded IP rights.

19.1.1 Exhaustion of Copyright in Austria

By Section 16 Austrian Copyright Act,[2] the author of a work has the exclusive right to the first (!) distribution of (copies of) his work. By virtue of this right, (copies of) the work may not be offered for sale or put into circulation in such manner that the work is made available to the public without the author's consent. It is also worth mentioning that for as long as the work remains unpublished, the right of distribution shall, pursuant to Section 16 (2) Austrian Copyright Act, include the exclusive

[1] E.g., Austrian Copyright Act, Austrian Trademark Act, Austrian Design Act, Austrian Patent Act, Austrian Plant Variety Act—see details below.

[2] Austrian Copyright Act, *Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte* (Urheberrechtsgesetz), Federal Law Gazette 1936/111 as amended by Federal Law Gazette I 2015/99.

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right to make the work available to the public by publicly posting, printing, hanging, exhibiting, or similarly using copies thereof.

However, pursuant to Section 16 (3) Austrian Copyright Act, the right of distribution shall not extend to (copies of) the work(s) which, with the authorization of the person entitled thereto, has/have been put into circulation by transfer of the property rights therein within the European Economic Area (hereafter "EEA"). The Austrian Copyright Act and the Austrian case law thus follow the principle of exhaustion within the EEA.[3] Contractual limitations cannot prevent the exhaustion within the EEA.[4]

On the other hand, according to the wording of the Austrian Copyright Act except the right of distribution, other rights of exploitation based on the Austrian Copyright Act are not subject to the principle of exhaustion, even when the work has been put in circulation within the EEA.[5] The Austrian Copyright Act expressly states that the exploitation right consisting in renting the work is not subject to the exhaustion of rights.[6] With respect to lending, the Austrian Copyright Act replaces the nonexhaustion by a right to remuneration.

It is, however, unclear whether—and to what extent—based on Articles 34 to 36 TFEU[7] the so-called general principle of EU-wide exhaustion of IP-rights can be applied on copyright matters going beyond the above.

19.1.2 Exhaustion of Trademark Right in Austria

By Section 10b Austrian Trademark Act,[8] the owner of a trademark cannot prohibit a third party from using the trademark in relation to (the concrete)[9] goods which have been put on the market within the EEA under that trademark by the owner himself or with his consent.

Consequently, the "principle of exhaustion within the EEA" applies to trademark rights in Austria,[10] meaning that then any use of the exhausted trademark for the regarded goods cannot be prohibited, including advertisement for those goods.[11] The consequence of the EEA-wide exhaustion is that the use of a trademark outside the EEA does not lead to an exhaustion of the trademark right in Austria.[12]

[3] Austrian Supreme Court, 11 May 2012, 4 Ob 85/12x.

[4] Austrian Supreme Court, 20 June 2006, 4 Ob 47/06z.

[5] Austrian Supreme Court, 11 May 2012, 4 Ob 85/12x.

[6] Austrian Supreme Court, 18 February 2003, 4 Ob 235/02s.

[7] Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–390.

[8] Austrian Trademark Act, *Markenschutzgesetz* 1970, Federal Law Gazette 1970/260 as amended by Federal Law Gazette I 2015/130.

[9] Austrian Supreme Court, 28 September 1999, 4 Ob 206/99y.

[10] Austrian Supreme Court, 27 April 1999, 4 Ob 63/99i.

[11] Austrian Supreme Court, 15 February 2000, 4 Ob 33/00g.

[12] Austrian Supreme Court, 28 September 1998, 4 Ob 223/98t.

However, if the trademark rights are exhausted within the EEA, it is irrelevant if the goods are exported outside the EEA and then again reimported in the EEA—the trademark right remains exhausted.[13]

It is worth mentioning that the Austrian case law had applied this principle of exhaustion within the EEA even before it was explicitly mentioned in the Austrian Trademark Act.[14]

Also, in Austria, the term “put on the market” triggering the principle of exhaustion within the EEA has to be interpreted according to Article 5 of the Trademark Directive[15,16]: therefore, the factual or legal possibility to handle the good is of relevance.[17] The pure fact that the goods have been put on the market by the owner leads to exhaustion—a (further) consent by the proprietor is not required.[18] However, from an Austrian perspective, it remains unclear whether—in case the proprietor belongs to a group of companies—the entire group is considered to be “the proprietor” in terms of Section 10b Austrian Trademark Act.[19] If this were the case—which is likely—any putting of the goods labeled with the trademark on the EEA market by whatever company of the group leads to the exhaustion of the trademark rights in the regarded goods. This does not happen regarding “independent” proprietors: if the identical trademark is registered for different owners in different countries and therefore used in different countries, no principle of exhaustion can be applied regarding the goods not put on the market by the corresponding owner.[20]

The user of the trademark has the burden to prove that the principle of exhaustion applies.[21] This burden leads especially in the context of the consent by the proprietor to quite difficult questions of evidence: if the good is put on the market within the EEA by a third party, the consent by the proprietor is needed to trigger the principle of exhaustion.[22] The consent can be given in any form; however, implicit consent cannot be argued if the proprietor labels goods for the EEA in a specific form and the goods at stake are not labeled in this manner.[23]

It is worth mentioning that irrespective of the exhaustion of the rights, a trademark infringement requires the use of the trademark by the infringer: if the

[13] Austrian Supreme Court, 18 November 2003, 4 Ob 214/03d.

[14] Austrian Supreme Court, 15 October 1996, 4 Ob 2252/96x.

[15] Directive 2008/95/EC of 22 October 2008 to approximate the laws of the Member States relating to trade marks, OJ L 299, 8.11.2008, pp. 25–33.

[16] Austrian Supreme Court, 16 December 2003, 4 Ob 213/03g.

[17] Austrian Supreme Court, 18 November 2003, 4 Ob 210/03s.

[18] Austrian Supreme Court, 18 November 2003, 4 Ob 210/03s.

[19] Pro exhaustion: Austrian Supreme Court, 28 September 1999, 4 Ob 206/99y; contra exhaustion: Austrian Supreme Court, 18 November 2003, 4 Ob 210/03s.

[20] Austrian Supreme Court, 28 September 1999, 4 Ob 206/99y.

[21] Austrian Supreme Court, 27 August 2013, 4 Ob 122/13i.

[22] Austrian Supreme Court, 18 November 2003, 4 Ob 210/03s.

[23] Austrian Supreme Court, 29 January 2002, 4 Ob 22/02t.

nonexhausted but with the trademark-labeled good becomes "only" part of another good, differently labeled and advertised under this new label, the trademark of the first is generally not used and therefore not infringed.[24]

As the wording of the Act shows, exhaustion does not apply on service marks.[25]

Furthermore, pursuant to Section 10b (2) Austrian Trademark Act, the principle of exhaustion within the EEA shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialization of the goods, especially where the condition of the goods is changed or impaired[26] after they have been put on the market. Generally, any change of the goods affects the interests of the proprietor, and therefore any change provides legitimate reasons to oppose further commercialization of the goods. However, in Austria, pursuant to (also) accepted case law, "slight changes," e.g. repacking, adding manuals, etc., do not constitute such legitimate reasons if (1) otherwise an artificial partitioning of the markets exists, (2) the quality of the goods is not impaired, (3) the consumers are not misled, (4) the reputation of the proprietor is not negatively affected, and (5) the proprietor is informed.[27] Again, the burden of proof lies with the user.

The above said regarding the "Austrian principle of exhaustion of trademark rights within the EEA" applies also on International Trademarks based on the Madrid System[28] with protection in Austria (Section 2 (2) Austrian Trademark Act).

For exhaustion of Community trademarks, see Article 13 Community Trade Mark Regulation.[29]

19.1.3 Exhaustion of Design Rights in Austria

Pursuant to Section 5a Austrian Design Protection Act,[30] the rights granted by a registered Austrian design shall not extend to acts concerning a product when the product is put on the market within the EEA by the right holder or with his consent.

There exists—as far as the author is aware—no Austrian case law regarding the exhaustion of design rights.

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24 Austrian Supreme Court, 8 November 1994, 4 Ob 133/94.

25 Austrian Supreme Court, 28 September 2004, 4 Ob 167/04v.

26 Austrian Supreme Court, 28 September 2004, 4 Ob 167/04v.

27 Austrian Supreme Court, 30 January 2001, 4 Ob 270/00k.

28 See http://www.wipo.int/madrid/en/.

29 Council Regulation (EC) 207/2009 of 26 February 2009 on the Community trade mark, OJ L 78, 24.3.2009, pp. 1–41.

30 Austrian Design Protection Act, *Bundesgesetz vom 7. Juni 1990 über den Schutz von Mustern* (Musterschutzgesetz 1990—MuSchG), Federal Law Gazette 1990/497 as amended by Federal Law Gazette I 2013/126.

For exhaustion of Community designs, see Article 21 Community Design Regulation.[31]

19.1.4 Exhaustion of Patent Rights in Austria

In Austria, exhaustion of patent rights is not expressly stipulated by legal provisions, with one exception, namely Section 22c Austrian Patent Act,[32] which exclusively refers to patents for biological material: if patented biological material is put on the market, the effect of the patent does not extend to such material, which was created by generative of vegetative reproduction. However, the exhaustion is applicable if this reproduction was the purpose for which the material was put on the market.

Consequently, regarding patented biological material, an "international exhaustion of patent rights" applies in Austria.

Regarding all other patents, an EU-wide exhaustion has to be based on Articles 34 to 36 TFEU that generally leads to the application of the "general principle of EU-wide exhaustion of IP-rights."

19.1.5 Exhaustion of Plant Variety Rights in Austria

Pursuant to Section 4 (5) of the Austrian Plant Variety Act,[33] the plant variety protection does not extend to corresponding material and also not to products directly obtained from a protected variety, which are sold or distributed by the proprietor or with his consent.

Consequently, an "international exhaustion of plant variety rights" applies in Austria.

However, exhaustion does not apply on derived propagation material that was used for a new production of propagating material or that is exported into a country that does not provide equivalent plant variety protection.

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[31] Council Regulation (EC) 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5.1.2012, pp. 1–24.

[32] Austrian Patent Act, *Patentgesetz* 1970, Federal Law Gazette 1970/259 as amended by Federal Law Gazette I 2013/126.

[33] Act Regarding the Protection of Plant Variety Rights, *Bundesgesetz über den Schutz von Pflanzensorten* (Sortenschutzgesetz 2001), Federal Law Gazette I 2001/109 as amended by Federal Law Gazette I 2015/93.

19.1.6 Does the "General Principle of Exhaustion Within the EU" Exist in Austria

As shown above, the "principle of exhaustion of IP rights" is laid down in the specific context of the intellectual property right at stake. Consequently, the Austrian case law on exhaustion refers to the rules in the corresponding Austrian legislation. Therefore, it remains unclear whether a "general principle of exhaustion of IP rights" exists in Austria that is going beyond the above-reported exhaustion. The Austrian approach is to provide for specific regulations on the exhaustion for each intellectual property right. Subsidiarily, Articles 34 to 36 TFEU (might) apply.

19.2 Exhaustion of IP Rights in Austria—And Possible Influence by EU (Case) Law

The Austrian legislator is—especially in the field of IP rights—implementing the EU law to the fullest extent. Consequently, the EU principle of exhaustion of IP rights is—as far as covered by specific EU Regulations and/or Directives—also implemented in the Austrian laws.

It is worth mentioning that Austrian courts are the ones referring—especially in relation to the size of Austria—the most IP, IT, and unfair competition matters to the ECJ/CJEU for guidance.[34] Especially due to the fast proceedings on preliminary injunctions up to the Austrian Supreme Court, the Supreme Court has in many cases issued the worldwide first decisions by a supreme court related to "new" issues in the field of IP and IT, *e.g*. nonregistered Community designs,[35] domain names,[36] keyword advertising,[37] etc. In line with these referrals, the Austrian courts are—especially in IP matters—following the EU law and the CJEU case law in nearly every detail, and therefore the EU regarding principles of exhaustion of IP rights is heavily influencing the national case law. The above-cited decisions by the Austrian Supreme Court on the exhaustion of the regarded IP rights are nearly always referring to or at least citing EU law or CJEU case law.

However, decisions respectively Acts or developments outside the EU are generally not reflected in Austrian case law.

[34] A detailed report on the references for a preliminary ruling from Austrian courts between 2009 and 2012 can be found under https://www.ris.bka.gv.at/Dokumente/Ebmj/ERL_07_000_20120109_001_15116EU_1_EU_12/07_20120109_15116EU1EU12_01.pdf (German only).

[35] Austrian Supreme Court, 13 February 2007, 4Ob246/06i.

[36] Austrian Supreme Court, 24 February 1998, 4 Ob 36/98t.

[37] Austrian Supreme Court, 19 December 2005, 4 Ob 194/05s.

19.3 "Traditional Industry"/"On-Line Industry" in Austria—And Exhaustion of IP Rights

19.3.1 Factual Background

Austria is one of the 12 richest countries in the world in terms of GDP (gross domestic product) per capita. Looking at "traditional industry" in Austria, although some industries are global competitors, such as several iron and steel works, chemical plants, oil corporations, cardboard producers, and gaming machine producers that are large industrial enterprises employing thousands of people, most industrial and commercial enterprises in Austria are relatively small on an international scale. These SMEs (small and medium enterprises) are relatively "flexible." As also—or even especially[38]—the Austrian society can be qualified as an "Information Society," meaning that creation, distribution, use, integration, and manipulation of information is a significant economic, political, and cultural activity, many Austrian SMEs fall under the "new economy": most important for Austria is the services' sector generating the vast majority of Austria's GDP. Vienna has grown into a finance and consulting metropolis and has established itself as the door to the East within the last decades. Viennese law firms and banks are business leaders in dealing with the new EU Member States.

Eight out of ten Austrian households were in 2013 equipped with Internet access (81 %); in 80 % of all households, broadband connections were used, 59 % used fixed broadband connections via a line (e.g. cable, fiber), 48 % used mobile broadband over cellular network.[39] In January 2013, 98 % of Austrian companies offered their employees the possibility to access the Internet; 86 % of all companies were present with a website on the Internet, although this depends on the company size[40]: 98 % of the large enterprises (250 or more employees), 94 % of the medium-sized companies (50–249 employees), 94 % and 84 % of the small enterprises (10–49 employees) in Austria have a web presence.

In Austria in 2011, 14,449 companies with 92,474 employees and annual revenues of EUR 25.7 billion were in the "online industry"[41]: despite the poor economic situation for the past few years, these figures had risen since 2009.

The Information Society, and all related issues, is a classic interdisciplinary matter that is not restricted to individual subjects (e.g. Internet, TV, broadband, e-Government, etc.) but rather requires integrated coordination. Although domestic initiatives and measures relating to the Information Society are carried out by the respective Federal Ministries under their own responsibility (e.g., eHealth in the Austrian Federal Ministry for Health; eLearning in the Austrian Federal Ministry

[38] See the figures regarding Internet access below.

[39] http://www.statistik.at/web_de/statistiken/informationsgesellschaft/ikt-einsatz_in_haushalten/.

[40] http://www.statistik.at/web_de/statistiken/informationsgesellschaft/ikt-einsatz_in_unternehmen/index.html.

[41] http://www.agnesstreissler.at/wp-content/uploads/2009/06/Internet-Economy-AT.pdf.

for Education, the Arts and Culture; infrastructure matters in the Austrian Federal Ministry for Transport, Innovation and Technology; etc.), the coordination of the Agenda on the Information Society is undertaken by the Austrian Federal Chancellery Constitutional Service.[42]

19.3.2 Overview of "E-Commerce Law" in Austria

Although most IP rights in Austria are technologically neutral, there are certain differences between rules applicable to the old and the new economy, the latter used as a synonym for e-commerce/m-commerce. For instance, the Austrian E-Commerce Act[43] implementing the European E-Commerce Directive[44] applies to services that are rendered via electronic processing and storage systems. Furthermore, there are special provisions on distance selling contracts which are contained in the Austrian Consumer Protection Act and the Long Distance Selling Act[45] and the Austrian E-Commerce Act.

A specificity of the Austrian E-Commerce Act is a strong focus on the "Country-of-Origin Principle": it provides that in general the regulations apply where the service provider has its main place of business. Consequently, a provider with a registered office in Austria must comply with the Austrian Trade Act[46] and related regulations governing supply and distribution of goods and services. Once the Austrian requirements are met, however, the provider may—in general—also conduct its e-commerce-activities in other EU Member States without additional requirements.

Consequently—although the Austrian courts generally follow the technologically neutral character of the laws—the Austrian case law reflects the distinction made by the regarded acts.

[42] http://www.bundeskanzleramt.at/site/7900/default.aspx.

[43] Austrian E-Commerce Act, *Bundesgesetz, mit dem bestimmte rechtliche Aspekte des elektronischen Geschäfts- und Rechtsverkehrs geregelt werden* (E-Commerce-Gesetz—ECG), Federal Law Gazette I 2001/152, as amended by Federal Law Gazette I 2015/34.

[44] Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17/07/2000, pp. 1–16.

[45] Austrian Consumer Protection Acts, *Bundesgesetz vom 8. März 1979, mit dem Bestimmungen zum Schutz der Verbraucher getroffen werden* (Konsumentenschutzgesetz—KSchG), Federal Law Gazette 1979/140 as amended by Federal Law Gazette I 2015/105 and Federal Act on Long Distance Selling, *Bundesgesetz über Fernabsatz- und außerhalb von Geschäftsräumen geschlossene Verträge* (Fern- und Auswärtsgeschäfte-Gesetz—FAGG), Federal Law Gazette I 2014/33.

[46] Austrian Trade Act, *Gewerbeordnung* 1994—GewO 1994, Federal Law Gazette 1994/194 as amended by Federal Law Gazette I 2015/155.

19.3.3 Exhaustion of IP Rights and Austrian "On-Line Industry"

The question of "online exhaustion of IP rights" has been and actually still is lively discussed in relation to the Austrian Copyright Act.[47]

The reason for this discussion is that the wording of Section 16 Austrian Copyright Act indicates that the principle of exhaustion would only be applicable on material (copies of) works [*Werkstücke*] and not on "immaterial" (copies of) works. However, also before the CJEU *UsedSoft/Oracle* decision,[48] the Austrian case law did not stick to this distinction: the online transfer of photos that were (however) automatically printed out by the recipients was considered as a distribution in terms of Section 16 Austrian Copyright Act.[49] Pursuant to case law also, the publishing of photos on the Internet leads to a distribution in terms of the Austrian Copyright Act.[50]

The discussion has become more intense in the context of online distribution of eBooks, music, and software. Regarding the latter, reference is made to the CJEU *UsedSof/Oracle* decision, which is, however, based on *lex specialis*, namely the Software Directive. Consequently, there is an ongoing discussion if offline and online distribution of "other works," meaning not software, but especially music and eBooks, should be treated differently; therefore, the question whether the online distribution leads to exhaustion of all and any works remains unanswered (also) in Austria. Even if exhaustion applies on the right of distribution, its application to the right of reproduction in relation to eBooks and online music, which is necessary to "re-sell" "used" eBooks and online music, is uncertain. Offline, the principle of exhaustion applies and the purchaser is—as factually no reproduction is needed—free to sell the purchased books or music CD. One may wonder why online and offline distribution should be treated differently. Reasons to make a difference can be found in the wording of the Database Directive,[51] in the

[47] Winklbauer/Geyer, Der urheberrechtliche Erschöpfungsgrundsatz im Zeitalter der Digitalisierung—Auswirkungen der Used-Soft-Entscheidung des EuGH, ZIR 2014, 93; Enchelmaier, Erschöpfung des Rechts zum (Weiter-)Verkauf "gebrauchter" Software, GPR 2013, 224; Bauer/Homar, Die Bedeutung von Echtheitszertifikaten im Gebrauchtsoftwarehandel, ZTR 2013, 98; Schmitt in Jahnel/Staudegger/Thiele, Jahrbuch Geistiges Eigentum 2013, 247: Der Fall "UsedSoft" und seine vertrags- und urheberrechtlichen Implikationen; Wendehorst, Der Anwendungsbereich des Gemeinsamen Europäischen Kaufrechts, AnwBl 2013, 345; Schmitt, Der Online-Vertrieb von Software nach dem EuGH-Urteil "UsedSoft," MR 2012, 256; Kulka, EuGH zum Handel mit "gebrauchter Software": Geburtsstunde eines blühenden Geschäftszweigs? ÖBl 2012/58; Streit/Jung, E-Books im österreichischen Recht, MR-Int 2012, 6.

[48] CJEU case C-128/11, *UsedSoft GmbH v. Oracle International Corporation* (not yet published).

[49] Austrian Supreme Court, 4 October 1994, 4 Ob 1091/94.

[50] Austrian Supreme Court, 12 June 2001, 4 Ob 127/01g.

[51] Directive 96/9/EC of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, pp. 20–28.

InfoSociety Directive,[52] and finally in Article 6 (2) of the WIPO Copyright Treaty[53] and also in the underlying facts, namely the high potential of misuse of online distribution: keep a copy and resell another copy. There are also arguments against this: the interests in eBooks, online music, etc ultimately remain the same as in online distributed software, and Digital Right Management (DRM) is suitable and commonly used to prevent the violation of the rights of the author in all fields of digitization.

In this context, it is worth bringing up the issue of "putting on the market" triggering exhaustion in the light of the "potential worldwide distribution on the Internet"; in other words, does offering on the Internet lead to worldwide exhaustion? Can geographic access restrictions and/or DRM and/or even only disclaimers prevent this? Regarding disclaimers, the Austrian Supreme Court ruled that such declaration might be of legal relevance, but in the actual case the offering party offered trademark-infringing goods beyond its own disclaimer also on the Austrian market, and therefore the disclaimer was already factually irrelevant.[54]

However, the view prevails in Austria that the ECJ's *UsedSoft*/*Oracle* decision, as it is based on *lex specialis*, cannot as such be transposed and respectively applied on "other digital content," and therefore the business models of "used music," "used eBooks," etc. should not be applicable in Austria. On the other hand, there also appears to be a common understanding in Austria that the outcome should not depend on the subject matter, i.e. software or other digital content. This could be legally supported by arguments based on Articles 34 to 36 TFEU respectively based on the principle of equal treatment as there seems to be no justified reasons to treat software and other digital content differently. However, as shown above, there are counterarguments, and at the end of the day it can be concluded (also) for Austria that it is up to the EU legislator to "fix this mess."[55]

Summing up, the legal situation regarding online copyright exhaustion is in Austria (and Europe) still far from being clear, and therefore business models based on such exhaustion, especially second-hand software, music, and eBooks are still far from being safe: their customers could pay the price, as they will be violating the author's rights if the second-hand usage of digital content is not covered by exhaustion.

It may also be that the application of the exhaustion principle onto all digital contents may have long-term detrimental effects for all. A monopoly situation might be resolved, and the exploitation of monopoly revenues will no longer be possible; consequently, lower profits would be a result, leading to potentially smaller incentives for innovation respectively new digital content.

[52] Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, pp. 10–19.

[53] WIPO Copyright Treaty adopted in Geneva on December 20, 1996, http://www.wipo.int/treaties/en/text.jsp?file_id=295166.

[54] Austrian Supreme Court, 20 March 2007, 4 Ob 47/07a.

[55] Compare Schmitt in Jahnel/Staudegger/Thiele, Jahrbuch Geistiges Eigentum 2013, 247: Der Fall "UsedSoft" und seine vertrags- und urheberrechtlichen Implikationen.

However, it is more likely that right holders will find ways to protect their interest: the most obvious option would be a switch to renting or leasing solutions as this cannot trigger the principle of exhaustion. Another option would be to offer "digital content as a service," namely to only give access to the content but not to transfer it as such to the customer. Then the interesting question remains, whether courts would accept such measures or see them as void because they might be designed only to circumvent the exhaustion principle. Nevertheless, so far there seems to be no evidence that the new decisions on exhaustion in the EU and/or the US have influenced the practices of "on-line industry" in Austria.[56] However, the reason that the consequences are not obvious might be that there has anyway been a change in the industry towards SaaS (software as a service) and that the software as such is provided as open source, but "only" the services to implement and customize the software are charged for, and therefore only the latter is of economic interest. A further reason could be that the practical impact of—and any possible corresponding work around—the CJEU *UsedSoft*/*Oracle* decision remains still unclear: since the German national courts have not issued a final decision yet and it remains unclear to what extent the presence of a "client–server-software" mattered for the CJEU, many practical questions remain unanswered.

19.4 IP Rights and "On-Line Industry": Infringement and Remedies in Austria

As mentioned above, the Austrian laws have and actually are interpreted by the Austrian courts as having a technologically neutral character. Consequently, in Austria there is no conceptual difference between an "on-line infringement" and a traditional infringement of an IP right. However, as the facts of the case differ—tangible goods vs intangible goods or services—the questions of infringement and of remedies might differ, but that is not a conceptual difference as such. The approach under which IP protection generally has a technologically neutral character leads to the consequence that everything that is considered to be an infringement offline is also considered as an infringement on the digital platform respectively "Digital Single Market" by the "on-line industry."

As IP rights are excluded from the "Country-of-Origin Principle" provided by the Austrian E-Commerce Act and therefore the "Country-of-Protection/Infringement Principle" applies (see Article 8 Rome II Regulation[57]), there is also no legal difference regarding the international dimension of infringements on "Digital Single Markets."

[56] See, however, that *Adobe* changed the business model for "Creative Suite®"to "Creative Cloud®."

[57] Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, pp. 40–49.

However, the privileges for access, backbone, link, search engine, and host providers, as intermediaries, provided by the Austrian E-Commerce Act have to be considered. Such privileges do actually not exist in the offline world, although, however, in practice nobody is trying to make the postal service liable for carrying infringing goods.

Also from a pure procedural perspective, there is no difference between online or offline IP infringements: Austria has strict rules relating to jurisdiction, and therefore the issue of forum shopping does not pose major problems. Exclusive jurisdiction in civil IP infringement proceedings lies solely with the Commercial Court of Vienna (*Handelsgericht Wien*) in 1st instance, in 2nd instance with the Higher Regional Court of Vienna (*Oberlandesgericht Wien*), and in 3rd and last instance with the Austrian Supreme Court (*Oberster Gerichtshof*). The conduction of criminal matters is generally under the exclusive jurisdiction of the Viennese Regional Court for Criminal Matters (*Landesgericht für Strafsachen Wien*).

The remedies available in case of an "on-line IP infringement" generally are as follows:

- irrespective of any fault civil claims regarding cease and desist (preliminary and permanent injunction—also in respect of threatened infringement), removal (if not interfering with third party rights), publication of the judgment, appropriate compensation, rendering of accounts, and receiving information on provenance/channel of distribution of the goods; and
- in case of infringement with fault: damages and surrender of profits.

All Austrian IP Acts provide for an appropriate compensation (reasonable royalty) irrespective of any fault of the infringing party.

Furthermore, under the Austrian IP Acts, the prevailing party may obtain a publication of the judgment in (online or offline) media on the account of the losing party. The Austrian Media Act stipulates that media is obliged to publish such decisions, with a right to charge corresponding fees for advertisements.

Damages and reimbursement can be claimed if the infringement was committed with fault. As indicated above, an appropriate compensation (reasonable royalty) can be claimed irrespective of any fault. In cases of culpable infringement, the right holder is—instead of claiming "only" appropriate compensation (reasonable royalty)—entitled to

- compensation of proven damages, including lost profit;
- the profit the infringer generated with the infringement; or
- in case of gross negligence or intent, a lump sum damage in the amount of twice the reasonable royalty even if no real damage can be proven.

In case of extraordinary circumstances also compensation for immaterial damages can be claimed additionally.

Requests for preliminary injunctions (cease and desist) in civil proceedings are often filed together with the full claim; however, a separate filing is admissible, also after the full claim was filed. In the majority of cases, the application for an injunction will be served on the defendant (compare Article 6 ECHR[58]), but the court may also grant *ex parte* injunctions if it can be established by the claimant that giving notice may defeat the purpose of the application. The court will form its view about the likely outcome of the definitive proceeding on the question of infringement and render its decision accordingly within a few weeks on the basis of legal opinions filed by the parties.

Unlike the main proceedings, the interlocutory proceeding is a "summary proceeding," meaning that no full proof but merely *prima facie* evidence is needed. On the other hand, this *prima facie* evidence has to be presented to the court in the given, short time frame. When applying for a preliminary injunction, the validity of the regarding IP right might have to be proven.

The court may condition the issuance of a preliminary injunction to the payment of security.

If the preliminary injunction is—at the end of the day—denied, the defendant has the right to request full compensation from the requesting party.

As preliminary and definitive injunctions are in Austrian practice the most common and therefore most important claims in IP infringement cases, it is worth briefly showing how such injunctions are enforced: a petition can be filed with the court of enforcement (*Exekutionsgericht*) in respect of each act of noncompliance following the enforceability of the claim, *i.e.* in case of a preliminary injunction immediately after its service. The petition has to be served by the enforcing party to the obliged party. Based on the petition and the alleged infringement, the court can impose a fine of up to EUR 100,000. For each further act of noncompliance with an injunction, a further petition can be filed and a new fine can be imposed. Although the petition must include a concrete and conclusive allegation of the act of noncompliance, it is not required to file any evidence of the noncompliance. However, the obliged party may initiate a (separate) proceeding in which the enforcing party is obliged to evidence the infringement. Preliminary and definitive injunctions are not effective against third parties, esp. against suppliers or customers of the infringing party, as those third parties have not been party to the proceedings. Whether those third parties can be sued by the right holder has to be evaluated based on the general requirements.

Preliminary injunctions are also used to enforce the rights provided by the Enforcement Directive.[59]

It is worth mentioning that the "urgency issue in interlocutory proceedings," e.g. existing under German law, meaning that the application for a preliminary injunction has to be filed within the shortest possible time after the right holder has become aware of the infringement, does not exist under Austrian law.

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[58] European Convention on Human Rights, http://www.echr.coe.int/Documents/Convention_ENG.pdf.

[59] Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights, OJ L 195/16, 2.6.2004, 16–25.

Of course, the enforcement of an injunction/decision against an "international on-line infringer" leads to specific difficulties if the headquarters of the "on-line industry" are located in a foreign country outside of the EU. Within the EU, the Brussels I(a)[60] Regulation[61] applies. However, outside the EU, even when the Lugano Convention[62] is applicable, especially injunctions are often very difficult to enforce. Out of the scope of the Lugano Convention, the enforcement of Austrian decisions generally depends on treaties between Austria and the regarding enforcement State, whereas only very few of such treaties existing, respectively, are effective. However, there are always exceptions, as not all countries are that restrictive in enforcing foreign decisions as, e.g., Austria itself is.

An intentional infringement of IP rights is a penal crime in Austria that can generally be sanctioned with imprisonment. What makes criminal proceedings particularly attractive in Austria is the fact that the right holder, not the public prosecutor, has to prosecute infringers himself. As the personal interest of the right holder in defending his rights outweighs the public interest in prosecuting counterfeiters, the legislator decided that only the right holder should have competence for filing a complaint. Even if this is an additional burden for right holders, it gives them much more control over the proceedings: they can decide whether to initiate proceedings, file applications (e.g., for house searches or destruction of counterfeit goods), or terminate the proceeding, which would not be the case in criminal proceedings initiated *ex-officio*.

Although IP litigation in Austria leads to comparatively low litigation costs, the costs depend on various factors. First of all, with respect to the legal costs under Austrian procedural law, a distinction must be made between (a) court fees (*Gerichtsgebühren*), (b) attorneys' fees (*Rechtsanwaltsgebühren*), and (c) cash expenditures (*Barauslagen*), including costs for interpreters, the translation of documents, travel expenses for witnesses or experts' costs.

19.5 Exhaustion of IP Rights in Austria and Whether It Undermines Protection or Leads to Unjustified Advantages

The purpose of granting exclusive rights—namely based on the above-named IP rights—is to give the right holder the possibility to authorize or prohibit certain use (depending on the IP right). Thus, the right holder is enabled to control the exploitation of his "rights" respectively the corresponding goods/works/material/

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[60] Recast: Council Regulation (EC) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, pp. 1–32.

[61] 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, 16.1.2001, pp. 1–23.

[62] Lugano Convention of September 16, 1988, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Federal Law Gazette 1996/448.

plants/inventions and therefore is willing and economically able to invent/create/produce further goods/works/material/plants/inventions for the benefit of the entire community.

Granting of the above-named exclusive rights has been, is, and will be (more or less—however, compare “legitimately acquired rights” in constitutional law) a pure political decision and not a “law of nature – *lex naturalis*.” Consequently, as the existence of the exclusive rights is a pure political decision, also its limitations are pure political decisions. The public discussion about ACTA[63] has shown that the opinion of right and wrong by the general public is essentially different from the stipulated IP rights—also in Austria.

Having said that, it is difficult to determine whether the principle of exhaustion of IP rights jeopardizes the protection of IP rights as such or is essential to balance interests in the Information Society. The latter is even more difficult, as the interests that have to be balanced are generally again to the outcome of political decisions: whether it is the freedom to carry out business, the fundamental right to property—including or not including IP—or the fundamental right to self-determination which has to be taken into account depends on “political believes.” Such “believes” are generally changing depending on the actual position of the commentator—i.e., depending on the presence of a personal interest in an extensive protection of IP rights, the question might be answered differently. However, taking a closer, objective look, the principle of exhaustion should ensure a balance between the rights of proprietors on the one hand and the marketability and transferability of goods having IP rights (at least) attached on the other hand. The latter is getting more important as the Information Society is more and more based on goods (and services) incorporating IP rights, but at the same time it is essential to the Information Society that a secondary market for (digital) content does not destroy the bases for innovation in a broad sense. Furthermore, it is essential that such secondary market is not connected with product piracy, etc.

19.6 Conclusions and Recommendations

The following recommendations by the author have been aligned with the Austrian Group of the LIDC in a meeting held in June 2014.

The principle of exhaustion of IP rights is essential to balance interests in the Information Society. However, this balance of interests has to be defined very carefully. As there seems to be no justified reasons to treat offline and online respectively regarding the latter software and other digital content differently, the principle of equal treatment seems to demand a uniform solution for the principle of exhaustion of IP rights.

[63] Anti-Counterfeiting Trade Agreement, COM/2011/0380 final.

As the CJEU decision in *UsedSoft/Oracle* is based on *lex specialis*, it cannot be easily transposed respectively applied on "other digital content" or even other IP rights than copyrights. However, there is actually no justification for applying the principle of exhaustion in a different way if software or other digital content or different IP rights are concerned.

Articles 34 to 36 TFEU respectively the principle of equal treatment could constitute a legal basis for a "general principle of online-exhaustion."

There are also good economic arguments to support a "general principle of online-exhaustion": the right holder is able to determine the timing and the remuneration on the primary market (offline and online). Based on this ability of the right holder on the primary market, there seems to be no justifiable economic interest of the right holder on the secondary market; in other words: the interest in the commercialization of the "ownership rights" of the purchaser and the interest in the marketability and in the transferability of (digital) contents override the interest covered by IP rights.

Summarizing, there are good legal and economical arguments that a secondary market shall be legitimate. However, as the legal situation of such secondary market remains unclear (at least) in Austria, it is up to the legislator to clarify respectively to make such secondary market possible.

For the sake of completeness: the marketability and transferability on such secondary market shall not lead to the consequence that the right holders are "loosing" the ability to determine and to obtain the remuneration on the primary market. Therefore, the secondary market must lead not to additional but only to identical use. On the other hand, the right holders should not be allowed to forestall the emergence of a secondary market by using technical measures (DRM). Technical measures should only aim at making sure that the usage remains the same and is not expanded.

Although digital platforms and the worldwide reach of the Internet have brought new challenges to the principle of exhaustion of IP rights, those challenges could be resolved by carefully balancing out the concerned interests. On the other hand, the digital platforms and the DRM have provided new means for the right holders to protect their interests which do not exclude the emergence of a secondary market.

Summing up, the legal situation regarding online exhaustion is in Austria (and Europe) still far from being clear, and therefore business models based on such exhaustion, especially second-hand software, music, and eBooks, are still far from being safe. At the end of the day, it can be concluded (also) for Austria that it is up to the EU legislator to "fix this mess." As Nelly Kroes said: "[t]echnology is changing. Business models are changing. The way we consume and enjoy creative works – music, movies, games – is changing. And, if we want to keep the right balance, the legal framework has to respond."[64]

[64] Keynote speech by Neelie Kroes in the 2012 Intellectual Property and Innovation Summit, http://ec.europa.eu/avservices/video/shotlist.cfm?ref=87837.

Belgium 20

Jan Clinck and Benjamin Docquir

20.1 Introduction

In the traditional "brick-and-mortar" industry, the principle of exhaustion is well established by case law, as well as by legislation in both European Union and Belgian laws. However, with new marketing and business models emerging and goods and services being increasingly distributed online (in the broadest sense), the traditional boundaries of the principle of exhaustion are put into question. As a consequence, the question "To what extent does the principle of exhaustion of IP rights apply to the on-line industry?" (the "Question"), which this report discusses, is of great importance as it determines the extent to which a user is free to use and to distribute onwards the "goods" that he/she purchased online.

This report sets as goal to give an overview of the current legal situation. The focus in this report shall lay on the European legislation and the recent developments in the case law of the European Court of Justice, in particular the recent *UsedSoft* decision.[1] The latter has given some new "food for thought" regarding the Question, and it renewed the already heavily debated discussion regarding this matter. Furthermore, the attention shall in particular go to copyrights as this is the domain in which "digital exhaustion" encounters the most challenges and which have been the subject matter of the most recent developments in case law. Because of the scarcity of decisions by Belgian courts on the issue at stake, attention shall be given mainly to the writings of scholars, both Belgian and European at large.

The second part of this report covers the definition of exhaustion, as well as the legal background. Section 20.3 contains an overview of what has to be understood

[1] ECJ, case C-128/11, *UsedSoft GmbH v. Oracle International Corp* (not yet published).

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with the notion "exhaustion." Section 20.4 focuses on the recent *UsedSoft* decision of European Court of Justice. Section 20.5 briefly summarizes the remedies a rightholder has when being confronted with an online infringement. Section 20.6 contains our conclusion on the Question.

20.2 The Principle of Exhaustion According to Belgian and European Law

20.2.1 Notion

The exclusive right of an intellectual property rights' holder to authorize the distribution of a good (be it under a trademark, a patent, or a model or as a copyrighted work) is limited under European law by the "principle of exhaustion."[2] In essence, the notion of exhaustion is justified by the inherent tensions between intellectual property rights and the fundamental principles of the free movement of goods and services within the European Union, as enshrined in the Treaty on the Functioning of the European Union[3] (see Sect. 20.3.1). In order to preserve these fundamental freedoms, the exercise of intellectual property rights must be limited to the right of being the first to put a product on the market, including through licensees, or to exploit that product[4] and does not extend to a right to control every resale of the same product by the purchaser thereof.

In the United States, a similar principle is known as the "First Sale Doctrine."[5]

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[2] In Belgium known as *de uitputtingsleer* or *la théorie de l'épuisement*.

A. Berenboom, Le nouveau droit d'auteur et les droits voisins (4th Ed.), Brussels, Larcier, 2005, 365 et s; M. Buydens and C. Bernard, "L'épuisement du droit à la marque", JDE 2013, vol. 196, 37 *et seq*., and S. Molenaers, "Het uitputtingsbeginsel in het merkenrecht", *IRDI* 2001, 4 *et seq*.; M. Krol and J. Mencl, "The principle of exhaustion of copyright in digital environment", Master of Laws in Intellectual Property – Collection of Research Papers 2008, World Intellectual Property Organization, Geneva 2009, 2; S. von Lewinski and M. M. Walter "Information Society Directive" in M. M. Walter and S. von Lewinski (eds.), European Copyright Law. A Commentary, Oxford, Oxford University Press, 2010, 997, nr. 11.4.16. and T. Overdijk, P. van der Putt, E. de Vries and T. Schafft, "Exhaustion and Software Resale Rights. A comparison between the European exhaustion doctrine and the U.S. First sale doctrine in the light of recent case law", Cri 2011, vol. 2, (33) 34.

[3] Articles 28 to 37 (free movement of goods) and 56 to 62 (freedom to provide services).

[4] Y. Van Couter and B. Van Brabant, Handboek Licentieovereenkomsten, Brussels, Larcier, 2008, 271–294.

[5] We notice that the scope of application of the European notion of "exhaustion" is not identical to the notion of "first sale" in the United States. Article 109(a) of the U.S. Copyright Act states: *Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord* (. . .). See for further information: M. Krol and J. Mencl, "The principle of exhaustion of copyright in digital environment", Master of Laws in Intellectual Property – Collection of Research Papers 2008, World Intellectual Property Organization, Geneva 2009 (available

Exhaustion is limited to the territory of the Members States of the European Union (or the European Economic Area ("EEA")). In other words, the right to oppose the resale of a product shall only be exhausted when that product has been put on the market in Belgium or in another country from the EEA. It is noteworthy that the European legislator explicitly rejected the concept of "international exhaustion."[6]

20.2.2 The Legal Framework in Belgium and the European Economic Area

Exhaustion was a concept created in the first place by case law and based upon article 36 TFEU. One of the first times the principle of exhaustion was mentioned was in the judgement of the Court of Justice of the European Union in *Deutsche Grammophon Gesellschaft v. Metr*o-*SB-Grossmärkt GmbH*:

> Although [the Treaty] permits prohibitions or restrictions on the free movement of products, which are justified for the purpose of protecting industrial and commercial property, article 36 only admits derogations from that freedom to the extent to which they are justified of safeguarding rights which constitute the specific subject-matter of such property.
>
> If a right related to copyright is relied upon to prevent the marketing in a Member State of products distributed by the holder of the right or with his consent on the territory of another Member State on the sole ground that such distribution did not take place on the national territory, such a prohibition, which would legitimize the isolation of national markets, would be repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market.[7]

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at: http://www.turin-ip.com/research-papers/papers-2008/Krol-Mencl.FINAL.pdf/view) and S. Vanden Heuvel, "Fighting the First Sale Doctrine: Strategies for a Struggling Film Industry", *18* Milch. Telecomm. Tech. L. Rev. 661 (2012). Available at: http://www.mttlr.org/voleighteen/vandenheuvel.pdf.

[6] Recital 28 InfoSoc Directive. See also: S. von Lewinski and M. M. Walter "Information Society Directive" in M. M. Walter and S. von Lewinski (eds.), European Copyright Law. A Commentary, Oxford, Oxford University Press, 2010, 1001, nr. 11.4.28 *et seq*.

In the United States, the first sale doctrine similarly applies only to goods manufactured in the United States. However, a recent decision by the US Supreme Court has extended this and brought the discussion on international exhaustion back in the picture. See US Supreme Court 19 March 2013, *Kirtsaeng, dba Bluechristines 99 v. John Wiley & Sons*, in which it was decided that "*The 'first sale' doctrine applies to copies of a copyrighted work lawfully made abroad*." Decision available at: http://www.law.cornell.edu/supremecourt/text/11-697. It can be estimated that this decision shall not effect European law (L. Fresco, "Kirtsae v. Wiley: de Amerikaanse uitputtingsslag om studieboeken", *IE-Forum.nl* (available at: http://www.ie-forum.nl/backoffice/uploads/file/IE-Forum%20L_E_%20Fresco,%20Kirtsaeng%20v_%20Wiley,%20de%20Amerikaanse%20uitputtingsslag%20om%20studieboeken,%20IE-Forum_nl%20IEF%2012498.pdf).

[7] ECJ, case 78/70, *Grammophon Gesellschaft v. Metr*o-*SB-Grossmärkt GmbH,* ECR 1971 I-487, pt 11–12.

This case law was confirmed by the Belgian Supreme Court, as well as by lower courts.[8]

The principle was thus already well known before it was expressly set forth in respect of each intellectual property right in the various regulations and directives that harmonize intellectual property rights within the European Union (community trademarks,[9] community models,[10] unitary patents,[11] rental and lending rights,[12] computer programs,[13] databases,[14] and copyright[15]). All of these provisions are quasi-identical and are all implemented in Belgian law accordingly.

Regarding copyrights, article 1, §1, par. 6 Belgian Copyright Act (which implements article 4(2) InfoSoc Directive) states:

> The author of a literary or artistic work alone shall have the right to allow the distribution, by sale or otherwise, of the original or copies of the work to the public. The first sale or other transfer of ownership in the European Community of the original or copies of the literary or artistic work made by the rightholder or with his consent shall give rise to

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[8] "*Cour de cassation/Hof van Cassatie*" in Belgium. See Cass. 12 June 1998, *ICIP-Ing. Cons.* 1999, 100 and Brussels 11 April 1997, *A&M* 1997, 265, note V. Vanovermeire. See also: S. Dusollier, Droit d'auteur et protection des œuvres dans l'univers numérique, Brussels, Larcier, 397, nr. 504 and M. Buydens and C. Bernard, "L'épuisement du droit à la marque", JDE 2013, vol. 196, 37, nr. 2.

[9] Article 13.1 of Council Regulation 207/2009 of 26 February 2009 on the Community trade mark: *A Community trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.* With regard to Belgium: Article 2.23.3 Benelux Convention on Intellectual Property (Trademarks and Designs), BS 26 April 2006.

[10] Article 21 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, OJ L 5 January 2002, n° 3, 1. With regard to Belgium: Article 3.19.4 Benelux Convention on Intellectual Property (Trademarks and Designs), BS 26 April 2006.

[11] Article 6 of Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 31 December 2012, n° 361.

[12] Article 9.2 of Directive 2006/115 of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 27 December 2006, n° 376, 28.

[13] Article 4.2 Directive 2009/24 of 23 April 2009 on the legal protection of computer programs, OJ L 5 May 2009, n° 111, 16 (hereafter referred to as the "Software Directive"). With regard to Belgium: Article 5.c of Act of 30 June 1994 regarding the transposition into Belgian law of the European Directive of 14 May 1991 on the legal protection of computer programs, BS 27 July 1994.

[14] Article 5.c of Directive 96/9 of 11 March 1996 on the legal protection of database, *OJ L* 27 March 1996, n° 77, 20 (hereafter referred to as the "Database Directive"). With regard to Belgium: article 4, par. 3 Act of 31 August 1998 regarding transposition into Belgium law of the European Directive of 11 March 1996 on the legal protection of database, *BS* 14 November 1996.

[15] Article 4.2 Infosoc Directive. With regard to Belgium: article 1,§1, par. 6 Act of 30 June 1994 on copyright and related rights, *BS* 27 July 1994 (hereafter referred to as the "Belgian Copyright Act").

exhaustion of the right of distribution of the original or that copy in the European Community (free translation[16]).

In addition, the principle of exhaustion is also incorporated in several major international treaties of which the European Union is a Treaty State, such as the Agreement on Trade-Related Aspects of Intellectual Property[17] (TRIPS) and the WIPO Copyright Treaty.[18]

20.3 Background of and Limitations to the Principle of Exhaustion

20.3.1 A Balance Between Free Movement of Goods and Intellectual Property Rights

The aforementioned *Deutsche Grammophon Gesellschaft* decision already underlined the great importance of the exhaustion principle. If a rightholder were able to prohibit the resale of his goods, parallel import to other Member States would be hindered. This would give effect to partitioning of the internal markets and would jeopardize the basic idea of the European Union, i.e. the constitution of a single market.[19] Therefore, the Court of justice held that the exercise of intellectual property rights within the internal market must be restricted to the specific subject

[16] The original text in Dutch states: *Alleen de auteur van een werk van letterkunde of kunst heeft het recht de distributie van het origineel van het werk of van kopieën ervan aan het publiek, door verkoop of anderszins, toe te staan. De eerste verkoop of andere eigendomsoverdracht in de Europese Gemeenschap van het origineel of een kopie van een werk van letterkunde of kunst door de auteur of met diens toestemming leidt tot uitputting van het distributierecht van dat origineel of die kopie in de Europese Gemeenschap*" In French: "*L'auteur d'une œuvre littéraire ou artistique a seul le droit d'autoriser la distribution au public, par la vente ou autrement, de l'original de son œuvre ou de copies de celle-ci. La première vente ou premier autre transfert de propriété de l'original ou d'une copie d'une œuvre littéraire ou artistique dans la Communauté européenne par l'auteur ou avec son consentement, épuise le droit de distribution de cet original ou cette copie dans la Communauté européenne*.

[17] In the TRIPs Agreement, the principle of "exhaustion" is only mentioned. Member States are thus free whether to apply this concept in their national legislation. See article 6 "exhaustion" of TRIPS: *For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.*

[18] Article 6.2 WIPO Copyright Treaty of 20 December 1996: *Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.*

[19] F. de Visscher and B. Michaux, Précis du droit d'auteur, Brussels, Bruylant, 2000, 88, nr. 105 and P. Torremans, "The future implications of the Usedsoft Decision", 3–4, available at http://www.create.ac.uk/wp-content/uploads/2014/01/CREATe-Working-Paper-2014-02.pdf. and A. Wiebe, "The principle of exhaustion in European Copyright law and the distinction between digital goods and digital services", GRUR Int. 2009, 114.

matter thereof, i.e. the right to be the first to put the product on the market. Once a particular good has been sold, the rightholder shall no longer have the right to oppose the further sale of that particular good.[20]

"Exhaustion" was thus created to strike a balance between the free movement of goods on the one hand and the exercise of exclusive intellectual property rights of the proprietor to distribute his goods on the other hand. The latter holds the right to choose where under which conditions and at which price his goods are, for the first time, put on the market.[21] This way the rightholder is guaranteed to receive an appropriate reward.[22] This ensures *the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large*.[23]

20.3.2 Consensus Regarding the Traditional Industry: The Principle of Exhaustion Is Limited to the Distribution of Goods by Means of a Tangible Support

To understand why it is not straightforward to apply the principle of exhaustion to digital goods, it is important to notice the difference between the "traditional industry" and the "on-line industry." None of these "industries" are legally defined. One could assume that the "on-line industry" amounts to the provision of "information society services," as defined by the E-Commerce Directive: *any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*.[24] With respect to such services, the EU

[20] The European legislator has, however, in some of the aforementioned provision foreseen that a rightholder can still oppose further commercialization of the product if there are "legitimate grounds." See regarding the Community trademark article 13.2 Regulation 207/2009 (paragraph 1 *shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market*) and regarding unitary patent article 6 Regulation 1257/201 ("(. . .), unless there are legitimate grounds for the patent proprietor to oppose further commercialisation of the product").

[21] A. Göbel, "The principal of exhaustion and the resale of downloaded software – The UsedSoft/Oracle case", ELR 2012, vol. 9, (226) 229 and M. Krol and J. Mencl, "The principle of exhaustion of copyright in digital environment", Master of Laws in Intellectual Property – Collection of Research Papers 2008, World Intellectual Property Organization, Geneva 2009, 2.

[22] With regard to copyright, see: Recital 10 InfoSoc Directive.

[23] Recital 9 InfoSoc Directive.

[24] See the definition of *information society services* in article 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (hereafter referred to as the 'E-Commerce Directive'): *any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*. This directive was transposed into Belgian law by the Act of 11 March 2003 regarding certain procedural aspects of the information society services, BS 17 March 2003.

legislator enacted specific rules, *to ensure legal certainty and consumer confidence* with regard to electronic commerce.[25] These services are regulated in a particular way as compared to services provided in the "traditional industry." The notion, however, appears not to be the most relevant with regard to the principle of exhaustion. Rather, it must be borne in mind that exhaustion only applies with respect to the sale or transfer of ownership of a product and not in relation to services.

20.3.2.1 Exclusion of Services

Within the area of copyright, the principle of exhaustion only applies to the right of distribution, i.e. the right to distribute copies of works of authorship. Other exclusive rights, such as the right of reproduction[26] and the right of communication and of making available to the public,[27] are not likely to be exhausted, especially to the extent that they relate to services provided by the copyright holder. The latter retains the right to oppose the making available of his/her work, or the reproduction thereof, within the context of services it provides. The rationale is that exhaustion should only impede the exercise of intellectual property rights to the extent that such exercise goes beyond the specific subject matter of such rights.[28] In other words, the copyright holder remains entitled to an appropriate reward for all acts of exploitation of his/her works that do not consist in the mere sale of a copy of those works.

This was expressly confirmed by the European Court of Justice in its two *Coditel* cases which concerned Belgian cable television diffusion companies:

> A cinematographic film belongs to the category of literary and artistic works made available to the public by performances which may be infinitely repeated. In this respect the problems involved in the observance of copyright in relation to the requirements of the Treaty are not the same as those which arise in connexion with literary and artistic works the placing of which at the disposal of the public is inseparable from the circulation of the material form of the works, as in the case of books or records.

[25] Such as particular information requirements and liability of intermediary service providers.

[26] Regarding trademarks, however, the European Court of Justice decided that the right of reproduction can be subject to exhaustion: ECJ, case C-337/95, *Parfums Christian Dior SA & Parfums Christian Dior BV v. Evora BV*.

Also, according to the first sale doctrine, in the United States exhaustion does not extend to the right to make new copies of an item. See very recently: US Supreme Court 13 May 2013, *Bowman v Monsanto Co et al.*, Available at http://www.supremecourt.gov/opinions/12pdf/11-796_c07d.pdf.

[27] Opinion Advocate General Bot delivered on 24 April 2012, case C-128/11, *UsedSoft Gmbh v. Oracle International Corp.,* point 48. The opinion of the Advocate General was, however, not followed by the Court itself in this case. See further Sect. 20.4.2.2.

[28] See Sect. 20.3.1.

> In these circumstances the owner of the copyright in a film and his assigns have a legitimate interest in calculating the fees due in respect of the authorization to exhibit the film on the basis of the actual or probable number of performances.(. . .).[29]

The European legislator has confirmed this point of view explicitly regarding copyrights. Article 3.3 InfoSoc Directive stipulates: "[the right of communication to the public and the right of making available to the public] *shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article*."[30]

20.3.2.2 The Sale of an Identical Copy on a Tangible Support

The *Coditel* decision clearly stipulates that the difference between a service and a good lays in the fact that goods are delivered on a tangible medium (*a material form of the work*). The principle of exhaustion thus applies when three conditions are fulfilled: (1) an identical copy (2) is sold (3) by means of a tangible support.

An Identical Copy

Exhaustion only applies to the specific goods that were put on the market by the proprietor. For each individual good, his consent is required. If he only commercializes a limited number of disks or CDs, additional copies of the works may not be resold without his/her consent.

At this stage, it is important to make a clear distinction between, on the one hand, the tangible medium on which the good is delivered (*corpus mechanicum*) and, on the other hand, the good which is protected by intellectual property rights (*corpus mysticum*).[31] When a consumer buys a CD, he becomes the owner of this particular CD. A sale has thus taken place and, as a consequence, the rightholder cannot prohibit the further circulation of this particular copy. Any contractual provision that would restrict the further distribution shall in principle be void.[32] Nevertheless,

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[29] ECJ, case 62/79, *SA Compagnie Générale pour la Diffusion de la Télévison SA Coditel Brabant and SA Compagnie Liégoise pour la diffusion de la Télévision v. SA Ciné Vog Films, ASBL Chambre Syndicale belge de la Cinématographie, SA "les Films la Boétie" and Chambre syndicale des Producteurs et Exportateurs de Films français,* pt 12 and 13 and ECJ, case 262/81, *Coditel SA, Coditel Brabant, Coditel Liège, Intermixt, Union professionnelle de radio et de télédistribution and Inter-Régies v. Ciné-Vog Films SA, Chambre syndicale belge de la ciné matographie, les Films La Boétie, Serge Pinon and Chambre syndicale des producteurs et exportateurs de films français*, pt 11 and 12. See also: ECJ, case C-17/92, *Federación de Distribuidores Cinematográficos (Fedicine) v. The Spanish State*, pt. 10 and Opinion Advocate General Kokott delivered on 3 February 2011, Cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd,* pt. 184. See further Sect. 20.4.3.2.

[30] See also recital 29 InfoSoc Directive.

[31] B. Van Brabant, "Les conflits susceptibles de survenir entre l'auteur d'une œuvre et le propriétaire du support", ICIP-Ing. Cons. 2004, vol. 2, (91) 92–93.

[32] To this respect, we mention that in Belgium (and in France) a so-called right of destination (*bestemmingsrecht—droit de destination*) is known. This right, recognized by the Supreme Court of Belgium (Cass. 19 January 1956, *Pas.* 1956, I, 484.), falls under the reproduction right and

the rightholder still holds the right on the work itself. He still has the right to copy the work on other CDs or to communicate it to the public. On the other hand, the consumer who buys a CD in a shop does not acquire intellectual property rights but only the ownership of the tangible medium.[33]

A Sale

Exhaustion shall only take place when a "sale" or "transfer of ownership" takes place. As a consequence, rental or lending does not give rise to exhaustion.[34]

A definition of "sale" is, however, not given in any of the aforementioned legal provisions.

Presumably, with respect to tangible products, there is no need to further define what a "sale" can be. However, the increasing success of distribution models such as streaming or downloading works goes along with the need to address the exact nature of what a "sale" can be, e.g. in relation to either goods or services. For instance, under the directive on consumer rights, implemented in Belgian Code of Economic Law by the Act of 21 December 2013,[35] a "sales contract" *means any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services*.[36] A sales agreement in a consumer context thus covers goods as well as services. However, "goods" are described as *any tangible movable item*.[37] There is thus also in consumer law a link between the sale of goods and the delivery on a tangible support.

The European Court of Justice has recently defined 'a sale' in its *UsedSoft* decision with regard to the notion of exhaustion. We shall come back to that definition below.[38]

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covers the right of the rightholder to limit the use of which contracting (or third) parties can make of reproductions which are put on the market. Reproduction is thus allowed but under certain conditions as specified by the rightholder and always subject to the rule of exhaustion. See: F. Gotzen, Het bestemmingsrecht van de auteur, Brussel, Larcier, 1975; F. Gotzen, "Art. 1" in F. Brison and H. Vanhees (eds.), Huldeboek Jan Corbet. De Belgische Auteurswet. Artikelsgewijze commentaar (3th ed.), Brussels, Larcier, 2012, 11–12 and B. Van Brabant, "Les conflits susceptibles de survenir entre l'auteur d'une œuvre et le propriétaire du support", ICIP-Ing. Cons. 2004, vol. 2, (91) 165 *et seq*.

[33] S. Dusollier, Droit d'auteur et protection des oeuvres dans l'univers numérique, Brussels, Larcier, 397 *et seq*., nr. 504 *et seq*.

[34] S. von Lewinski and M. M. Walter "Information Society Directive" in M. M. Walter and S. von Lewinski (eds.), European Copyright Law. A Commentary, Oxford, Oxford University Press, 2010, 1003–1004, nr. 11.4.36.

[35] BS 30 December 2013.

[36] Article 2.5 Directive 2011/83.

[37] Article 2.3 Directive 2011/83.

[38] See *further* Sect. 20.4.2.1.

By Means of a Tangible Support

The principle of exhaustion was traditionally understood as covering exclusively goods on a tangible medium. Nonetheless, as electronic commerce developed rapidly in the information society, this distinction blurred. Nowadays, music, video, software, books, etc... are all available in digital form. Not only are they provided by way of on-demand services (such as streaming and cloud computing), but they can also be obtained by downloading (e.g., iTunes).

When downloading, the work is delivered over the networks and eventually incorporated on a tangible medium, which the buyer already possessed and which is thus not included as such in the "sale." Unlike in the traditional situation where a tangible product incorporating a work is put on the market, the recipient actually obtains a new copy (a reproduction of the work) which is not the same as the one of the sender (i.e., the rightholder himself or a previous acquirer). With it a license is granted to use the good. The original "master" copy is in fact retained by the rightholder. The question thus arises if such "transfer" has to be qualified as a "sale" for the purposes of exhaustion. In the affirmative, the distribution right would be exhausted and the purchaser would have the right to resell the good.

However, it is argued that such a way of distributing works does not amount to a sale but constitutes a mere provision of services.[39] This point of view can be founded on multiple legal provisions.

First of all, the expressions "copies" and "original and copies" in the WIPO Treaty *refer exclusively to fixed copies that can be put into circulation as tangible objects*.[40]

Second, the Infosoc Directive (as well as the preparatory work[41] hereto) confirms this. Recital 28 InfoSoc Directive states:

> Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. (...) (emphasis added).

[39] S. Dusollier, Droit d'auteur et protection des oeuvres dans l'univers numérique, Brussels, Larcier, 396–397, nr. 503.

[40] Agreed Statements of 23 December 1996 concerning the WIPO Copyright Treaty, CRNR/DC/96, 2. Available at: http://www.wipo.int/edocs/mdocs/diplconf/en/crnr_dc/crnr_dc_96.pdf.

[41] European Commission, Green Paper "Copyright an Related Rights in the Information Society" (19 June 1995), COM (95) 382 final, 47–48: *On the other hand, if the work or related matter is not incorporated in a material form but is used in the provision of services, the situation is entirely different.* (...) *the interested parties feel that it should be ensured that the rights are no exhausted by the information superhighway. In fact, given that the provision of services can in principle be repeated an unlimited number of times, the exhaustion rule cannot apply* (emphasis added). This was also confirmed in the follow-up to this Green Paper: European Commission, "Follow-up to the Green Paper on copyright and related rights in the information society" (20 November 1996), COM(96) 568 final, chapter 2: "(...) Parties confirmed that given that services can in principle be repeated an unlimited number of times, the exhaustion rule cannot apply. (...)" (emphasis added).

Recital 29 stipulates:

> The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides (emphasis added).

The same principle could already be found in 1996 in recital 43 of the Database Directive.[42]

This view could already been found in the *Coditel* cases[43] and was later on confirmed by the European Court of Justice.[44]

Also, the Belgian court of first instance of Ghent, in one a few cases regarding this subject, affirmed this distinction: *The rule [of exhaustion] has to be understood in the light of the substantial difference between the (actual) property right and the (material) support (i.e. a CD-rom, a floppy disk, etc.), on the one hand, and the (intellectual) property right on the (immaterial) work (i.e. the computer program as such) that lies (as a copy) herein, on the other hand*[45] (free translation).

The majority of legal scholars subscribe to this point of view.[46]

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[42] Recital 43 Database Directive: *Whereas, in the case of on-line transmission, the right to prohibit re-utilization is not exhausted either as regards the database or as regards a material copy of the database or of part thereof made by the addressee of the transmission with the consent of the rightholder* (emphasis added).

[43] See Sect. 20.3.2.1.

[44] ECJ, case C-479/04, *Laserdisken ApS v Kulturministeriet,* [2006] ECR I-08089, pt. 23: "(. . .) According to the twenty-eight recital in the preamble to Directive 2001/29, copyright protection under that directive includes the exclusive right to control distribution of the work incorporated in a tangible medium. (. . .)" (emphasis added).

[45] Court of First Instance of Ghent 23 September 2009, *A&M* 2010, vol. 1, (42) 48: *Deze regel moet worden begrepen in het licht van het wezenlijke onderscheid tussen het (reëel) eigendomsrecht van de (materiële) drager (d.i. een CD-Rom, een diskette, e.d.m.), enerzijds, en het (intellectuele) eigendomsrecht van het (immateriële) werk (d.i. het computer-programma) als dusdanig) dat er (in kopie) in vervat ligt, anderzijds.*

[46] In particular, for Belgium: F. de Visscher and B. Michaux, Précis du droit d'auteur, Brussels, Bruylant, 2000, 88, nr. 104; N. Helberger, ""Verkauft ist verkauft; wiederholen ist wiederholen"-reflecties op de *UsedSoft*-uitspraak van het Europese Hof", DCCR 2013, vol. 98, (31) 33 and S. Dusollier, Droit d'auteur et protection des oeuvres dans l'univers numérique, Brussels, Larcier, 396–397, nr. 503. See also: L. G. Grigoriadis, "Exhaustion and software resale rights in licht of recent EU case law", Journal of International Media and Entertainment Law (2013–2014), Vol. 5, No. 1 (111) 113 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2403554.); A. L. Schloetter, "The Acquis Communautaire in the Area of Copyright and Related Rights: Economic Rights" in T-E. Synodinou (ed.), Codification of European Copyright Law, Kluwer Law International, The Netherlands, 2012, (115) 120; H. Struik, P.C. van Schelven and W.A.J. Hooreman, Softwarerecht. Bescherming en gebruik van computerprogrammatuur onder auteursrecht en octrooirecht, Kluwer-Deventer, 2010, 140 and A. Wiebe, "The principle of

In the United States, during the preparation of the Digital Millenium Copyright Act, the US Copyright Office investigated the usefulness of an extension of the first sale doctrine to digital goods. They came at that time to the conclusion that this was not desirable.[47]

Recently, the Court of Justice has shed more light on this issue of "digital exhaustion." This was done in the *UsedSoft v. Oracle* case,[48] which shall now be discussed.

20.4 UsedSoft v Oracle: The Beginning of Digital Exhaustion

20.4.1 Facts

A proper understanding of the Court's decision requires to briefly summarize the facts.

The case concerned computer software marketed by Oracle and upon which Oracle holds the exclusive rights under copyright law. Oracle distributes her software mainly by downloading from her website. If a customer wants to use the software, he must conclude two distinct agreements with Oracle: on the one hand, a license agreement, which allows him to download the program and to store a copy of the program permanently on a server and to allow a certain number (i.e., 25) of users to access it by downloading it to the main memory of their workstation computers and, on the other hand, a maintenance agreement which guarantees future updates and patches for the software. In return for the payment of a one-time fixed price, the user is granted *for an unlimited period a non-exclusive, non-transferable user right free of charge for everything that Oracle develops and makes available to you on the basis of this agreement*.[49]

UsedSoft markets second-hand software licenses. It acquired from Oracle's customers user licenses and distributed them.

Two main issues were at stake. First, could the download of a copy of a computer program from the Internet, authorized by the copyright holder, give rise to the exhaustion of the right of distribution of that copy in the EU within the meaning of article 4(2) Software Directive? Second, is the acquirer of the used licenses to be regarded as a "lawful acquirer" who enjoys *inter alia* the right to reproduce the

exhaustion in European Copyright law and the distinction between digital goods and digital services", GRUR Int. 2009, 114–115. Contra: M. Krol and J. Mencl, "The principle of exhaustion of copyright in digital environment", Master of Laws in Intellectual Property – Collection of Research Papers 2008, World Intellectual Property Organization, Geneva 2009, 2.

[47] US Copyright Office, A Report of the Register of Copyrights pursuant to §104 of the Digital Millenium Copyright Act, August 2011. 82 *et seq*. Available at http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf (hereafter referred to as "DMCA Section 104 Report").

[48] ECJ, case C-128/11, *UsedSoft GmbH v. Oracle International Corp*. (hereafter referred to as "*UsedSoft*").

[49] *UsedSoft*, pt. 23.

computer program to the extent necessary for the use of it in accordance with its intended purpose?[50]

20.4.2 The Decision of the Court

20.4.2.1 A License Agreement Can Constitute a "Sale," and a Sale Can Relate to a Tangible as Well as to an Intangible Good

As said above,[51] exhaustion only applies when a sale (or transfer of ownership) takes place. Without a sale, there is no exhaustion of the distribution right. Because a common definition of sale in European law was lacking, the Court felt free to give a uniform and independent interpretation of this notion. According to the Court, *a 'sale' is an agreement by which a person, in return for payment, transfers to another person his rights of ownership in an item of tangible or intangible property belonging to him.*[52]

The fact that *the downloading of a copy of a computer program and the conclusion of a user licence agreement for that copy form an indivisible whole* (. . .) *makes it no difference whether the copy of the computer program was made available to the customer by the rightholder concerned by means of a download from the rightholder's website or by means of a material medium such as a CD-ROM or DVD*. (. . .) *Since an acquirer who downloads a copy of the program concerned by means of a material medium such as a CD-ROM or DVD and concludes a licence agreement for that copy receives the right to use the copy for an unlimited period in return for payment of a fee, it must be considered that those two operations likewise involve, in the case of the making available of a copy of the computer program concerned by means of a material medium such as a CD-ROM or DVD, the transfer of the right of ownership of that copy.*[53]

A "sale" is thus an autonomous notion under the law of the European Union, which may include the distribution of a copy by download if (a) the rightholder

[50] The full questions for a preliminary ruling were as follows:

1. Is the person who can rely on exhaustion of the right to distribute a copy of a computer program a "lawful acquirer" within the meaning of Article 5(1) of Directive 2009/24?

2. If the reply to the first question is in the affirmative: is the right to distribute a copy of a computer program exhausted in accordance with the first half-sentence of Article 4(2) of Directive 2009/24 when the acquirer has made the copy with the rightholder's consent by downloading the program from the internet onto a data carrier?

3. If the reply to the second question is also in the affirmative: can a person who has acquired a "used" software licence for generating a program copy as "lawful acquirer" under Article 5 (1) and the first half-sentence of Article 4(2) of Directive 2009/24 also rely on exhaustion of the right to distribute the copy of the computer program made by the first acquirer with the rightholder's consent by downloading the program from the internet onto a data carrier if the first acquirer has erased his program copy or no longer uses it?

[51] See Sect. 20.3.2.2, *A Sale*.

[52] *Usedsoft*, pt. 42.

[53] *UsedSoft*, pt. 44 and 47.

receives a payment in compensation for the granting of an unlimited usage right and (b) a transfer of ownership takes place. According to the Court, granting a licence for an unlimited period of time equals such a transfer of ownership. Whether the transfer takes place by means of a tangible or intangible medium is of no importance for the qualification and does not bear on the fact that there is a "transfer of ownership." Nor does it make it a difference how such "transfer" was qualified by the parties (as a "sales agreement" or a "license agreement").[54]

The decision of the Court is thus in contrast with the majority opinion so far.[55] Exhaustion can take place even when the computer program is provided exclusively online.

The Court leaves no room for doubt on this point. It found *abundantly clear the intention of the European Union legislature to assimilate, for the purposes of the protection laid down by* [the Software Directive], *tangible and intangible copies of computer programs*.[56] In contrast with what one might think, according to the Court, such interpretation is not in contradiction with the InfoSoc Directive, as the Software Directive is a *lex specialis*.[57] Moreover, such assimilation is justified from an economic point of view: *the on-line transmission method is the functional equivalent of the supply of a material medium*.[58] If these two ways of distribution would not be equal, a rightholder would have the opportunity to control the resale of copies downloaded from the Internet and to demand further remuneration on the occasion of each new sale. Such restriction would create partitioning on the markets and would jeopardize the principle of free movement of goods.[59] As the latter forms one of the fundamental principles of the European Union, it must prevail.[60]

Nevertheless, the decision of the Court offers no argument to sustain that also services can "exhaust." The right of distribution still *does not relate to contracts for services*.[61]

[54] *UsedSoft*, pt. 49: "(. . .) if the term 'sale' within the meaning of Article 4(2) of Directive 2009/24 were not given a broad interpretation as encompassing all forms of product marketing characterised by the grant of a right to use a copy of a computer program, for an unlimited period, in return for payment of a fee designed to enable the copyright holder to obtain a remuneration corresponding to the economic value of the copy of the work of which he is the proprietor, the effectiveness of that provision would be undermined, since suppliers would merely have to call the contract a 'licence' rather than a 'sale' in order to circumvent the rule of exhaustion and divest it of all scope."

[55] See *supra* Sect. 20.3.2.2, *By Means of a Tangible Support*.

[56] *UsedSoft*, pt. 58.

[57] *UsedSoft*, pt. 56. This was later confirmed: ECJ, case C-355/12, *Nintendo Co. Ltd, Nintendo of America Inc., Nintendo of Europe GmbH v PC Box Srl and 9Net Srl,* pt. 23.

[58] *UsedSoft*, pt. 61.

[59] *UsedSoft*, pt. 62–63.

[60] See above Sect. 20.3.1.

[61] *UsedSoft*, pt. 66.

20.4.2.2 Exhaustion of the Right of Communication to the Public But Not of the Right of Reproduction

Although it deems that *the on-line transmission method is the functional equivalent of the supply of a material medium*,[62] it may come as a surprise that the Court expanded the scope of exhaustion to the making available of a copy of the computer program on a website. After all, such a transmission constitutes an act of communication to the public under the InfoSoc Directive.[63] As already mentioned, paragraph 3 of article 3 of the InfoSoc Directive of this article explicitly states that no act of making available to the public shall give rise to exhaustion.[64] However, according to the Court, such "making available to the public" of a computer program cannot be qualified as a "making available to the public" within the meaning of article 3.1 and 3.3 InfoSoc Directive.

Although the text of the InfoSoc Directive is quite clear and leaves little room for interpretation, the Court bases its decision, once again, on the fact that the Software Directive is a *lex specialis* in relation to the InfoSoc Directive. In such a case, when an act of communication at the same time constitutes a "transfer of ownership" (i.e., a license for unlimited duration against a one-time payment) of the copy of this computer program, this *changes an 'act of communication to the public' provided for in Article 3* [InfoSoc Directive] *into an act of distribution referred to in Article 4* [InfoSoc Directive] *which, if the conditions in Article 4(2) of the directive are satisfied, can, like a 'first sale . . . of a copy of a program' referred to in Article 4(2)* [Software Directive]*, give rise to exhaustion of the distribution right.*[65]

The right of reproduction still remains unaffected by exhaustion. If the first acquirer wishes to make a reproduction, he shall in principle be obliged to request the authorization of the rightholder. It is also for this reason that the Court emphasizes that, if the first purchaser decides to resell his copy, then, in order to avoid infringing the exclusive right of reproduction of a computer program belonging to the author, he has to make his own copy unusable at the time of this resale. The practices of UsedSoft, i.e. acquiring some of the user rights of the original purchaser, are thus illegal as both UsedSoft (or a later acquirer) and the first purchaser shall continue to use the same copy of the computer program: the Court does not allow to split multiuser licenses.[66]

20.4.2.3 The Second Acquirer Is a "Lawful Acquirer" and Therefore Allowed to Use the Copy of the Computer Program

The Court also had to address whether the acquirer of the used licenses could actually use these licenses (and the copy of the computer program).

[62] *UsedSoft*, pt. 61.

[63] Recital 23 InfoSoc Directive.

[64] See above Sect. 20.4.2.1.

[65] *UsedSoft*, pt. 52.

[66] *UsedSoft*, pt. 70.

In that respect, the Court decided that the second acquirer could be qualified as a "lawful acquirer" within the meaning of article 5(1) Software Directive. Such "lawful acquirer" is allowed to *inter alia* reproduce permanently the computer program without requiring the rightholder's authorization when this reproduction is necessary for its use in accordance with its intended purpose. The download (from the website of Oracle) by the new acquirer onto his computer of the copy of which the license was sold by the first acquirer *must be regarded as a reproduction of a computer program that is necessary to enable the new acquirer to use the program in accordance with its intended purpose*.[67]

20.4.3 The Post *UsedSoft* Period: Perhaps an Isolated Case, Limited to Computer Programs

20.4.3.1 The Recent *Nintendo v PC Box* Decision

The *UsedSoft* decision has undoubtedly extended the scope of exhaustion by considering that the grant of a license on a copy of a computer program for an unlimited period provided by means of an intangible support constitutes a sale and thus leads to exhaustion. The question remains, however, if the reasoning of the Court of Justice would also apply to other categories of works, especially literary and artistic works.

After all, *UsedSoft* only dealt with computer programs and a good deal of the Court's reasoning relies on the idea that the Software Directive is a *lex specialis*.[68] Computer programs, which are by their nature "digital,"[69] are to be distinguished from other "works" (e.g., film, music, books, etc.) which fall under the general InfoSoc Directive.

This was very recently affirmed in the Court's *Nintendo v. PC Box* decision of 23 January 2014. In this case, which concerned mainly article 6 InfoSoc Directive and the notion of "technical protective measures," the Court stated that a videogame is *a complex matter which does not only contain a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption*. Therefore, it is protected exclusively by the InfoSoc Directive.[70] As none of the questions

[67] *UsedSoft*, pt 81.

[68] *UsedSoft*, pt. 56.

[69] M. Krol and J. Mencl, "The principle of exhaustion of copyright in digital environment", Master of Laws in Intellectual Property – Collection of Research Papers 2008, World Intellectual Property Organization, Geneva 2009, 24.

[70] ECJ, case C-355/12, *Nintendo Co. Ltd, Nintendo of America Inc., Nintendo of Europe GmbH v PC Box Srl and 9Net Srl,* pt. 23.

The fact that videogames were not to be qualified as "computer programs" was until then not completely clear. See, e.g., B. Peeters, "Videospelen: bescherming onder het auteursrecht, maar volgens welke spelregels?", IRDI 2013, vol. 2, 155–169 and A. Nicholson, "Old habits die hard?: UsedSoft v Oracle", SCRIPTed 2013, vol. 10/3, (389) 400. Available at: http://script-ed.org/?p=1167.

for a preliminary ruling were related to the scope of the Software Directive, it may seem noticeable that the Court made this explicit clarification.

The scope of the Software Directive, and as a consequence of the *UsedSoft*-decision, seems thus limited to computer programs in the strictest sense.[71]

In Belgium, there exists at this moment no case law applying the principles from the *UsedSoft*-decision.

20.4.3.2 The Present Legal Framework Is Not Adapted to an Extension to Other Works

The main argument supporting a limited interpretation of the *UsedSoft* decision is that the current legal framework does not provide any grounds to expand the scope of *UsedSoft* to other works.

First, according to the WIPO Copyright Treaty, the right of distribution concerns exclusively fixed copies that can be put into circulation as tangible objects.[72] As the European Union is a Treaty State hereof, European legislation has to be in compliance with it.[73] International treaties are recognized as prevailing over secondary Community legislation.[74]

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[71] R. Schoefs, "Ontwikkelaars mogen bescherming spelconsoles omzeilen", Juristenkrant 26 February 2014, 5 and E. Wildman and G. Dickson, "Nintendo judgments puts Usedsoft back in the PC Box", available at http://www.lexology.com/library/detail.aspx?g=40aa8656-34d9-451e-a4e1-04008d789733.

According to recital 7 Software Directive, a "computer program" is defined as *any form, including those which are incorporated into hardware. This term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage.*' The European Court of Justice furthermore precised that this covers *the expression in any form of a computer program which permits reproduction in different computer languages, such as the source code and the object code* (ECJ, case C-393/09, *Bezpečnostní softwarová asociace—Svaz softwarové ochrany v Ministerstvo kultury,* pt 35). Does not fall within this definition: the elements of a computer program, neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program (ECJ, case C-406/10, *SAS Institute Inc. v World Programming Ltd,* pt. 39). Also the graphic user interface does not fall under this definition (ECJ, case C-393/09, *Bezpečnostní softwarová asociace—Svaz softwarové ochrany v Ministerstvo kultury,* pt 42).

[72] Agreed Statements of 23 December 1996 concerning the WIPO Copyright Treaty, *CRNR/DC/96*, 2. Available at: http://www.wipo.int/edocs/mdocs/diplconf/en/crnr_dc/crnr_dc_96.pdf.

[73] Article 216(2) TFEU states: *Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.* See also: E. Linklater, "*UsedSoft* and the big bang theory: Is the e-exhaustion meteor about to strike?", pt. C.1. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271129.

[74] ECJ, case C-344/04, *The Queen on the application of: International Air Transport Association, European Low Fares Airline Association v Department for Transport,* pt. 35: *Article 300(7) EC provides that 'agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'. In accordance with the Court's case-law, those agreements prevail over provisions of secondary Community legislation.* See also ECJ, Case C-61/94, *Commission v Germany*, [1996] ECR I-3989, pt. 52, and ECJ, Case C-286/02, *Bellio F.lli*, [2004] ECR I-3465, pt. 33.

As mentioned above, the InfoSoc Directive, in particular recitals 28 and 29, and the case law of the European Court of Justice appear to sustain the same reasoning as they still link exhaustion with a tangible support.[75] Nevertheless, the tone of the same Court of Justice in *UsedSoft* leaves some room for doubt: *However, even supposing that Article 4(2) of Directive 2001/29, interpreted in the light of recitals 28 and 29 in its preamble and in the light of the Copyright Treaty,* (. . .) *indicated that, for the works covered by that directive, the exhaustion of the distribution right concerned only tangible objects* (. . .).[76] It must therefore be noticed that the Court introduced the idea of equivalence between services and goods which are downloaded from the Internet. Advocate General Kokott already suggested quite a similar idea in her opinion delivered in the *Premier League* case.[77]

Even assuming that "services" in recital 29 only cover works exclusively made available without providing the possibility for the user to store a copy on a tangible medium,[78] there still remains an obstacle. After all, to use its copy of the work, two acts of reproduction have to take place: to acquire a copy of the work, it has to be transferred from the first acquirer to the second and, afterwards, a copy has to be made each time the device (e.g., computer, smartphone, tablet, etc.) has to run the copy of the work.[79] In principle, for each act of reproduction, the rightholder's authorization is required since his right of reproduction is not exhausted.[80]

In the *UsedSoft* decision, a "get around"[81] was found in article 5(1) Software Directive to cover both acts. It is questionable whether the InfoSoc Directive contains an exception to the same extent (i.e., to allow both acts of reproduction made without the authorization of the author). It seems justifiable to state that article 5(1)[82] covers the "use" of the work as these acts of reproduction are only

[75] See Sect. 20.3.2.2, *By Means of a Tangible Support*.

[76] *UsedSoft*, pt. 60.

[77] Opinion Advocate General Kokott delivered on 3 February 2011, Cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd,* pt. 184–185: "*Admittedly, some services differ from goods in that they cannot be re-used per se* (. . .) *Other services, by contrast, do not differ significantly from goods. Computer software, musical works, e-books, films, etc. which are downloaded from the internet can easily be passed on in electronic form.* (. . .)."

[78] W.G.L. During, "Rekken en strekken met de UsedSoft-formule", AMI 2014, vol. 1, (1) 5 and M. Krol and J. Mencl, "The principle of exhaustion of copyright in digital environment", Master of Laws in Intellectual Property – Collection of Research Papers 2008, World Intellectual Property Organization, Geneva 2009, 45 *et seq*.

[79] H. Struik, "Past de *UsedSoft*-constructie ook in de Auteursrechtrichtlijn?", *AMI* 2014, vol. 2, 47–52.

[80] A. Göbel, "The principal of exhaustion and the resale of downloaded software – The UsedSoft/ Oracle case", ELR 2012, vol. 9, (226) 230.

[81] E. Linklater, "*UsedSoft* and the big bang theory: Is the e-exhaustion meteor about to strike?", 11. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271129.

[82] *Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use.*

temporary and transient (or incidental), they form an integral and essential part of a technological process, and their sole purpose is to enable a lawful use. However, the first act of reproduction (i.e., the second acquirer obtaining the work) does not fall under this exception as this reproduction is neither temporary nor transient. Also, the exceptions and limitations enumerated in paragraph 2 of article 5 InfoSoc Directive do not seem to provide sufficient legal ground to allow without the author's consent an act by which a work is digitally transferred from one device to another on which it may be used indefinitely. The Infosoc Directive enumerates the possible exceptions a Member State is allowed to implement in its national law. This is an exhaustive list.[83] Such copy can, for example, not be qualified as a private copy[84] as a resale obviously involves that the reproduction is made for purposes that are (directly or indirectly) commercial. Article 5(2)b InfoSoc Directive can thus not be invoked to justify such use.[85]

In our opinion, although the tone of the ECJ in *UsedSoft* seemed to be favorable for such an analogy between computer programs and other works, the present legal framework does not allow such extension. We come back on this point in our conclusion.[86]

An interesting case to refer to is *Capitol Records v ReDigi*, a decision from the US District Court of New York.[87] In this case, *ReDigi* provided an online service by which a user could sell music on *ReDigi's* website. To do so, the user has to download a specific program first. This program selects the music on a person's computer, which is eligible for sale (i.e., only music from iTunes or from another *ReDigi* user). This music is then uploaded to a remote server (Cloud Locker). After a file is uploaded, the software deletes the file from the original computer. After a second analysis of the file, the music is ready to be sold. The argument of *ReDigi* that this process was covered by the first sale doctrine was rejected by the court: (. . .) *the first sale defense is limited to material items, like records, that the copyright owner put into the stream of commerce* (. . .) *ReDigi is not distributing such material items* (. . .) *it is distributing reproductions of the copyrighted code embedded in new material objects* (. . .) *The first sale doctrine does not cover this* (. . .).[88] The argument of *ReDigi* that such reading of the first sale doctrine would in

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[83] Recital 32 InfoSoc Directive. P. Charleton and S. Kelly, "The Oracls speaks. Case C-128/11", 14. Available at http://fordhamipconference.com/wp-content/uploads/2013/03/2013.charleton.paper_.pdf.

[84] Article 5(2) b InfoSoc Directive: *in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned.*

[85] W.G.L. During, "Rekken en strekken met de UsedSoft-formule", AMI 2014, vol. 1, (1) 8.

[86] See Sect. 20.6.

[87] US District Court Southern District of New York 30 March 2013, *Capitol Records v ReDigi*. Available at: http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1334&context=historical. (hereafter referred to as "*ReDigi*").

[88] *ReDigi*, 12.

effect exclude digital works form the meaning of the statute was also not accepted. The US District Court clearly stated that, even if there were good reasons to extend the scope of the first sale doctrine to such digital works, such extension could not be made in the current legal framework.[89]

20.5 Intellectual Property Rights and Online Industry: Infringement and Remedies

As the question of online infringement is not a particular problem with regard to the principle of exhaustion, this chapter shall be limited to a survey of the remedies that are available to a rightholder.

Although protecting intellectual property rights online is a specific topic of Europe's Digital Single Market agenda,[90] no specific European regulation is made on this point. Two legal instruments are in particular worth mentioning: first, the Directive on the enforcement of intellectual property rights (hereafter referred to as the "Enforcement Directive"),[91] which provides the general framework for Member States to enforce intellectual property rights.[92] Second, in particular with regard to "information society services," the E-Commerce Directive, which enables intellectual property rights holders to obtain interim measures against intermediaries whose services are used to infringe upon their rights.[93]

Several remedies are available to a rightholder who is confronted with an infringement of his intellectual property rights online: coercive and monetary remedies, as well as criminal sanctions.[94]

A rightholder may seek an injunction from the President of the Commercial Court or the President of the Court of First Instance, with a specific cease-and-desist

[89] *ReDigi*, 13.

[90] Http://ec.europa.eu/digital-agenda/en/pillar-i-digital-single-market/action-6-protecting-intellectual-property-rights-online.

[91] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 2 June 2004, n° 195, 16. The Directive was implemented into Belgian law by the Act of 9 May 2007 concerning civil law aspects of intellectual property rights protection (BS 10 May 2007) and the Act of 10 May 2007 concerning aspects of judicial law of intellectual property rights protection (BS 10 May 2007).

[92] According to its article 1 Enforcement Directive applies to *the measures, procedures and remedies necessary to the enforcement intellectual property rights*. Moreover, Member States are free to extend for internal purposes, the provisions of the Directive. (recital 13 Enforcement Directive) For copyright, article 8 InfoSoc Directive already contained such provision. The Enforcement Directive is without prejudice to the InfoSoc Directive (recital 16).

[93] Article 18.1 E-Commerce Directive. In Belgium: Act of 11 March 2003 concerning certain procedural aspects of information society services as meant in article 77 of the Constitution, *BS* 17 March 2003. This act only deals with procedural aspects and is to be distinguished of the act adopted on the same date and also concerning certain procedural aspects of information society services.

[94] See regarding copyright infringement in Belgium: Articles 80 *et seq*. Belgian Copyright Act.

procedure (*vordering tot staking—action en cessation*).[95] This procedure uses the same procedural paths as ordinary summary proceedings, but with the advantage that the applicant does not have to prove the urgency, and the judicial decision will be rendered on the merits, will be provisionally enforceable notwithstanding any appeal or opposition, and may be accompanied with an obligation to pay a penalty lump sum in case of noncompliance with the order. It provides the rightholder (or any other who has a legal interest) with an efficient mean to have the infringement cease rather quickly.[96] No damages can be claimed at this stage.[97]

Such an injunction can be applied for, not only against the infringer itself but also against intermediaries, for instance Internet service providers. This is of great importance in an online environment, as the infringer himself is often very difficult to identify or to sanction effectively. Intermediaries are most of the time best placed to put an end to infringements of intellectual property rights.[98] A rightholder can even apply for preventive measures to be taken by the intermediary.[99]

At the same time, the provisions of the E-Commerce Directive[100] establish a specific regime of exclusion of liability for certain intermediaries.[101] Against this backdrop, in order to obtain an injunction against the intermediary, the applicant does not need to prove that the latter acted with negligence or is personally liable for the infringing acts but simply has to establish the existence of such infringing acts, which are carried out thanks to the services of the intermediary. In contrast to an injunction against the infringer itself, even if he concludes that the applicant's (intellectual property) rights have been infringed upon, the judge has no obligation to issue an injunction against the intermediary but has a certain discretion allowing to take into account the interests and the fundamental rights and freedoms not only of the intermediary but also of those using its services.[102]

[95] Depending on the matter, a rightholder can base its action on article 114 Act of 6 April 2010 on market practices and consumer protection (BS 12 April 2010) *juncto* article 3 Act of 6 April 2010 with respect to certain procedures in the frame of Act of 6 April 2010 on market practices and consumer protection, BS 12 April 2010 (hereafter the "Procedural Act on Market Practices") and, with regard to copyrights, article 87, §1 Belgian Copyright Act.

[96] B. Michaux and E. De Gryse, "De handhaving van intellectuele rechten gereorganiseerd", TBH 2007, vol. 7, (623) 633, pt. 25.

[97] Article 3, § 3 Procedural Act on Market Practices.

[98] Recital 59 InfoSoc Directive.

[99] ECJ, case C-324/09, *L'Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L'Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi*, pt. 131 and ECJ, case C-70/10, *Scarlet Extended NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)*, pt. 31.

[100] Recital 15 Enforcement Directive.

[101] Articles 12–14 E-Commerce Directive.

[102] Antwerp 26 September 2011, *RABG* 2011, vol. 18, (1269) 1271, note P. Van Eecke and A. Fierens; ECJ, case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih Gmbh and Wega Filmproduktiongesellschaft mbH*, pt. 61 and ECJ, case C-70/10, *Scarlet Extended NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)*, pt. 43.

A rightholder shall also have the possibility to claim damages before the Belgian courts and this, in extracontractual matters, is based on article 5(3) Regulation No 44/2001 of 22 December 2000.[103] In such a case, Belgian courts shall only have jurisdiction to determine the damage caused within the Belgian territory. The principle of territoriality hinders to adjudicate on the damage caused in other Member States.[104]

The decisions of Belgian courts are in principle enforceable in other Member States. The recognition and enforcement in Belgium of judgments issued in other Members States are governed by the Brussels I-Regulation.[105]

The enforceability against an infringer who has his headquarters in a non-Member State shall be more difficult and shall mainly depend upon the existence of an international treaty with the country in which the headquarters can be found. If no bilateral treaty exists, the rules of the Belgian code of international private law shall apply.[106]

20.6 Conclusion

Our answer to the question whether the principle of exhaustion of IP rights apply in the online industry is that at this time the extension of the principle seems to be limited to computer programs. The traditional opinion holds that the right of distribution can only be exhausted when a good is sold by means of (or together with) a tangible medium. The download of the same good from a website appears thus not to trigger the exhaustion of the distribution right. As we have seen, the European Court of Justice did not hold the same opinion in respect of computer programs. Under certain conditions, the distribution right is exhausted when a copy of a computer program is downloaded. Our report showed that this decision cannot simply be extended to other categories of works but rather is rooted in the specific nature of the Software Directive. The current legislative framework simply does not allow such an extension of the exhaustion principle.

The question arises of course if a legislative intervention is necessary or desirable. In our opinion, this would be preferable. As the business models of distribution changes rapidly, a proper answer should be given to this issue on a European level. This can only be done by the legislator himself. This does not necessarily mean the latter has to choose whether or not a download can be seen as a good or as a service. It is interesting to draw the attention here on the European consumer law.

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[103] 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, 16 January 2001 (hereafter referred to as the "Brussels I-Regulation").

[104] ECJ, case C-170/12, *Peter Pinckney v KDG Mediatech AG*, pt. 45–46 and ECJ, case C-387/12, *Hi Hotel SARL v Uwe Spoering*, pt. 38–39.

[105] Article 32 *et seq*. Brussels I-Regulation.

[106] Articles 22–31 of the Belgian Act of 16 July 2004 concerning the Code of private international law.

Also in this domain, digitization had blurred the classical difference between "goods" and "services."[107] The European legislator has recently introduced the new Directive 2011/83 on consumer rights.[108] Instead of "choosing a side," a third category, namely "digital content," was introduced. Recital 19 of Directive 2011/83 states:

> Digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means. Contracts for the supply of digital content should fall within the scope of this Directive. If digital content is supplied on a tangible medium, such as a CD or a DVD, it should be considered as goods within the meaning of this Directive. Similarly to contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating, contracts for digital content which is not supplied on a tangible medium should be classified, for the purpose of this Directive, neither as sales contracts nor as service contracts (emphasis added).

Therefore, certain provisions in the new Directive make a distinction between sales agreements, service agreements, and, with regard to "digital content,"[109] "contracts for the supply of digital content which is not supplied on a tangible medium."[110]

A similar solution may be an appropriate response for the issue of exhaustion.

Nevertheless, a more fundamental question should, in our opinion, be answered first: is it desirable at all to treat digital goods and "traditional" goods equally? With regard to computer programs, the European Court of Justice clearly indicated it did. The Court decided that "The on-line transmission method is the functional equivalent of the supply of a material medium": there is no difference between making available a copy of computer program by means of a material support or by means of a download.[111] The decision of the Court is thus positive as it honors in a way the principle of equal treatment: there may be no differentiation between a buyer of a

[107] M. Demoullin, Droit des contrats à distance et du commerce électronique, Brussels, Kluwer, 2010, 7–11, nrs. 8–10; H. Jacquemin, "Digital Content and Consumer Protection within European Law" in A. Arnab and J.-N. Colin (eds.), Virtual Goods'10, Namen, P.U.N., 2010, (41) 45–47 and H. Jacquemin, "Les nouvelles règles applicables aux contrats à distance et l'incidence des Technologies de l'information et de la communication sur certaines pratiques du marché" in E. Balate, I. Ferrant, H. Jacquemin, J. Laffineur and J. Stuyck, La protection du consommateur après les lois du 6 avril 2010, Louvain-la-Neuve, Anthemis, 2010, (59) 62–65, nrs. 3–10.

[108] Directive 2011/83 of the European Parliament and the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *OJ L* 22 November 2011, nr. 304, 64.

[109] According to article 2.11 Directive 2011/83: '*Digital content*' *means data which are produced and supplied in digital form*.

[110] See for example: article 9.2(c) Directive 2011/83.

[111] *UsedSoft*, pt. 47 and 61.

CD and an online buyer of an MP3. This equalization was mainly inspired *from an economic point of view*.[112]

However, several remarks can be made at this stage.

First, this functional approach is, in our opinion, not fully respected by the Court itself. "Traditional" distribution only exhausts the rights on the original copy[113] (i.e., as it was sold to the first purchaser), while "digital" distribution, according to the Court, also *extends to the copy of the computer program sold as corrected and updated by the copyright holder*.[114] This is at least questionable, and it indicates that there is more than just a difference in the way both items are delivered.[115]

Second, from an economic point of view, the decision can also be criticized. The creation of a digital second-hand market seems to be less attractive than at first glance, both for the consumer and for the software developer.

One should remember that a secondary market could very likely have a detrimental effect on the rights of copyright holders. The value of digital goods does not decrease in time. There is at least a possibility that the quality of the goods which could thus be found on a second market be exactly the same as the original ones sold by the rightholder. In that perspective, it can be doubted whether an authentic "second hand" market actually exists at all because the second purchaser can offer the same good as the rightholder and this at a lower price.[116] Admittedly, the first purchaser has the obligation to erase its own copy of the work, though for the right holder this may prove hard to assess with certainty. As a consequence, it can be further questioned whether an online secondary market is possible at all.[117]

The question thus arises is whether the balance between the free movement of goods and the protection of intellectual property rights is properly struck. It seems doubtful to us that the exclusive right of distribution and the guarantee of receiving an appropriate award still can be ensured. After all, if a second-hand market would exist, a rightholder shall evidently have to adapt his pricing policy (i.e., to lower the prices). His possibilities of determining when, how, and at which price he brings his goods on the market prior to the others will thus become more limited. Admittedly, the same goes for a traditional industry where the second-hand market also has an influence on the prices of the rightholder. However, in an online industry, he has to compete with goods of equal quality.[118] Under these circumstances, it seems

[112] *UsedSoft*, pt. 61.

[113] See above Sect. 20.3.2.2, *An Identical Copy*.

[114] *UsedSoft*, pt. 68.

[115] M. Razavia and S. André, "*Oracle c/UsedSoft*, un an après: regard critique sur les consequences pratiques de cette decision", RLDI 2013, vol. 97, (8) 9.

[116] As the US Copyright Office emphasizes: *Physical copies of works degrade with time and use, making used copies less desirable than new ones. Digital information doe not degrade, and can be reproduced perfectly on a recipient's computer. The "used" copy is just as desirable as (in fact, is indistinguishable from) a new copy of the same work*. (See: DMCA Section 104 Report, 82 *et seq.*)

[117] DMCA Section 104 Report, 82.

[118] J. Cabay, "L'épuisement en ligne du droit d'auteur. Pérégrinations le long des frontières américaines et européennes du droit de distribution", A&M 2013, vol. 5, (303) 315–317, nr. 11.b.

doubtful whether the price still constitutes "an appropriate reward." After a "sale" in the UsedSoft sense, the user is allowed to resell the good, so that the "appropriate award" might need to be higher than in cases where only a nontransferable license is granted. This is all the more so, considering that two acts take place for which the rightholder's consent is needed: an act of distribution and, at the same time or subsequently, an act of communication to the public. For both, a rightholder can request a payment.

If the license given constitutes in fact a sale, there are thus good reasons to justify a higher price. Nevertheless, the contrary shall be more likely: as a second market with goods of equal quality emerges, the rightholder shall see itself forced to lower his prices.

It may be tempting to rely on the idea that, if exhaustion would also extend to other works, consumers would enjoy lower prices. Nonetheless, we wonder if this would truly set off all the negative effects that can come with this evolution. It goes without saying that a software developer shall take steps in order to protect its rights and to receive the aforementioned appropriate reward. As it shall be difficult to receive the latter fully, a rightholder shall have an incentive to limit the use of its goods by implementing technical protective measures. This was also suggested by the ECJ itself in order to solve the problem of first purchasers who would not delete their copy after reselling it.[119] One might therefore wonder how far these measures could or may go and if, ultimately, this would not limit the consumer in its use more than just being deprived of the right to resell its digital object. If a rightholder has to prevent the making of unlawful copies, in order to protect their rights, shall it certainly implement such measures to the extent that even a private copy might no longer be possible? Consequently, this could affect the regime of fair compensation, as the potential harm to rightholders would increase by allowing "digital exhaustion." It is thus not uncertain that the amount of a "fair compensation," which is introduced to compensate a rightholder adequately for the use made of his/her protected works or other subject matter, would increase, as the possible harm for the rightholders also increases.[120] An increase in compensation shall ultimately be paid by the consumer himself.[121]

Furthermore, the recent *UsedSoft* development gives rightholders the incentive to change their business models. As the case law of the European Court of Justice still excludes services from the principle of exhaustion, rightholders shall seek alternative ways of delivery which do not consist in providing a real copy of the good (on an intangible support). Cloud computing services such as *SaaS* (Software

[119] *UsedSoft*, pt. 79.

[120] Recital 35 InfoSoc Directive.

[121] J. Cabay, "L'épuisement en ligne du droit d'auteur. Pérégrinations le long des frontières américaines et européennes du droit de distribution", A&M 2013, vol. 5, (303) 317, nr. 11.c.

as a Service) shall become more and more important for this matter.[122] The consequence, however, is that if a consumer wants to use the service, e.g. listen to an MP3, he shall always need an Internet connection. Downloading and copying an MP3 to an IPod shall thus no longer be possible *offline*.

To conclude, although the European Court of Justice has slightly opened the door for "digital exhaustion," we think the legal framework that currently exists in the European Union does not allow a full extension of the exhaustion principle to the online industry. It seems it is up to the European legislator to provide an answer. As the US Supreme Court stated in the *Redigi* case when considering *ReDigi*'s argument that the existing legislation would be out of date if *ReDigi*'s business model would be considered unlawful: *It is left to Congress, and not this Court, to deem them outmoded.*

[122] B. Docquir, "Les programmes d'ordinateur et le droit de l'Union", IRDI 2013, vol. 2, (142)153; P. Laurent, "De auteursrechtelijke bescherming van software: drie beslissingen van het HJEU die de zaak veranderen" 24, available at http://www.crid.be/pdf/public/7198.pdf; A. Göbel, "The principal of exhaustion and the resale of downloaded software – The UsedSoft/Oracle case", ELR 2012, vol. 9, (226) 232 and M. Razavia and S. André, "*Oracle c/UsedSoft*, un an après: regard critique sur les conséquences pratiques de cette décision", RLDI 2013, vol. 97, (8) 11.

Brazil

21

Paulo Parente Marques Mendes

21.1 Exhaustion of IP Rights

Brazilian law currently establishes a principle of national exhaustion of IP rights. Basically, the owner of an IP incorporated into a product cannot impede its use if the product was introduced in the Brazilian market by the owner himself or by someone authorized by him.

In Brazil, all IP rights are subject to exhaustion of rights. To some IP rights, however, the exhaustion is international, as further detailed below.

Most cases which have reached the higher courts of Brazil refer to protection of trademarks in the context of parallel importation.

In general, the courts are allowing parallel importation of goods covered by registered trademarks, albeit the national exhaustion, in the following cases:

i) The distributor in Brazil was authorized by the owner of the trademark.
ii) The importation was made for personal use (the good was not bought to be introduced in the internal market).
iii) The owner of the trademark did not take any action for a long time despite having knowledge of the parallel importation. The time needed to make the parallel importation legal is to be defined according to the specificities of each market branch.

Trademarks, patents, and industrial designs are explicitly subject to national exhaustion rights, as per articles 132, III and 43, IV of the Brazilian Industrial Property Law,[1] respectively.

[1] Federal Law No. 9,279/96.

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The Brazilian Copyright Law (Federal Law No. 9,610/98) and the Brazilian Software Law (Federal Law No. 9,609/98) do not establish the exhaustion regime of copyrighted works and software; hence, they are submitted to the general rule of international exhaustion regime.

The Brazilian IP Law grants some rights to the owner in the specific case of trademarks even after lawful insertion in the internal market.

More specifically, the owner of a trademark registration has the right to impede the modification of the trademark in the product even after first sale, as long as the modified product is reinserted in the market (i.e., not for personal use), as per article 189, II of the Brazilian IP Law. The courts have been construing this article to also prohibit the sale of a customized product which is identified by a registered trademark.

Another legal prohibition is the one enclosed in article 190, II of the Brazilian IP Law, which prohibits an original product from being offered for sale inside a package bearing another trademark.

Recently, scholars and lawyers have been discussing the possibility of impeding a product lawfully inserted in the market from being resold in a venue which is deemed incompatible with the trademark's value. For instance, under this doctrine, the owner of a registered trademark for luxury watches could impede the resale of said watches for prices which are considerably lower and on popular venues. The basis for this proposed doctrine is the defense against dilution of the trademark, as well as the protection of consumers, considering that the second-hand market is usually less careful with packaging and information about the product. Yet this doctrine has not yet been sanctioned by the courts.

Moreover, concerning software, the Brazilian Software Law,[2] in its article 2, §5, grants the owner of copyright in software the exclusive right to authorize or prohibit commercial leasing. Also, the law explicitly states that this right is not exhausted by the sale, license, or any other form of transfer of the copy of the software.

Ultimately, in our opinion, the principle of exhaustion as conceived in Brazilian law is satisfactory and manages to balance the involved rights and interests.

21.2 "Traditional Industry"/"On Line Industry"

Brazil does neither have a formal definition of e-commerce nor any law which attempts to define it. In case law, an explicit definition has not been attempted, yet e-commerce is generally regarded as any transfer of property or rendering of services using the Internet as a medium.

Despite not being defined by any law, the online industry is regulated in Brazil by Federal Decree No. 7,962/2013, which altered the Brazilian Consumer's Code[3] to include specific provisions concerning the rights of consumers vis-a-vis the

[2] Federal Law No. 9,609/98.

[3] Federal Law No. 8,078/90.

online industry. Establishing a minute list of obligations to service providers online—including group buying websites—the Decree aims at providing clear information to consumers, easy to use customer service and full right of cancelling and returning goods purchased online.

21.3 Exhaustion of IP Rights in "On Line Industry"

As far as our research went, there have been only cases regarding issues of exhaustion of trademarks.

We are not aware of any cases which dealt differently with exhaustion of trademark rights in traditional industry vis-à-vis online industry.

Accordingly, we are not aware of any court decision which dealt with a case similar to Oracle (EU Court) in Brazil.

Yet we should think that Brazilian courts would construe the license of software as exhausting IP rights in it, as the EU Court of Justice did in the Oracle case. Contrarily to some other national laws, Brazil does not confine exhaustion of rights to a transfer of property (purchase or donation) but defines it by the "insertion in the market," which is a term that can be construed to include the license of use.

Corroborating this is the language of article 2, §5 of the Brazilian Software Law[4]:

> *§ 5. Among the rights guaranteed by this Law, and by the copyright legislation and connected provisions currently in force in Brazil, is included the exclusive right to authorize or prohibit commercial leasing. <u>This right is not exhausted by the sale, license or any other form of transfer of the copy of the software</u>* (our highlight).

The underlined part of the article links exhaustion of rights to the licensing of software and seems to consider the license as a species of "transfer of the copy of the software."

In theory, a contract could establish control of the owner of an IP right over the use and destination of the product which incorporates said IP right.

Yet, as the Brazilian Law upholds the exhaustion principle, this contractual restriction would be construed as waving of rights.

Brazilian Civil Code (Federal Law No. 10,406/2002) states in article 423 that any waiver of rights in adhesion contracts are considered null.

Hence, if the contract in case is considered as an adhesion contract (as most contracts are), the contractual restrictions to the usage of works should be considered null. The same nullity applies to contracts entered into with consumers, as per article 51 of the Brazilian Consumer Code (Federal Law No. 8,078/1990).

On the other hand, the contractual restriction would probably be considered lawful if the parties have thoroughly discussed the contract and the end party is not considered a consumer.

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[4] Federal Law No. 9,609/98.

Ultimately, Brazilian law and case law has not yet been directly influenced by decisions from the US or the EU.

21.4 IP Rights and Online Industry: Infringement and Remedies

In Brazil, the concept of "online infringement" of an IP right does not differ from a traditional infringement.

As a matter of fact, any acts which violate third parties' legitimate rights in a digital environment, such as a website, would be considered an infringement on the digital platform.

Basically, the same remedies available in relation to traditional infringements are available in relation to online infringements. Of course, what would be a "seizure" of infringing products is substituted by the takedown of the infringing website and/or material.

In our opinion, current legislation in Brazil is generally adequate to treat online infringement but may fall short on some specific issues. As noted above, the seizure available in traditional infringement may not be undertaken in online infringement.

In order to take down a website, one must request the judge to send a notification to Registro.br (Brazilian registrar) or to determine the infringing party to shut down the site/remove the infringing material under penalty of a daily fine.

It must be noted that neither the police nor government authorities have powers to take down websites; these powers are exclusive to the Judiciary and Registro.br.

It is important to highlight that Brazil has enacted a law to regulate the Internet called "Marco Civil." Yet "Marco Civil" does not grant powers to any authority other than the Judiciary to take down websites.

In any event, and notwithstanding our critical standpoint stated above, Brazilian Civil Procedure law grants effective preliminary/interim remedies in case of online infringement.

In fact, granted that plaintiff is able to evidence a risk of irrecoverable damage and a probability of infringement, the Judge may issue orders to impede or mitigate the infringement before a ruling is available. This request may be made in any step of the proceeding.

Most of the time, the difficulty of enforcing a decision against an "on-line infringer" arises from the fact that he has used fake information to register his website or, even if the information is real, plaintiff cannot obtain his actual location in order to seize infringing products or to collect damages.

Of course, this difficulty significantly arises if the infringer is located abroad and/or if the website is hosted in a foreign country, as a Brazilian judge does not have jurisdiction over a foreign country's registrar.

21.5 Conclusion

In our opinion, a different application of the principle of exhaustion of IP rights to online industry is not necessary.

Brazilian lawyers have been monitoring closely recent cases arising in the USA and EU concerning the attempt of owners of IP rights to control the resale of products distributed online, such as music, films, and software. In our view, the use of license agreements instead of purchase agreements may lead to a crisis in the IP law and the exhaustion principle, with wide economic effects.

However, as far as national law is concerned, any significant change in the exhaustion principle of IP rights in the online industry has not yet ensued.

IP law in Brazil is generally adequate to face the phenomenon of the online industry. Yet some changes should be probably undertaken regarding specific remedies against infringement of IP rights over the Digital Market Place.

In particular, we are of the opinion that the exhaustion principle should be adapted in order to protect marketing strategies and safeguard commercial reputation and consumer rights. Yet this adaptation should be done very carefully and be mindful of the secondary market and consumers' freedom concerning the destination of products which embody IP rights.

Bulgaria 22

Teodora V. Tsenova

22.1 Exhaustion of IP Rights

22.1.1 General Notes

The approach undertaken by the Bulgarian legislator regarding IP rights is that each type of IP is regulated in a separate statutory act. Therefore, there is no single definition of exhaustion of IP rights, and depending on the type of IP, the rules of exhaustion may vary.

The following common characteristics of the principle of exhaustion of IP rights under Bulgarian law may be derived from the effective legislation: (1) the first sale or another act of transfer of the goods, incorporating or marked with the respective IP, (2) where the IP has been placed on/incorporated in the goods in question by or with the consent of the IP holder and (3) the first sale or another act of transfer has been made by the IP holder or with his consent, (4) limits the rights of the IP holder with respect to the goods in question.

However, two separate approaches may be identified, namely towards (1) exhaustion of copyright and related rights and (2) exhaustion of industrial property rights. The main difference in both approaches is that while the exhaustion with respect to copyright and related rights limits only one of the bundle of rights of the right holder, the exhaustion of industrial property rights terminates all exclusive rights (with some exceptions) of the right holder.

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22.1.2 Exhaustion of Copyright and Related Rights

The principle of exhaustion of copyrights and related rights was introduced in the Bulgarian copyright legislation with the adoption in 1993 of the Law on Copyright and Related Rights (hereinafter "LCRR"), currently in effect.[1] In contrast to the remaining IP-related statutory instruments, the LCRR does not use the term "exhaustion" but instead uses "termination" of the right. This, however, does not lead to different interpretation of the effect of the rule. For the sake of consistency, the generally accepted term "exhaustion" is used in that report, irrespective of the specific IP in question.

The LCRR defines the exhaustion of rights in the field of copyright and related rights in its Art. 18a.[2] According to this provision,[3] the first sale or another act of transfer of ownership in the original or copy of a work, made by the copyright holder or with his consent, terminates the right of distribution of the copyright holder with respect to the original or copy in question.

Article 18a applies to all copyright protected works, including, among others, computer programs and databases, insofar as the law does not differentiate between the different types of works.

The scope of exhaustion under the law covers any eligible transaction within the territory of the EU.[4] Before accession of Bulgaria to the EU, national exhaustion was applied, as opposed to the currently effective regional exhaustion.

The exhaustion principle with respect to copyright and related rights is not unlimited. Firstly, exhaustion applies only with respect to the right of distribution, and the remainder of rights of the copyright holder remain intact. Further, the first sale or another transfer does not affect the rental right regarding the respective original(s) or copies of the work (the rental right is considered to be encompassed by the right of distribution). The resale right of the copyright holder and the right to receive remuneration for each lending of the work are also unaffected by the exhaustion rule.

It should be noted that from the scope of the exhaustion rule are excluded online provided works with respect to the material copies of the works made with the

[1] Initially, the principle was set in Art. 18 (4) of the law.

[2] The adoption of a separate article to regulate exhaustion of rights happened in 2002.

[3] The current version of Art. 18a reads as follows: "The first sale or another transaction on the territory of the Member States of the European Union made by the copyright holder or with his consent which transfers ownership in the original or copy of the work shall lead to termination of the right of their distribution on this territory, without prejudice to the right to rental. (2) The provision of para 1 shall not affect the rights referred to in Art. 20 and Art. 22a, para 2. (3) The provision of para 1 does not apply to cases of provision of originals or copies of the work in digital way, in respect to the materialised copies of the work made by the recipient with the consent of the copyright holder."

[4] Considering, however, that on EU level exhaustion for the territory of the European Economic Area is to be applied, it may be reasonably concluded that the exhaustion rule should be interpreted as covering the territory of the European Economic Area.

consent of the copyright holder. For example, the exclusion would cover cases such as an e-book or computer program, licensed for use by or with the consent of the copyright holder and stored on the hard drive of a computer or another device. (Please see Sect. 22.3.2 below on the interpretation of that exclusion rule in the light of the Judgement of the CJEU on case C-128/11.)

The exhaustion rule applies accordingly also to related rights, i.e. the rights of performing artists, producers of phonograms, film producers and those of radio and TV organisations with respect to their programs.[5]

22.1.3 Exhaustion of Industrial Property Rights

All of the Bulgarian statutory acts on industrial property provide for exhaustion of the respective rights with the fact of first placement on the market of the goods in question. In particular, that principle is introduced and applicable with respect to all types of industrial property,[6] recognised by the Bulgarian law. Relevant rules are contained in the legislation on trademarks,[7] industrial designs,[8] patent and utility models,[9] as well as on the topographies of integrated circuits.[10]

All of the relevant statutory acts use the same approach in defining the exhaustion of the rights in goods (products). More specifically, the first placement on the market of the respective goods (branded with a mark or incorporating a registered design or patent/utility model or topography of integrated circuits or similar) leads to exhaustion of the respective IP regarding such goods (products), provided they have been placed by or with the consent of the IP proprietor.

The trademark and industrial design legislation reproduces to a great extent the respective texts of Directive 2008/95/EC[11] related to trademarks and of Directive 98/71/EC[12] related to designs. In addition to a rule corresponding to Art. 15 of Directive 98/71/EC, the Bulgarian industrial designs act contains also a provision, similar to para. 2 of Art. 7 of Directive 2008/95/EC. In particular, the law provides that the exhaustion rule does not cover cases, where the goods are altered. Accordingly, the exhaustion rule with respect to both trademarks and industrial designs is

[5] The law uses a specific legislative technique extending application of that rule to the listed types of related rights by way of reference, made, respectively, in Art. 84, Art. 90, Art. 90v and Art. 93 of the LCRR.

[6] Except for geographical indications, which is understandable in view of the characteristics and function of that type of industrial property.

[7] Art. 15 of the Law on Marks and Geographical Indications.

[8] Art. 21 of the Law on Industrial Designs.

[9] Art. 20a of the Law on Patents and Registration of Utility Models.

[10] Art. 18 of the Law on the Topographies of Integrated Circuits.

[11] Directive No. 2008/95/EC of the European Parliament and the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks, OJ 2008, L 299, p. 25.

[12] Directive No. 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, OJ 1998, L 289, p. 28.

not unlimited and the exclusive rights of the trademark/industrial design proprietor would continue to apply with respect to goods, put on the market by or with his consent, which are subsequently altered. The exhaustion rule on trademarks would also not apply for goods, which condition is impaired after they were placed on the market.

The patent and utility model legislation provides that the exclusive patent/utility model rights do not cover actions with respect to a product protected with a patent/utility model, which has been put on the market on the territory of the European Economic Area (EEA) by or with the consent of the patent/utility model proprietor. There are also special rules with respect to rights in biological material, plant propagating material and breeding stock or other animal reproductive material, whereunder limitations on the exhaustion rule are provided in relation to the listed types of materials.

Under the currently effective legislation, placement on the Bulgarian market of a product incorporating topography of integrated circuits leads to exhaustion of the rights with respect to the product in question, for the territory of Bulgaria only. The law does not provide for any limitations or exceptions to that rule.

All of the referenced statutory acts, except for one, embody the principle of regional (Community) exhaustion, where the rights are considered exhausted for the territory of the EEA with the fact of first placement on the market of any of the EEA Member States. In effect, at the time of the accession of Bulgaria to the European Union, the principle of national exhaustion has been abandoned in favour of the principle of regional exhaustion for all other IP rights. It is only with regard to topographies of integrated circuits that national exhaustion is still applied. Thus, the law on the topographies of integrated circuits appears in this regard to be incompliant with EU law. In the light of the Constitutional rule[13] that all international treaties to which Bulgaria is a party, which have been duly ratified and promulgated in the State Gazette, have priority over domestic statutory acts that contradict them, and considering CJEU extensive case law on the rules on free movement of goods, as laid down in the EU founding treaties,[14] it may be concluded that despite this omission of the Bulgarian legislation, there are normative grounds for application of regional exhaustion with respect to topographies of integrated circuits as well. Nevertheless, amendment of the relevant statutory rule to address regional (Community) exhaustion is highly recommendable.

22.1.4 Bulgarian Court Practice on Exhaustion of IP Rights

22.1.4.1 Exhaustion of Copyright and Related Rights

There is very limited practice of the Bulgarian courts of law, discussing the rule of Art. 18a of the LCRR. Exhaustion of the right of distribution has been mainly

[13] Art. 5, para. 4.

[14] With respect to Arts 34–36 of the TFEU.

addressed in the context of criminal proceedings for crimes against copyright. In particular, in several cases, the courts of law have confirmed that Internet clubs, providing to its clients the possibility to play computer games, installed on computers available in the clubs, actually rent computer programs (games), and therefore the exhaustion rule under the law does not cover such cases.[15] No court practice is available where exhaustion of copyright/related rights has been among the main subject matters of the dispute, and hence it remains unclear how the Bulgarian courts would apply the rule to more complex cases (e.g., cases of online uses of works).

22.1.4.2 Exhaustion of Industrial Property Rights

Exhaustion of industrial property rights has been examined by the Bulgarian courts, mainly in cases decided the last decade. Publicly available cases where exhaustion of rights has been addressed relate to trademark rights in the context of parallel imports. In an interpretive decision of 2012,[16] the Supreme Court of Cassation (hereinafter "SCC") expressly examined the principle of exhaustion of trademark rights under Art. 15 of the Law on Marks and Geographical Indications (hereinafter "LMGI"). In its decision, the SCC ruled that the principle of exhaustion of rights applies and has relevance with respect to genuine goods only. The SCC also noted that in view of the fact that exhaustion of rights applies only to genuine goods, the exhaustion rule should not be reviewed in trademark infringement cases under the LMGI because it is not applicable to trademark infringements under the LMGI. The latter conclusion is grounded on a prior interpretive decision of the SCC, holding that "trademark infringement," as defined in the LMGI in relation to available civil claims for trademark infringements, covers only cases of counterfeit goods.

The above-addressed interpretive decisions mark some quite controversial developments of the court practice on trademark infringement cases in Bulgaria. More specifically, with an interpretive decision of 2009,[17] the SCC supported a position highly criticised by the academic community. According to the SCC, as far as commercial use of genuine goods is concerned, such goods are excluded from the scope of the statutory definition of trademark infringement for the purposes of trademark civil claims, regulated by the LMGI. An attempt to change that position was made in 2011, but with the interpretive decision of 2012, the SCC re-confirmed its original position, stating that such position contradicts neither the case law of the CJEU nor the secondary legislation of the EU. The SCC, however, specified that its decision relates only to civil claims available in the event of

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[15] Decision on criminal case No. 2556 of 2009 of Plovdiv Regional Court.

[16] Interpretive Decision No. 1/2009 in interpretive case No. 1 of 2008 of the General Assembly of the Commercial Chamber of the Supreme Court of Cassation. Interpretive decisions are binding upon the lower instance courts, as well as the panels of the Supreme Court of Cassation.

[17] Interpretive Decision No. 1/2009 in interpretive case No. 1 of 2008 of the General Assembly of the Commercial Chamber of the Supreme Court of Cassation.

trademark infringement under the LMGI and not to the rest of the enforcement mechanisms available to a trademark proprietors under the LMGI—e.g., preliminary measures or measures for collection of evidence. To the extent that any use of trademarks in relation to genuine goods is concerned, the SCC stated that the trademark proprietor may seek enforcement of its rights on grounds of the general contract and/or tort rules.

In conclusion, given that the interpretive decisions of the SCC are binding on the lower instance courts and the panels of SCC, for the time being it may be expected that the Bulgarian courts would apply the rule on exhaustion of trademark rights narrowly, where exhaustion would be relevant only with respect to genuine goods.

22.2 "Traditional Industry"/"On-Line Industry"

The IP legislation does not differentiate between traditional and online industry. With the emerging of new technologies, the Bulgarian IP legislation (mainly copyright legislation) has been amended to include provisions that expressly address rights and situations, related to the Internet (e.g., express inclusion of economic right to cover digital transmission of works, specific rules on computer programs, etc.).

Bulgarian legislation does not provide a specific definition of the "on-line industry." General rules related to e-commerce are contained in the Law on E-Commerce (LEC), which implements Directive 2000/31/EC.[18] The law defines "e-commerce" as provision of a service of the information society, where "information society service" is defined as a service, normally provided for remuneration, at a distance, by electronic means and at the individual request of the service recipient. Given the broad definition, the concept of e-commerce comprises m-commerce and all other activities related to the supply of goods or services through a digital platform or distance means of communication.

The provisions of LEC on exemption of liability of service providers reiterate the rules of the EU Directive on electronic commerce but also set forth additional safe harbours. In particular, the LEC contains express rules on hyperlinking and automated search engine services.

So far there is no relevant court or administrative practice, as the limited published cases on LEC relate mainly to unsolicited commercial communication and the requirements for identification of providers of information society services.

[18] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), OJ 2000, L178, p. 1.

22.3 Exhaustion of IP Rights in the "On-Line Industry"

22.3.1 Bulgarian Court Practice on Exhaustion of IP Rights in the "On-Line Industry"

As noted in Sect. 22.1.4 above, the Bulgarian court practice on exhaustion of IP rights is very limited. In most of the publicly available court decisions addressing the principle of exhaustion of rights, the principle was only mentioned, without detailed discussion of any specifics of its application to different objects or environments.

There are no publicly available court decisions on online use of copyright protected works where the principle of exhaustion of the right of distribution is addressed or taken into account.

In the field of online use of industrial property, there are a few decisions discussing offers and sale on the Internet of goods, branded with trademarks of third persons and related use of such trademarks on the respective websites for advertising purposes. In the light of the two interpretive decisions of the SCC, addressed in Sect. 22.1.4.2 above, the main subject of examination by the courts in those cases is the question whether the goods offered for sale are genuine or not. In all cases, after concluding that genuine goods have been offered online, the courts have found that there is no trademark "infringement" at least as far as the LMGI is concerned.[19] The question on exhaustion of rights was not examined since it was deemed irrelevant to the respective proceedings.[20] Until the date of this report, no court decisions are available on claims for damages in tort due to trademark infringement, where genuine goods were involved.

22.3.2 Article 18a, para. 3 of the LCRR in the Light of the Case *UsedSoft GmbH v Oracle International Corp.*

As it has already been noted in Sect. 22.1.1 above, the exhaustion rule of Art. 18a of the LCRR applies to all types of works within its scope, including, among others, computer programs. Paragraph 3 of this article mirrors to a great extent the wording of Recital 29 of Directive 2001/29/EC.[21] In particular, the law says that the

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[19] Decision No. 133 of 15 January 2013 on commercial case No. 1055/2010 of the Supreme Court of Cassation, First Chamber, 3-judge panel.

[20] It is interesting to note, that the courts in all mentioned decisions ruled that there was no trademark infringement. The unauthorised use of others' trademarks for advertisement purposes was not examined in detail and only a general conclusion was made, that since the cases concerned offers for sale of genuine goods, the use of others' trademarks to offer such goods (i.e., the advertisement purposes of the use) did not constitute trademark infringement under the LMGI.

[21] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Information Society Directive), OJ 2001, L 167, p. 10.

principle of exhaustion of the distribution right does not apply with respect to the material copies of a work, made by the user with the consent of the copyright holder when the work has been provided to the user online (i.e., digitally).

On the other hand, recalling that "Directive 2009/24 [. . .] constitutes a *lex specialis* in relation to Directive 2001/29,"[22] the CJEU ruled that the limitation of the scope of the rule of exhaustion (online services excluded), as provided in the Information Society Directive, does not apply to computer programs, given that the exhaustion rule of Directive 2009/24/EC on the legal protection of computer programs (Computer Programs Directive) prevails as *lex specialis*. Based on that and the interpretation of Art. 4, para 2 of the Computer Programs Directive, the CJEU has concluded that "the right of distribution of a copy of a computer program is exhausted if the copyright holder who has authorised, even free of charge, the downloading of that copy from the internet onto a data carrier has also conferred, in return for payment of a fee intended to enable him to obtain a remuneration corresponding to the economic value of the copy of the work of which he is the proprietor, a right to use that copy for an unlimited period."[23]

It is clear from the above that the rule of Art. 18a, para. 3 of the LCRR, with respect to exhaustion of the distribution right regarding computer programs, contradicts the interpretation of the CJEU of the exhaustion principle, as embedded in the Computer Programs Directive. Thus, it may be concluded that the exhaustion rule regarding computer programs has not been implemented correctly in the Bulgarian LCRR.

As of the date of this report, there are no Bulgarian court decisions available which discuss the right to distribution with respect to copies of works downloaded online, including specifically with respect to computer programs. In view of the fact that the norm of Art. 18a, para. 3 is effective, and as such binding on the territory of Bulgaria to all concerned subjects, as well as on the courts, it may not be expected that Bulgarian courts would apply the interpretation provided by the CJEU in case C-128/2011, before Art. 18a, para. 3 of the LCRR is amended.

Therefore, it is recommendable that the rule of Art. 18a, para. 3 of the LCRR is amended to reflect the difference in the application of the exhaustion principle to computer programs, downloaded online, and other works.

22.3.3 Contractual Restriction of the Usage of Works

There is no available Bulgarian court practice on the validity of contractual limitations to the distribution right regarding works, with respect to which this right has been exhausted by virtue of the law, i.e. on post-sale restrictions.

It should be noted that the principle of exhaustion is a mandatory rules of law, from which no deviation by means of contractual stipulation is permissible. On

[22] CJEU, Case C-128/11, *UsedSoft GmbH v Oracle International Corp.*, ECR 2012 I-0000, pt 56.

[23] CJEU, Case C-128/11, *UsedSoft GmbH v Oracle International Corp.*, ECR 2012 I-0000, pt 72.

grounds of the fact that the imposition of restrictions on transfer after exhaustion of the distribution rights would actually achieve an effect, contrary to the exhaustion principle, such contractual limitations should be considered void.

22.4 IP Rights and On-Line Industry: Infringement and Remedies

22.4.1 Single Concept of Infringement of IP Rights

The Bulgarian legislation does not differentiate between online infringement and traditional infringement of IP rights. Therefore, the same rules apply irrespective of whether the infringement is performed in the digital or traditional environment.

Further, no difference may be established in the approach of the Bulgarian courts to infringements performed online and offline. Indeed, in the few available court decisions concerning infringement of copyright on the Internet, the courts have examined the economic right, specifically created to answer the digital realities and in particular the right to digital transmission.[24] Apart from that, cases of online and offline infringements do not feature any difference in the collection and examination of evidence or the application of the statutory rules. Accordingly, the courts follow the same approach in deciding both types of cases.

22.4.2 Remedies Available in Case of an "On-Line Infringement"

Given that there is no differentiation in the law between online and offline infringements, the remedies available under the law should be accordingly applied and used to infringements performed in both environments.

Generally, the remedies available under the IP legislation to an IP holder in the event of infringement of his rights are[25] (1) civil action—for ascertaining of the fact of infringement, injunction ordering discontinuation of the infringement and compensation for damages suffered; (2) criminal prosecution; (3) administrative enforcement—imposition of monetary sanctions by the competent authorities and injunction ordering discontinuation of the infringement; or (4) border control measures. Clearly, border control measures are not available for online infringements. As for the rest of the enumerated types, each of them may be applied to infringements made online. The main difference is that the course of action mentioned in "1" above is initiated by the right holder and the burden lays on the

[24] The LCRR determines this right as "the provision of access to unlimited number of persons to works or parts thereof, by wire or wireless means, where access may be made from a place and at a time, individually chosen by the individuals."

[25] The statutory acts regulating the different types of IP provide for some IP specific remedies, e.g. civil claim for destruction of counterfeit goods, which however seem to be irrelevant for the present report.

right holder to prove that its rights have been infringed (as well as the actual amount of damages suffered—if claimed). With the options under “2” and “3” above, the right holder needs only to inform the competent authorities about an alleged infringement of its IP rights, and it will be for the competent authorities to investigate the case, collect evidence, etc. On the other hand, since the IP holder would not have a leading role, he will have only very limited possibilities to influence the developments of the relevant proceedings.

Based on the available court practice, online infringements of copyright have been mainly addressed in a few criminal proceedings.[26] A reason for that seems to be the fact that the police and investigating authorities have a broad range of powers to investigate, and all state bodies and private persons are under the obligation to provide them any required information and documentation they have. Thus, criminal proceedings prove more effective in identifying who performed an online infringement, when it was performed and how it was performed (qualifying as a crime), as opposed to civil actions, where the burden of proof is on the plaintiff, who normally has limited means for collecting evidence and information.[27] A difficulty in the context of criminal proceedings is the fact that under Bulgarian law only individuals may bear criminal liability. Given that most business activities nowadays are conducted by legal entities, the above-mentioned specifics require additional efforts in identifying the individual or individuals who have performed the respective infringing acts through a legal person.

The limited court practice concerning infringement of industrial property relates to use of others’ trademark on the Internet. The subject matter of such proceedings has been mainly offers for sale and sale of goods online and use in advertisements. The approach of the courts in examining and deciding such claims does not differ in any aspect from that applied to traditional infringements. Please refer to Sect. 22.3.1 above on a brief overview of the available court practice on trademark infringements online.

22.4.3 Preliminary (Interim) Proceedings with Respect to IP Infringements

The preliminary measures available under Bulgarian IP legislation do not differentiate between the environment of the alleged infringement (online or offline). Imposition of preliminary measures may be requested prior to initiating civil action or in the course of already pending proceedings.

[26] Mainly in relation to the activities of “torrent” related websites.

[27] Indeed, for the purposes of collection of evidence, the law entitles the claimant to request provision of evidence and information from the defendant and third persons. This procedural possibility however, is not that productive, because it does not have the effect of surprise and also in practice the possibility of the claimant to make multiple of such requests, depending on the obtained or provided information, is not unlimited.

The main difficulty in obtaining a preliminary injunction, especially before initiating civil action, is the requirement under the law to present to the courts sufficient evidence on the alleged infringement. As mentioned in Sect. 22.4.2 above, lack of sufficient evidence on infringements performed online is usually the main hurdle to the success of a civil claim.

22.5 Conclusion and Recommendations

Under Bulgarian law, the principle of exhaustion of rights exists with respect to all types of IP. With one exception, Bulgaria applies regional exhaustion where the first transaction on the territory of an EEA Member State by or with the consent of the right holder precludes him from the possibility to object to further use, regarding industrial property, and further distribution, regarding copyright and related rights, of the goods in question.

Bulgarian legislation does not contain different rules on exhaustion in traditional and online environment. There is one single rule in the copyright and related rights law, addressing online provision of works, whereunder no exhaustion of distribution right occurs regarding the material copy of an online provided work, made by or with the consent of the right holder. Since this rule applies to all copyright protected works, in the light of the judgement of the CJEU in the case C-128/2011, it appears that the exhaustion principle in relation to computer programs has not been implemented correctly in the Bulgarian LCRR. Therefore, it is recommendable that the LCRR (Art. 18a, para. 3) is amended to reflect the difference in the application of the exhaustion principle to computer programs and other types of works downloaded online.

There is very limited practice of the Bulgarian courts on the application of the exhaustion principle in general. There is no available practice on the application of the exhaustion principle to the online industry in relation to copyright and related rights. The limited amount of published court decisions on industrial property used online and the exhaustion of rights in that context relate to trademarks.

Further, the Bulgarian legislation does not differentiate between online and offline infringements of IP, and the limited publicly available court practice on infringements online does not reveal different approach of the courts in examining and deciding cases in both environments. The main problem, with which IP holders are confronted when their rights are infringed online, relates to the difficulty in collecting evidence on the infringements, which is among the main reasons for the small number of claims filed in Bulgarian courts for online infringements.

Czech Republic 23

Karin Pomaizlova

At present, a question arises as to whether the state of the law is keeping up with the pace of technological developments and whether it is necessary to amend national laws and European law or not. The Czech Republic is no exception. Currently, the principle of exhaustion of IP rights on digital media is subject to public discussion. A definitive answer can be only provided by a decision of the Supreme Court of the Czech Republic, which has yet to receive a case that would address this legal problem. As the Czech Republic is part of the European Union, the interpretation of the national laws has to be also compliant with the EU directives and the interpretation of the ECJ/CJEU of these directives. This paper mainly focuses on the issue of copyright exhaustion, as copyright/author's rights are the most frequent rights that apply to digital media and online industry, and also on the exhaustion of trademark rights.

23.1 Author's Act No. 121/2000 Coll.

The Author's Act no 121/2000 Coll., as amended, provides protection to the following works:

> Article (1)
> The subject matter of copyright shall be a literary work or any other work of art or a scientific work, which is a unique outcome of the creative activity of the author and is expressed in any objectively perceivable manner **including electronic form**, permanent or temporary, irrespective of its scope, purpose or significance (hereinafter referred to as "work"). A work shall be, without limitation, a literary work expressed by speech or in writing, a musical work, a dramatic work or musical-dramatic work, a choreographic work and pantomimic work, a photographic work and a work produced by a process

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similar to photography, an audiovisual work such as a cinematographic work, a work of fine arts such as a painting, graphic or sculptural work, an work of architecture including an urban design work, a work of applied art, and a cartographic work.

(2)

A computer program shall also be considered a work if it is original in the sense that it is the author's own intellectual creation. A database which by the way of the selection or arrangement of its content is the author's own intellectual creation, and in which the individual parts are arranged in a systematic or methodical way and are individually accessible by electronic or other means, is a collection of works. No other criteria shall be applied to determine their eligibility for that protection. A photograph or a work produced by a process similar to photography, which are original in the sense of the first sentence, shall be protected as a photographic work.

(3)

A collection like a journal, encyclopedia, anthology, exhibition, or any other collection of independent works or other elements that by reason of their selection and of the arrangement of the content meet the conditions set out in Paragraph 1 above, is a collection of works.

(4)

The items that are not works hereunder, shall include, but are not limited to the theme (subject) of a work as such, the news of the day and any other fact as such, an idea, procedure, principle, method, discovery, scientific theory, mathematical and similar formula, statistical diagram and similar item as such.

(5)

Alongside the author's right to his work, the Czech Author's Act also provides protection to the rights related to author's rights:

(i) The rights of a performer to his artistic performance;
(ii) The right of a producer of a phonogram to his phonogram;
(iii) The right of a producer of an audiovisual fixation to his fixation;
(iv) The right of a radio or television broadcaster to his broadcast;
(v) The rights enjoyed, in respect of a previously unpublished work, by the person who, after the expiry of copyright protection, for the first time lawfully made the work public;
(vi) The right of a publisher to remuneration in connection with the making for personal use of a copy of the work published by him;
(vii) The rights of a database maker to his database.

Most of these rights can be transformed into digital format and made available to public, and distributed on-line. The exhaustion of digitalized author's works mainly concern e-books, music and film downloads, photographs and software. Under the general concept of Czech author's law, the author has the right to use his work in its initial form or in a form adapted by another person. Third parties may use the author's work only with the author's permission (safe legal exceptions, which are out of the scope of this paper). The forms of use are provided for in the author's law by way of example, these are mainly:

(i) to reproduce a work,
(ii) to distribute an original or a copy of the work,
(iii) to rent an original or a copy of the work,
(iv) to lend an original or a copy of the work,
(v) to exhibit an original or a copy of the work,
(vi) to communicate the work to the public.

The principle of exhaustion applies only to the distribution of the original of the author's work or its copy. The distribution, according to Article 14 paragraph 1 of the Author's Act, means

> The distribution of the original or copies of a work shall mean making the work available **in a tangible form** by sale or other transfer of ownership of an original or to a copy of the work, including their offer for such purposes.

The exhaustion of the author's distribution rights is outlined in Article 14 paragraph 2 of the Author's Act as follows:

> The author's distribution right, in the territory of a member state of the European Communities or any other Party to the Agreement on the European Economic Area, to the original or copy of a work, is exhausted by the first sale or any other first transfer of ownership to such an original or a copy of a work **in a tangible form**, that was performed by the author or with the author's consent in the territory of a member state of the European Communities or any other Party to the Agreement on the European Economic Area; rental right to the work and lending right to the work shall remain unaffected.[1]

The Czech Author's Act differentiates between the tangible and intangible form of author's works. Under the Czech law, the author's works in their intangible form are being "communicated" to the public, rather than distributed.

The communication of a work to the public under Article 18 of the Author's Act shall mean making the work available in an **intangible form**, live or from a recording, by wire or wireless means. It shall also mean making the work available in such a way that members of the public may access it from a place and at a time individually chosen by them, **especially by using a computer network or similar network**. For avoidance of doubt, the communication of the work to the public shall not mean the mere operation of a facility enabling or ensuring such communication. As regards exhaustion of author's rights, the Czech Author's Act expressly provides in Article 18 paragraph 4 that by communication of the work to the public the author's right shall not be exhausted.

A question arises, therefore, as to whether the communication of author's work to the public in its intangible form, i.e. giving access to the public to one's works by wire or through wireless means or by using a computer or a similar network, also covers situations where the end user downloads the work in its digital form onto its own computer or similar device (tablet, telephone, MP3 player).

Unlike in the event of broadcasting the work, certain sharing of digital works requires the end user to download the digital file, i.e. make his own copy of the work on his device. On the one hand, a TV broadcaster can make some of its programs available online for viewing via Internet access (usually for free). On the other hand, a music publisher or software house can provide music files or software to the end user by way of authorized downloads into the end user's device. The latter is a growing business, where the end user pays for downloading the copyrighted music, films, games, software, e-books, etc. Economically, the latter is certainly closer to

[1] This provision is in line with the principle outlined by the ECJ in the case Warner Brothers Inc. and Metronome Video Aps v. Erik Viuff Christiansen C-158/86 and also Directive 2001/29/ES. This means that purchasing an original or copy of author's work in a tangible form does not allow the purchaser to use the author's work by way of its rental or lending to third parties.

the sale of author's works on CDs, DVDs, or in a printed form, where the end user obtains ownership to a tangible carrier of the author's work.

The end user paid the rights owner for the possibility to have at his disposal a copy of an author's work. It can be anticipated that the owner of the digital copy, likewise the owner of the tangible copy of the works, would like to dispose of it in a similar manner, for example be able to re-sell it or give it to somebody else. Certain providers of digital content provide technically a function that enables the end user to "give" an e-book to somebody else, but that does not solve a legal situation where a third party would like to base its business on such works and purchase and re-sell such digital works (save that the original copy of the end user would be deleted).

The new Czech Civil Code effective as of 1 January 2014 (Act no. 89/2012 Coll.) expressly provides for tangible and intangible things in legal sense, i.e. the ownership can be transferred not only to tangible works but also to works in their intangible form. Thus, the Civil Code does not exclude in principle that the author's rights be exhausted to digital works sold over the Internet by allowing the end user to download them to the end user's device. However, as long as Article 14 paragraph 2 of the Author's Act expressly provides only for exhaustion of rights vested in works expressed in a tangible form, the exhaustion of rights in digital works remains only a theoretical matter.

23.2 The Trademark Act

Under Section 11 of the Czech Trademark Act No. 441/2003 Coll., the proprietor of a trademark is not entitled to prohibit its use in relation to goods, which have been put on the market in the Czech Republic, in a member state of the European Union or in another member state of the European Economic Area under that trademark by the proprietor or with his consent, except where the proprietor of the trademark has legitimate reasons to prohibit further commercial dealings in the goods, in particular where the condition of the goods has been changed or impaired after they have been put on the market. The Trademark Act does not distinguish between tangible and intangible goods. The goods mean anything other than services. As already mentioned above, under the new Civil Code, things in legal sense can be both tangible and intangible. Also, software is traditionally classified in class 9, which under the Nice Agreement on international classification of goods and services is a class reserved for goods, not services. This is one more reason to justify provision of intangible copyrighted contents as goods, subject to trademark exhaustion.

Traditionally, the Czech Republic and (before that) Czechoslovakia applied the regime of worldwide exhaustion, i.e. the rights of the trademark owner were exhausted as soon as first placement of his goods with his consent took place. In connection with Czech Republic joining the European Communities,[2] the new Trademark Act was adopted (no. 441/2003 Coll. effective as of 1 April 2004).

[2] 1 May 2004.

Under the new Trademark Act, the principle of regional exhaustion was introduced into the Czech legal system, in which the trademark owner's rights are exhausted by first placement of goods on the market within the territory of the member states of the European Economic Area.

23.3 European Perspective

The legal framework for exhaustion of copyright was set out by Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society (the "Information Society Directive").

The aim of the Information Society Directive was to foster the development of the information society in Europe, unified internal market within the Community and increased competitiveness of European industry, both in the area of content provision and information technology. The Directive acknowledges that technological development has multiplied and diversified the vectors for creation, production and exploitation and that the law on copyright and related rights needed to be adopted and supplemented to respond adequately to economic realities such as new forms of exploitation. It also acknowledges that a fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject matter must be safeguarded. And the existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment.

The preamble of the Information Society Directive in paragraphs 28 and 29 sets out the principles of exhaustion in copyrighted matter. Under paragraph 28 of the preamble, the copyright protection shall include the exclusive right to control distribution of the work incorporated in a **tangible article**. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control the resale of that object in the Community. This right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community. Paragraph 29 of the preamble expressly says that exhaustion does not arise in case of services and online services and that this also applies with regard to a material copy of a work or other subject matter made by a user of such a service with the consent of the rightholder. The Directive also says that unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every online service is in fact an act which should be subject to authorization where the copyright or related right so provides.

This claim is made in the context of the Directive setting the framework for protection of acts of on-demand transmission of copyright works and subject matter protected by related rights over networks. According to paragraph 25 of the Directive, all rightholders recognized by the Directive should have an exclusive right to make available to the public copyright works or any other subject matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterized by the fact that members of the public may access them from a place and at a time individually chosen by them.

In paragraph 26 of the preamble, the Directive uses the term "on-demand services" when speaking of radio and television broadcasters. The question arises then, does the Directive intend to view transmission of on-demand contents by wire or wireless means, including the transmission via the Internet as a service? If so, does the limitation of paragraph 29, which says that the exhaustion does not apply in the case of services and online services, apply also to making access to digital content to copyrighter works to end consumers via the Internet?

Article 3 of the Directive says that exhaustion shall not apply to the author's rights and related rights in case of copyrighted works communicated to the public by wire or wireless means, including the making available to the public of their works, in such a way that members of the public may access them from a place and at a time individually chosen by them.

On the other hand, Article 4 of the Directive speaks of exhaustion in respect of the original works and copies thereof, where the first sale or other transfer of ownership in the Community of that **object** is made by the rightholder or with his consent.

Whilst the English version of the Directive in Article 4 uses the term "object," the Czech version also uses the corresponding term to the English object. Both terms refer to tangible, material subject matter. The Czech Author's Act speaks of original or copy of author's work in its tangible form. This means that the Czech Author's Act is compliant in this point with the Information Society Directive.

As regards Directive 2009/24/EC on the legal protection of computer programs of 23 April 2009 (the "Software Directive"), this Directive in Article 4 paragraph 2 provides for exhaustion of the distribution right within the Community of a copy of a program by its rightholder, after its first sale in the Community (with the exception to the right to further control the lending and rental of the program or copy thereof). The Software Directive, unlike the Information Society Directive, does not require for it to be an exhaustion of rights that the first sale occurs vis a vis a tangible article, an object; it rather refers only to the copy of a computer program. A copy is a reproduction of the digital contents, which need not necessarily be saved on a tangible drive but can be downloaded via the Internet directly from the rightholder.[3] This means that the Software Directive provides for broader exhaustion of rights than the Information Society Directive. As it represents *lex specialis* in respect of the Software Directive,[4] it does not apply to any other digitally transmitted works other then the software. Czech Author's Act does not provide for any specific exhaustion in relation to software in terms of Article 4 paragraph 2 of the Software Directive.

[3] This interpretation has been confirmed by the CJEU in the case UsedSoft GmbH v. Oracle International Corp. C-128/11 of 3 July 2012—paragraph 55, 59.

[4] Paragraph 20 of the Information Society Directive preamble; confirmed by CJEU in case C-128/11 in paragraph 56.

The CJEU in the case of UsedSoft GmbH v. Oracle International Corp. C-128/11 of 3 July 2012 has been widely commented on by Czech IT media. So far, there has been no court decision that would deal with the exhaustion of the author's rights as a result of the first sale of intangible digital copy of author's work online. The proposal for amendment of the Czech Author's Act that is currently pending at the Czech Parliament does not deal with the issue of broader exhaustion of the rights vested in computer program either.

France

24

Mary-Claude Mitchell, Jean-Louis Fourgoux, Tiphaine Delannoy, and Rachel Nakache

24.1 Introduction

Reflecting the balance between free movement of goods (for which the Court of Justice of the European Union guarantees respect) and the monopoly of exploitation granted to the holder of an intellectual property, the exhaustion of rights is principle of in constant mutation.

The exhaustion of rights presents a concrete reality: the impossibility for the right holder to control the subsequent conditions of commercialisation after a first introduction of the product on the market within the European territory, by the holder or with its consent. This principle tends to avoid that the right holder, after having had a fair compensation to the putting into circulation of its product, organises a partitioning of the markets.

Of German origin, the concept was first applied by the European Court of Justice (ECJ) in the Deutsche Grammophon[1] case on the basis of articles 28–30 of the Treaty establishing the European Community (now articles 34–36 of the Treaty on the Functioning of the European Union). These articles lay down the principle of free movement of goods within the European Economic Area.

The notion, enshrined by different Community Directives, had also been clarified through the case law of the Court of Justice. Under that impulse, France integrated the rule of exhaustion of rights within its legislation, by providing a

[1] ECJ, case 78/70, *Deutsche Grammophon,* ECR 1971 487.

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specific provision for each intellectual property right (copyrights and related rights, trademarks, drawings and designs, patents, databases, software), in the course of transposition of related Directives.

Nowadays, exhaustion of rights has raised new questions. If this principle has been designed for an application to the "traditional industry", it appears to be poorly adapted to the "on-line industry", especially for digital work.

Hence, challenges represented by the latest technological evolutions require a reconsideration of national legal systems on that specific point.

24.2 Application of the Principle of Exhaustion of IP Rights to the "Traditional Industry"

The exhaustion of rights is only made under certain circumstances that are valid for all the different IP rights. However, it faces, for certain specific rights, several limits.

24.2.1 Conditions

The French Intellectual Property Code[2] subordinates the exercise of the principle of exhaustion to the combination of two fundamental conditions:

1. a first introduction on the market within the European Economic Area;
2. the consent of the holder to this first introduction on the market.

24.2.1.1 First Introduction on the Market Within the European Economic Area Territory

The principle of exhaustion of rights implies a first commercialisation in the territory of a Member State of the European Economic Area (EEA).

It follows from case law, and more specifically from cases regarding trademarks and patents, that the place of commercialisation is interpreted as the place where the goods were truly put on the market, that is to say, where they are made available to customers and not where the contract was concluded.[3]

Moreover, the commercialisation involves an act of sale, in other words, an effective transfer of the property right to a third party. Thus, preparatory acts, such as the movement of goods between companies belonging to the same group before their sale, the importation of goods by the holder in order to sell them or even the delivery of the demonstration goods to intermediaries, without a transfer of

[2] Articles L. 122-3-1, L. 211-6, L. 513-8, L. 613-6 and L. 713-4 of the Intellectual Property Code.

[3] TGI Paris, 9 November 1993, PIBD 1994, III, p. 111 confirmed by CA Paris, 29 May 1998, Gaz Pal. 2000, doct., p. 144.

property, do not characterise the exhaustion. If these solutions were adopted by Community case law,[4] there is scarcely any doubt that they would apply in French law.

Finally, the place of first commercialisation is limited to the Member States of the European Economic Area. French case law does not recognise the international exhaustion.[5] Similarly, a first sale on an associated territory in application of the Treaty on the Functioning of the European Union does not realise the exhaustion for future sales within the EEA.[6]

24.2.1.2 Consent of the Holder to the Introduction on the Market

Secondly, the first putting on the market has to come from the intellectual property right holder itself or, if it comes from a third party, should be realised with its consent. Thus, the licensee who has been granted an exclusive license to manufacture, make, distribute and sell in one of the Member States of the European Union is duly authorised by the right holder.[7]

However, asked for a preliminary ruling by the French Supreme Court, the Court of Justice has held that if the licensee violates a clause of its contract regarding article 8 §2 of the Directive of 21 December 1988[8] concerning the duration, the form covered by the registration, the scope of the goods or services, the territory or the "*quality of the goods manufactured or of the services provided by the licensee*", such a violation obstructs the exhaustion of rights.[9] Taking into account the above-mentioned answers brought by the Court of Justice, the Supreme Court has excluded the exhaustion of rights in a case where the distributor licensee of a trademark has infringed a clause of its contract forbidding the sale to discount stores and therefore undermined the *quality of the goods manufactured*.[10] In this way, the holder can limit the scope of its consent by providing contractual restrictions, the disregard of which can then obstruct the exhaustion. On the other hand, once the license is expired, the owner of a trademark will be able to invoke again the prerogatives conferred by its trademark towards its former licensee.[11]

Similarly, assuming economic ties exist between the owner and the "third party", such as a subsidiary firm, the consent is deemed to be given.[12]

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[4] ECJ, case 16/03, *Peak Holding v. Axolin-Elinor,* ECR 2004 I-11313*;* CJEU, case 127/09, *Coty Prestige Lancaster Group GmbH* v. Simex *Trading AG*, ECR 2010 I-4965.

[5] Regarding trademarks: Cass. Com., 2 December 1997, no 95/17255, adjusting to Community case law: ECJ, case 355/96, *Silhouette International v. Hartlauer,* ECR 1998 I-4799.

[6] With regard to Curaçao Island: CA Lyon, 17 September 1998, PIBD 1998, III, p. 519.

[7] CA Paris, 13 October 1999, PIBD 2000, III, p. 68.

[8] First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trademarks, OJ 1989 L 40/1.

[9] ECJ, case 59/08, *Copad v. Dior,* ECR 2009 I-3421.

[10] Cass. Com., 2 February 2010, no 06/16202.

[11] Cass. Com., 13 July 2010, no 09/14668.

[12] CA Paris, 25 April 2001, PIBD 2001, III, 543.

The consent to the making available of the product on the market requires, in addition, to be strictly considered. It has to be given for each and every sample of the product for which the exhaustion is required. This solution comes from the Community case law[13] and has been applied a number of times by the Supreme Court.[14]

Moreover, it stems from the *Davidoff* case of the ECJ regarding trademark that the consent of the owner can be explicit or tacit, for as much as it is expressed in a way which indicates, in a clear and certain way, that the owner waives its prerogatives.[15] The decision points out that it is for the national judge to appreciate the existence of the consent through *facts and circumstances prior to, simultaneous with or subsequent to the placing of the goods on the market outside the EEA*. It is also specified that in any case, those circumstances cannot be the result of silence, an absence of indication on the products that their putting on the market is prohibited or even of an absence of contractual reservations during the transfer of ownership of the products. The French case law has endorsed this interpretation.

Therefore, in a judgment dated 9 April 2002, the Commercial Chamber of the Supreme Court admitted that the owner of a trademark registered in Brazil had tacitly given its consent to a Brazilian company when the exclusive license contract specified that it did not mention any restriction regarding the manufacturing, the commercialisation and the exportation of the products covered by the trademark granted by a license.[16]

On the other hand, it was judged that the violation of contractual obligations, in this case of a settlement agreement by an importer that ignored specific conditions for the marketing of products, did not characterise the consent of the trademark owner to a putting of those goods on the market of the European Economic Area, nor did it reflect a waiver, express or tacit, to its right to oppose to this importation.[17]

In another case, the Court of Appeal of Paris endorsed the principle according to which implicit silence does not constitute consent, considering that the exhaustion of rights could not be deduced from tolerance of the parallel importations, during several years, by a manufacturer.[18]

Lastly, it must be emphasised that if the above cases were issued in trademark matters, resulting solutions are, however, easily transposable to other protected rights.

[13] ECJ, case 173/98, *Sebago. v. Unic*, ECR 1999 I-4103.

[14] Cass. Com., 20 February 2007, no 05/11088; Cass. Com., 26 February 2008, no 05/19087; Cass. Com., 7 April 2009, no 08/13378; CA Paris, 15 June 2011, no 2009/12305.

[15] ECJ, cases 414/99 to 416/99, *Zino Davidoff SA v. A & G Imports Ltd and Levi Strauss & Co. and Others v. Tesco Stores Ltd and Others,* ECR 2001 I-8691.

[16] Cass. Com., 9 April 2002, no 99/15428.

[17] Cass. Com., 21 October 2008, no 05/12580.

[18] CA Paris, 28 March 2003, no 2001/18187.

24.2.2 Limits

If the exhaustion of rights applies, under certain circumstances, to the entire IP rights, this principle is nevertheless not absolute in the way that it is confronted to several limits specific to protected right. The inherent limits to the trademarks law and to the copyrights and related rights, which apparently have been, on their own, the subject of jurisprudential applications, will be analysed more specifically.

24.2.2.1 Inherent Limits to Trademark Law

In matters of trademark, article L. 713-4 of the Intellectual Property Code, transposing article 7 of the Directive of 21 December 1988,[19] establishes a limit to the exhaustion of rights by providing a possibility for the holder to oppose to further commercialisation of the goods, especially where legitimate reasons exist and are related in particular to the modification or the impairment of the goods after they have been put on the market.

Inspired by the Community case law, French courts first applied the legitimate reason to the impairment and the modification of the products, reason expressly referred to in article L. 713-4 of the Intellectual Property Code,[20] in order to then expand it to damage to the reputation of the trademark. The impairment or the modification of the goods, which concerns hypothesis in which the product no longer has its original features, was applied by the Court of Justice, mainly in matters of the reconditioning of the pharmaceutical products.

This legitimate reason is meant to protect the essential function of the trademark in order not to mislead the consumer about the origin of the branded object, unless the repackaging is strictly necessary.[21] It is this trend that the Supreme Court followed.[22] The exception linked to the impairment or the modification of the products was also applied to nonpharmaceutical products by French case law.[23]

Deviating from the letter of the above-mentioned Directive, the Community case law introduced a new legitimate reason related to damage to the reputation of the trademark,[24] which was later enshrined by the French courts. Thus, even without any impairment to the product, the Supreme Court considered that the demeaning context surrounding the sale of Chanel products was tarnishing the look and the image of prestige of the perfumes and luxury cosmetics of the owner of the trademark. Therefore, Chanel had a legitimate reason to oppose to a new

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[19] First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trademarks, OJ 1989 L 40/1.

[20] Paragraph 2 of article L. 713-4 of the Intellectual Property Code.

[21] ECJ, case 102/77, *Hoffmann Laroche v. Centrafarm*; ECR 1978 1139; ECJ, case 427/93, *Bristol Meyers Squibb v. Paranova,* ECR 1996 I-3457.

[22] Cass. Com., 7 July 2004, no 02/17729, for the repackaging of phytosanitary products.

[23] Cass. Com., 28 January 1992, no 90/14292, as concerns jeans.

[24] ECJ, case 337/95 *Dior v*. Evora; ECR 1997 I- 6013; ECJ, case 59/08, Copad *v. Dior*, ECR 2009 I-3421.

commercialisation of its products.[25] This solution is only valid, nevertheless, for the luxury trademarks and not for the common trademarks for which damage to the reputation of the trademark, except in the case of an impairment of the product, would be more problematic to prove. More recently, following the *Copad* case above mentioned, the Supreme Court noted that damage to the *aura of luxury* could constitute a legitimate reason allowing to act as a barrier to the exhaustion.[26]

24.2.2.2 Inherent Limits to Copyright and Related Rights

In matters of copyright and related rights, articles 122-3-1 and L. 211-6 of the Intellectual Property Code, which transpose the Directive of 22 May 2001,[27] limit the exhaustion of rights to material copies of the work.[28] Moreover, the exhaustion, which does not affect the moral rights, targets the distribution right alone, excluding other prerogatives from the destination right, which is based on the use of the work (reproduction right, representation right). Furthermore, the renting and the lending of copies of a work are submitted to the owner authorisation. This solution stems from the Community law and is also adopted by the Supreme Court.[29]

Beyond these legal limitations, the Act of 1 August 2006[30] transposing the Directive of 22 May 2001 foresees the possibility for rights holders to put in place "technical measures" on their works, that is to say, anti-copying devices, in order to prevent infringements to their non-exhausted IP rights. Perceived as compensation to the exhaustion of rights, the use of technical measures is not without raising difficulties since it tends to disregard fundamental rights of users and especially at the exception of the right of private copying.

At last, if the traditional rule of exhaustion of rights affects, by principle, the intellectual property rights of their holders, the growing development of exceptions narrows more and more the reach of its application.

The position is different for the digital use of the works which is deeply renewing the traditional problematic of the exhaustion of rights.

[25] Cass. Com., 23 April 2010, no 09/65839, Chanel v. Caud; Cass. Com., 23 March 2010, no 09/66987, Chanel v. Marm; Cass. Com., 24 May 2011, no 10/20620, Chanel v. Jarnis.

[26] Cass. Com., 9 October 2012, no 11/11094, contra: CA Paris, 5 June 2013, no 10/18348, for common products bearing a luxury trademark.

[27] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 2001 L 167/10.

[28] Articles 122-3-1 and L. 211-6 of the Intellectual Property Code.

[29] Cass. Com., 27 April 2004, no 99/18464, La Plume v. Nintendo.

[30] Act no 2006-961 of 1 August 2006 concerning copyright and related rights in the information society, OJ no 178, 3 August 2006, p. 11529.

24.3 Application of the Principle of Exhaustion of IP Rights to the "Online Industry"

It stems from the texts that the implementation of the exhaustion of rights necessitates a tangible support. The technological evolution leads to question the application of the principle to intangible goods.

24.3.1 Tangible Good

The principle of exhaustion of rights is applicable whether the tangible good is commercialised through traditional networks or through the Internet. However, the specific case of software should be noted; it indeed can be incorporated in a tangible support or be intangible.

24.3.1.1 Identical Application

The principle of exhaustion of rights in the online industry area is applied the same way that it is in the traditional industry area. Indeed, as soon as the conditions for its implementation are met (first commercialisation of the product into a Member State of the EEA, consent), the exhaustion of rights applies within the EEA.[31]

Especially in matters of trademark, the online commercialisation of luxury products is likely to be considered as depreciating, so much that the holder of the rights has a legitimate reason to neutralise the exhaustion. Thus, it has been judged that an exclusively online sale, by an unauthorised distributor, of products usually sold within a selective distribution network which ensures an enhancing presentation of the products in order to maintain their image of luxury goods constitutes a commercial practice damaging the prestige of the products and trademarks.[32]

This point is not in question as long as it is a tangible good, by opposition to intangible goods like software available online.

24.3.1.2 Specific Case of Software

Protected by copyright, computer software, however, has received special treatment in the Intellectual Property Code, given its specific nature. The application of the rule of exhaustion of rights to computer software stems from article L. 122-6 of the Intellectual Property Code resulting from the Act of 10 May 1994[33] transposing the

[31] As opposed to the solution of the US Supreme Court which admits the international exhaustion—US Supreme Court, 19 March 2013, no 11-697.

[32] TGI Paris, 28 April 2011, no 09/13567.

[33] Act no 94-361 of 10 May 1994 implementing the Directive no 91-250 of the European Communities Council dated 14 May 1991 on the legal protection of computer programs and amending the Intellectual Property Code, OJ no 109, 11 May 1994, p. 6863.

Directive of 14 May 1991.[34] The text establishes the same conditions that have been previously mentioned, namely a first sale of "a copy of the software" ("copy of a computer program", according to the terms of article 4.2 of the Directive) within the EEA territory by the author or with its consent. However, unlike copyright and related rights, the text is limited to the term "copy" without specifying whether tangible or intangible.

Furthermore, French case law does not recognise, in matters of software, the international exhaustion.[35]

Article L. 122-6 of the Intellectual Property Code was first applied in France in a judgment given by the Commercial Court of Créteil on 12 November 1996.[36] In this case, the Commercial Court judged that the author no longer could impose, after the first introduction on the market, its conditions on the commercialisation of the product based on the copyright except in the name of specific contractual agreements.

However, the rule of exhaustion of rights is put aside in matters of licence to use software. As an example, in a decision of 23 September 1997, the Court of Appeal of Paris refused to apply the principle in the presence of a licence to use when it confers to the licensee limited prerogatives on the software and does not divest the licensor of the property of the program nor exhausts the rights of the provider who keeps all the rights, including the right of taking it out of the market.[37]

In the particular case of a software sale with a license explaining its conditions of use, the principle of exhaustion is applicable, but the resale should be accompanied by restrictions resulting from the licence to use.[38]

In any case, case law limits the exhaustion of rights to the sale of the software tangible medium and not to the software itself.

The introduction of software on the market under an intangible form, through downloading it, brought the Community case law to position itself on this question.

24.3.2 Intangible Good

Pushed by an economic reality, the Court of Justice of the European Union delivered a decisive decision on 3 July 2012, which was implicitly applied in France and which stakes could lead to forthcoming upheavals.

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[34] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ 1991 L 122, modified by Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009, OJ 2009 L 111/16.

[35] CA Paris, 19 January 2005, no 04/16422, in the hypothesis of an online software sale.

[36] T. com Créteil, 12 November 1996, RIDA, April 1997, p. 310.

[37] CA Paris, 23 September 1997, no 93/491, 93/636, 93/13558, 93/2562.

[38] CA Douai, 26 January 2009, no 07/02368.

24.3.2.1 Impulse by the Court of Justice

The issue of the exhaustion of rights to computer software brings up special difficulties given technological developments. Indeed, the transfer from material to intangible, that is to say from a communication mode based on a physical device to a communication mode by storage on computers (digitisation), could cast doubt on the qualification of good or of service of such a diffusion.

Moreover, the digitisation makes the question of the first introduction on the market of the good more difficult.

In a decision, UsedSoft/Oracle of 3 July 2012 (case 128/11), the Court of Justice expanded the exhaustion of rights to software commercialised under an intangible form. The Court of Justice has thus considered that the making available of a software copy to the customer by the right holder by means of a download, accompanied by the conclusion of a user licence agreement for an unlimited period in return for payment of a fee, constitutes a sale, permitting therefore the implementation of the exhaustion.

Since the decision is not making any distinction between computer programs and other categories of works, the question of the transposition of this solution to all cultural works which are accessible by downloading arises (books, music, films. . .).

24.3.2.2 French Application

In France, the principle laid down by the Court of Justice has recently but implicitly been applied by the Supreme Court in a decision of 11 September 2013 about musical works.[39]

In this case, the company iTunes was proposing phonograms accessible online by downloading. The Spedidam (a French Collecting Society) claims that iTunes failed to seek the consent from the artists in order to exploit their performance by downloading since they have authorised only the publication of their performance *under phonogram form published in order to be sold*. The first Civil Chamber, confirming the Court of Appeal's decision, considered that the qualification of phonogram was independent from the existence of a tangible support and because of that fact, the authorisation given by the artists involved the making available by downloading.

By this decision, the Supreme Court seems to expand the position of the Court of Justice in the UsedSoft/Oracle case to the musical files distributed online. This solution adapts to an economic reality, the sale of numeric files having widely exceeded the sale of physical support in the last few years. It is criticisable insofar as it is not without repercussion on the rights of artists, who are thus forced to assign their rights without any counterparty for the digital exploitation of the record of their performance. More precisely, this solution infringes the fundamental principle of the copyright, the principle of specialty of the cession, laid down in article L. 131-3 of the Intellectual Property Code (L. 212-3 of the Intellectual Property

[39] Cass. Civ 1st 11 September 2013, no 12/17794.

Code for the related rights), according to which the rights holder must give its authorisation for each exploitation of its work.

24.3.2.3 Issues and Perspectives

In order to limit the reach of the UsedSoft/Oracle decision, market players and especially software providers have already reacted by modifying licences designed for the European market. As an example, some providers have imposed duration limitations for the use of their software in order to avoid the qualification of sale and therefore the implementation of the exhaustion.

However, the extension of the principle of exhaustion of rights to intangible goods is now overwhelmed by a new mode of distribution of software which is based on the SaaS licences (Software as a Service). In this framework, the final user benefits a "remote access" to the software, this latter being hosted not on the client servers but on the editor servers or its provider. The service, accessible through subscription and payable through periodic fees, is not the object of any local copy at client location. Therefore, it does not amount to a sale but amounts to a contract for the provision of services, which does not permit the application of the exhaustion of rights. Furthermore, within this context, the recourse to cloud computing by the use of remote servers strengthens even more the obsolete nature of the notion of "copy" conditioning the exhaustion of rights. Given these evolutions, the reach of the UsedSoft/Oracle looks more limited in practice.

By contrast, in matters of intangible works, the recent decision of the Supreme Court demonstrates, at the opposite, that the principle of exhaustion of rights has not yet said its last word. It may also have to evolve, because of the emergence of a new online activity, initiated in the US by the American website ReDigi. This website proposed sales of used mp3 files legally bought on download platforms. It has been condemned by the United States District Court for the Southern District of New York, which judged that the principle of exhaustion of rights did not apply to the online sale of intangible goods.[40] To be noted that in 2013, the companies Apple and Amazon filed a patent application for a marketplace for used digital files. It is likely that the company ReDigi, given the Court of Justice's more favourable approach, could open the same kind of website for the European consumers.

With regard to the new issues that the development of a secondary market of the digital cultural goods could represent, the French Ministry of Culture and Communication charged the Artistic and Literary Property High Council, in July 2013, to put in place a commission on the used digital market. This Commission, which should soon publish its conclusions, has the mission to debate the question of the lawfulness of the used digital cultural goods market and of its economic impact on the primary market in order to ensure a fair compensation for the creators as much as an adequate level of financing of the creation.

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[40] U.S. District Court, Southern District of New York, *Capitol Records LLC v. ReDigi Inc,* no 12-00095.

The European Commission also took up the issue and launched a public consultation, on 5 December 2013, in order to adapt copyright rules to the new digital age. This consultation, which has invited professionals of this sector to propose their contributions, especially on the question of exceptions and limits to copyright, was closed on 5 March 2014. It should lead to the adoption of a white book. The French government has for its part published its answer. It reminded that the European and international texts limit the exhaustion of the distribution right to material copies of protected works by an intellectual property right. In connection to used digital works, the Government alerted the Commission on the direct competition that this market represented with the market for new products and its implications on the principle of private copying, since it seems complicated to make sure of the destruction of the initial copy of the digital work in case of a resale.

These questions about the application of the principle of exhaustion of rights within the framework of the online business lead necessarily to focus on the notion of electronic commerce and on the various forms of breach of copyright on the Internet.

24.4 Concept of E-Commerce

The traditional French consumer has become an active online consumer for few years.

Nearly 34 million online users purchased on the Internet in 2013,[41] and the e-commerce in France generated revenues amounting to more than 45 billion euros. E-commerce is so important that it became necessary to define and regulate it to face the legal issues raised by this new form of trade.

24.4.1 Definition of E-Commerce

The definition of e-commerce results from a transposition of the e-commerce Directive.[42]

24.4.1.1 European Definition

The European Union defined a legal framework for e-commerce in order to ensure, on one hand, the free movements of information society services in the internal market and, on the other hand, a legal certainty for companies and consumers, active on this market.

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[41] Press statement, 30 January 2014 “Quarterly barometer of the e-commerce audience in France, 4th semester 2013”.

[42] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”), OJ 2000 L. 178/1.

These services are provided normally for remuneration at a distance, by means of electronic equipment for the processing and storage of data, and at the individual request of a recipient of a service.[43] In principle, Member States cannot submit an online activity to a prior authorisation or any other requirement having an equivalent effect.[44]

24.4.1.2 French Definition

In France, e-commerce is defined as the economic activity by which an individual offers or provides goods and services at a distance, by means of electronic equipment.[45] Some online activities, exercised for free, are also considered as e-commerce.

This definition, which is articulated around 3 criteria (activity, technology and finality) falls within the framework of extensive definitions of e-commerce. It allows the integration of new types of e-commerce as technology evolves.

24.4.2 New Types of E-Commerce and Their Integration on the DSM

The issue is whether the new distribution channels are independent from one another or whether they are part of a broader market: the "Digital Single Market".

24.4.2.1 New Types of E-commerce

Currently, two new distribution channels exist: smartphones ("mobile commerce" or "m-commerce") and social networks ("Facebook commerce" or "f-commerce").

Concerning the m-commerce, 4.6 million French consumers purchased through their mobile or their digital tablet in 2012,[46] thus developing mobile payment (or "m-payment"), considered, by law, as a new instrument of payment.[47] In this regard, a payment transaction is authorised only if the buyer has given its consent in the form agreed with the service provider. Failing to meet this condition, the transaction is deemed unwritten, under the terms of articles L133-6 and L133-7 of the monetary and financial code.

[43] Paragraph 17 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), OJ 2000 L. 178/1; Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1998 L. 204/37.

[44] Article 4 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), OJ 2000 L. 178/1.

[45] Article 14 of the Law 2004-475 of 21 June 2004 to support confidence in digital economy, namely "LCEN Act".

[46] Rapport d'activité 2012/2013, Fédération e-commerce et vente à distance, www.fevad.com.

[47] Article L. 311-3 of the Monetary and Financial Code.

We observe today the emergence of the "Omni-consumer" who joins and uses every distribution channel at his disposal: traditional or electronic, under any form. The French Competition Authority, in its opinion no 12-A-20, underlined this point by supporting the emergence of new distribution channels which *encourage the multi-channel behavior of the consumer*.[48]

24.4.2.2 The Digital Single Market

The European Union pursues its goal to create, by 2015,[49] a digital internal market, the "Digital Single Market" or "DSM", in which no barrier to the expansion of e-commerce and to its beneficial effects to the economy would exist. The DSM, encompassing e-commerce, integrates m-commerce and f-commerce.

Beneficial effects to the economy will be significant since the lack of legal standardisation between Member States regarding e-commerce costs Europe around 800 billion euros per year.[50] Therefore, within the DSM, there are different types of e-commerce, which are formalised by contracts between professionals and online consumers.

24.4.3 Contracts Concluded by Electronic Means

The law of 21 June 2004 and order no 2005-674 of 16 June 2005 is meeting the evolution of commerce by specifying the legal regime applying to online activities in order to ensure on the one hand the free and informed consent of the online consumer and on the other hand his protection.

24.4.3.1 The Consent of the Online Consumer

Contracts related to an online activity are submitted to formalism, imposing the communication of pre-contractual information to the online consumer.

Thus, a website must contain legal information about the identity of the service provider, the applicable taxes and the delivery fees if a price is mentioned. In addition, the general terms and conditions must be accessible to the consumer in such way that allows its conservation and its reproduction and mention the different steps of the conclusion of the contract and the electronic means and technical ways to correct mistakes prior to its conclusion.[51]

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[48] Competition Authority, opinion no 12-A-20 of 18 September 2012 regarding the functioning of the competition in the electronic commerce; www.autoritedelaconcurrence.fr.

[49] "Roadmap to Digital Single Market", Policy Department A: Economic and scientific policy, European Parliament http://www.europarl.europa.eu/document/activities/cont/201209/20120914ATT51402/20120914ATT51402EN.pdf.

[50] Completing the Digital Single Market leads to an extra 260 billion per year, 4 January 2014, http://www.ecommerce-europe.eu/news/completing-the-digital-single-market-leads-to-an-extra-260-billion-per-year.

[51] Articles 1369-1 and 1369-4 of the civil code.

Once this information is delivered, the contract by electronic means is formed when the acceptance meets the offer. Acceptance is materialised by a “double click”, which is a technique foreseen in article 1369-5 of the civil code and specific to online sales. The online consumer can, with one click, validate his order, check its details and modify it if needed. By a second click, he confirms his order that will be subject to an acknowledgement of receipt from the professional, expressing the meet between the offer and the acceptance. The contract concluded by electronic means has the same probative value as a traditional contract (Articles 1108-1 and 1316-1 of the civil code).

In the absence of a common choice by the parties, the applicable law will depend on the place of establishment of the service provider.[52] Both at European and French levels, the concept of establishment implies the effective exercise of an economic activity that is stable and indefinite. In case of a conflict regarding this contract, the competent jurisdiction is the one of the domicile of the consumer when he is the claimant. Failing that, a choice of jurisdiction between the one of the domicile of the service provider and the one of the consumer is open.[53]

24.4.3.2 Protection of the Online Consumer

The principle of consensualism applied to e-commerce, which implies a depersonalisation and a dematerialisation of the contract, raises issues regarding the legal certainty of the online consumer. This is the reason why online activities were introduced in the provisions regarding distance sales.[54]

Thus, the online consumer enjoys the same right of withdrawal as the traditional consumer. With the entry into force of the law of 17 March 2014, namely “HAMON Act”, the period of withdrawal now lasts 14 days.[55] The consumer must be informed of his right to withdraw at the pre-contractual stage. Failing that, the period is extended to 12 months.[56] Judges are trying to precisely define the scope of the right of withdrawal covering online sales, in particular by holding that it does not apply to sale at a distance realised through a website such as Price Minister as it is a transaction between non-professionals.[57]

The online consumer, as the weaker party to the contract, also enjoys a protection against unfair terms in consumer contracts.[58] Some provisions of the service

[52] Article 17 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”), OJ 2000 L. 178/1.

[53] Article 16 of Council Regulation no 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ 2001 L. 12/1.

[54] Articles L. 121-16 to L. 121-20 of the consumer code.

[55] Law no 2014-344 of 17 March 2014 on the consumption; new article L. 121-21 of the Consumer Code.

[56] New article L. 121-21-1 of the Consumer Code.

[57] Jur. prox. Paris 3rd arrondissement., 25 June 2013, Noisette G./Priceminister; Jur Prox. Dieppe, 7 February 2011, Igor/Priceminister.

[58] Article L. 132-1 of the consumer code.

provider's general terms and conditions were declared unfair by the judge.[59] The adaptation of provisions of the consumer code to e-commerce has also known a recent application regarding misleading commercial practices.[60]

24.4.4 Towards a Digital Commercial Establishment

The e-commerce expansion gives rise to the question of the qualification of the online activity of a commercial establishment, just like the traditional trade.

To exist, a commercial establishment needs to have clients. French e-consumers can remain attached to e-commerce site or only buy from it occasionally. If the goodwill is lawful and personal, it is the same as for traditional commercial establishment.

Moreover, the commercial establishment must comprise a set of tangible and intangible assets. Tangible assets are comprised of the physical installation (computers, phones, accessories of animation of the website) and the merchandise (which are the object of the online sale). Intangible assets are trade names, commercial signs and domain names. Finally, as the commercial establishment does not necessarily need commercial premises, its absence does not have an impact on the qualification of digital commercial establishment.

The expansion of e-commerce has lead to a significant increase of online infringements to copyright.

24.5 Online Infringements to Copyright

The development of the Internet led to the birth of new types of copyright infringements, specific to online activities. This is why the question of the liability of the online intermediaries was raised.

As the violation of a copyright is a counterfeiting offence, it is logical that sanctions were adapted to the Internet. When such action is filed, it is nevertheless necessary, with regard to the specificities of the Internet, to identify the competent jurisdiction and the applicable law.

[59] TGI Paris, 1st Chamber, 4 February 2003 Rev.Lamy.dr.aff.2003, no 60, no 3787, D.2003, obs Manara C.; TGI, 7th Chamber, 21 March 2006, RLDI 2006/17, no 512, obs.L.C.

[60] T.com. Paris, 4 October 2011, RLDI 2011/76, Expedia.fr; Cass. Com., 4 December 2012, no 11-27.729, RLDI 2013/89, No 2977, obs.L.C, Leguide.com.

24.5.1 New Types of Online Intellectual Property Infringements

Illicit reservation of domain names, illegal downloads and fraudulent sales through an Internet sales platform are different types of trademark and copyright infringements specific to the Internet.

24.5.1.1 Illicit Reservation of Domain Names

As the domain name allows the access to a website, its allocation and its use are considered as a use of a trademark. As a result, the third party who reserves a domain name comprising a protected trademark infringes the right of its owner and is called a “cybersquatter”.

Prior to legal proceedings, an alternative dispute resolution procedure (“ADRP”) concerning domain name was created by AFNIC. This administrative procedure is managed by the Center of Mediation and Arbitration of Paris (“CMAP”) and is aimed at finding a settlement between the owner and the cybersquatter. The particularity of this procedure is the possible freezing of the domain name while the procedure is pending.[61] Its was inspired from the UDRP procedure, managed by the World Intellectual Property Organization (“WIPO”), which applies to Top Level Domain (“TLD”) and generic TLDs. UDRP principles were adopted by the Internet Corporation for Assigned Names and Numbers (“ICANN”) on 26 August 1999.

The Office and the Bureau of Registry of domain names have not eradicated cybersquatting at its source because, as their intervention is purely technical, they are only submitted to an obligation of means. However, they are bound by an obligation of result if the owner of a trademark notifies them of the existence of a domain name that harms its intellectual property right.[62]

Therefore, legal proceedings have to be initiated against cybersquatters. Judges recognised that the reservation of a domain might be infringing an earlier trademark.[63]

They also pronounced a withdrawing and prohibitive measure against a domain name registered by a French company with the American organism Internic.com in breach of an earlier trademark of a French owner. In this case, the judge pronounced the withdrawal not only from the French Internet but also from the global Internet.[64]

24.5.1.2 Illegal Downloads

The High Authority promoting the distribution and protection of creative works on the Internet (“HADOPI”)[65] ensures the protection of copyright on the electronic

[61] Article 35 of the AFNIC Charter.

[62] TGI Paris, 3rd Chamber, 26 August 2009, no 08/17160, Recueil dalloz 2009, p. 2219.

[63] TGI Draguignan, 21 August 1997, Commune de Saint-Tropez/SA Eurovirtuel and others.

[64] TGI Bordeaux, Referee Order, 22 July 1996, Sapeso and Atlantel/Icare.

[65] Enacted by the Law no 2009-669 of 12 July 2009 encouraging the display and the protection of the creation on Internet.

communication channels. It is particularly active to pursue illegal downloads of music and/or movies and condemn this practice by a "graduated response".

Thus, when an Internet user illegally downloads a creative work, such as music or movies, on the Internet in breach of the author's rights, the Commission of the Protection of Rights ("CPD") implements a warning procedure. Firstly, the Internet user is notified by an email and, in the event of a repeat offence in the 6 following months, is notified by a registered letter.

If a new offence is revealed, it is presented before a judge, who can decide to impose a EUR 1500 fine and a one-month suspension of Internet subscription.[66] As of today, only one suspension of subscription has been pronounced. However, it will no longer be applied since a decree of 8 July 2013 suppressed this sanction.[67]

24.5.1.3 Illicit Sales on an Internet Platform

Different types of trademark infringements may be committed by means of an Internet sales platform (sale without authorisation, sale of a counterfeiting product or a marked product with an illicit origin). However, the liability of the platform will depend on its qualification, editor[68] or hosting service provider.[69] If the platform is qualified as editor, its liability may be engaged for a copyright infringement, whereas as a hosting service provider, it would be in principle irresponsible.

24.5.2 The Particularity of the Online Intermediaries' Liability

Under article 6 of the law, to support confidence in digital economy, the e-commerce technical intermediaries, such as Internet access providers, are not liable with regard to the content they store or display. Indeed, they are submitted neither to a general obligation of surveillance on the data displayed or stored nor to an obligation of looking after facts or circumstances revealing unlawful activities. Their liability could be only engaged if they were aware of the unlawfulness of these stored/displayed data and that they did not act promptly to make their access impossible.[70]

Now, it is also possible to order against the provider of a publicly available electronic communication service all proportionate measures which may prevent or stop a damage caused by the content of an online electronic communication

[66] Decree no 2010-695 of 25 June 2010 providing a characterized negligence offense protecting the artistic property on Internet.

[67] Decree no 2013-596 of 8 July 2013 suppressing the complementary penalty of suspension of the access to publicly available electronic communications service and relative to modalities of transmission of information provided by article L. 331-21 of Intellectual Property Code.

[68] Three judgments of the Commercial Court of Paris, 30 June 2008, no 2006077799, LouisVuitton Malletier, Christian Dior Couture, Perfumes Christian Dior/eBay Inc., eBay International Ag.

[69] TGI Paris, 3rd Chamber, 3rd Section., 13 May 2009, no 07/11365, L'Oréal and a.c eBay France.

[70] Cass. 1st Civ, 12 July 2012, no 11-15.165, 11-15.188, no 11-13.669, no 11-13.666, Google Inc et Google France/. Auféminin.com.

service.[71] The European Court of Justice admits that a court may require an Internet access provider to block a website that displays online protected works without the agreement of the owner's right.[72]

24.5.3 Adaptation of the Legal Proceeding for Counterfeit to Online Infringements

The harm caused to the owner of a copyright is qualified as a counterfeiting offence by article L716-1 of the Intellectual Property Code and can be sanctioned both by civil and criminal laws.

Under civil law, torts lead to the payment of damages the amount of which depends on legal criteria, which seem applicable to an online infringement. These criteria are the loss suffered or the loss in profit, the moral damage and the profits realised by the infringer.[73] The law of 11 March 2014 specified this last criterion, which should be understood as the savings of intellectual and promotional investments that the offender earned from the infringement. Moreover, it gives the judge the opportunity to appreciate these criteria distinctly.[74]

Measures of publicity of judgments were also adapted to the Internet considering the fact that judges can order, in addition to the publication in a newspaper, the display of the judgment on the homepage of the concerned website for a limited period of time.[75]

Criminal penalties, such as a EUR 400,000 fine and a 4-year imprisonment,[76] can also be inflicted to the infringer who sold products under a counterfeiting trademark.

Counterfeit is also an offence under custom law. The European Court of Justice had recently the opportunity to address its application on the Internet. The Court recognised the power of customs Authorities to retain goods coming into the territory of a Member State when it was sold by a website located in a third country to an individual living in a Member State.[77]

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[71] Law no 2014-344 of 17 March 2014 on the consumption.

[72] ECJ, 27 March 2014, case 314-12, UPC Telekabel Wien, not yet published.

[73] Article L. 716-14 of Intellectual Property Code modified by the Law of 29 October 2007 to fight against the approximate fixing damages by the judge who sets up the criterion of economic or intangible nature.

[74] Article 2 of the Law no 2014-35 of 11 March 2014 reinforcing the fight against counterfeiting.

[75] TGI Paris, 7 November 2007, no 06/11852 Eastpack; TGI Paris, 14 November 2007, no 05/11735, Euridile.

[76] Article L. 716-9 of the Intellectual Property Code: 4 years imprisonment and 400,000€ fine; Article L. 716-10 of the Intellectual Property Code: 3 years imprisonment and 300,000€ fine.

[77] ECJ, 6 February 2014, case 98/13 *M.Blomqvist/Rolex*, not yet published.

24.5.4 Competent Jurisdiction and Applicable Law to a Trademark Infringement

Under article 46 of the civil procedure code, a claimant may, in tort law, seize the jurisdiction of the place where the defendant lives, the jurisdiction of the place of the harmful event or the one where the damage has been caused.

Nevertheless, it is not specified which place to consider in case of a cyber tort. Indeed, the nature of the Internet leads to a display of the information in several countries. Two doctrines may resolve this issue: the focus doctrine under which the competence of a jurisdiction is determined if a sufficient and substantial link between the activities of an e-commerce site and the French territory is proven[78] and the accessibility of online content doctrine, which allows to seize all the jurisdictions of Member States in which information are displayed.[79]

The European Court of Justice recently judged on this duality and retained the criterion of accessibility in order to determine the jurisdiction competent to hear an online copyright infringement.[80] The seized judge will determine the law applicable to the online copyright infringement. The Berne Convention provides that he shall apply the law of the country where the protection is asked.

Nevertheless, bearing in mind that the protection in the country of origin is enacted by the national legislation and it can be understood by “country of origin” the country of the first publication, its application on the Internet may be questioned. Indeed, is the display of the work on the electronic channels sufficient to be considered as a publication? The Supreme Court applies the provisions of the Berne Convention[81] as a conflict-of-law rule, namely the law whose protection is claimed. The Court has also used the criterion of the place of destination and of the reception of the connecting services as a link to French law.

24.6 Conclusion

Made for the traditional industry, the principle of exhaustion of rights appears today largely inappropriate in relation to the evolution of the online industry. Indeed, these last few years, the technological evolution, and especially the growing development of online activities, has profoundly changed the application of the intellectual property rights and, by extension, its exceptions. These mutations,

[78] Cass. Com., 13 July 2010, no 06-20.230, Louis Vuitton/Google; Com., 29 March 2011, no 10-12.272, Maceo/eBay.

[79] Cass. Civ., 1st, 6 January 2010, no 08-19066 Sanofi Aventis/Novo Nordisk; Cass. Com., 20 March 2012, no 11-10600, Sanofi Aventis/Novo Nordisk.

[80] ECJ, 3 October 2013, case 170/12, Pinckney, not yet published.

[81] Article 5.2 of the Berne Convention of 9 September 1886: *“apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed”*.

which modify the economic scheme existing until then, could drive to rethink the legal framework currently in force.

The issue at stake lies today in the necessity of finding the right balance between the protection of rights, in order to promote the creation and innovation, and the widest possible access for the users to goods endowed with intellectual property rights, as permitted by the principle of exhaustion of rights. In particular, the sale of online used files triggers new sets of problems, which have to lead to the definition of clear rules.

As for the resale platforms, which are likely to develop on the Internet, it must be ensured that competition will be taking place properly in order to avoid any attempt to limit interoperability. Thus, the consumer, who will have initially, and lawfully, acquired a file on one of them, should indeed be able to resell it on another platform. In other words, no commitment to resell it only on the initial platform should be imposed on this consumer. In this manner, the consumer will preserve its freedom to buy and sell the same file on a different platform.

Moreover, the infinite possibility of making unaltered copies of digital files, unlike the copying of tangible works, would be prejudicial to the authors. The destruction of its copy by the seller should thus constitute a mandatory first step to the online resale of the file, in order to maintain a constant number of copies on the market. However, the technology that could ensure this process is still to invent even if some, such as the ReDigi site, already propose software able to inspect the content of the consumer computer and other connected devices (external hard drive, USB key. . .) in order to verify the effective destruction of the file. Such a traceability system is not without causing difficulties in terms of data protection and privacy.

It might also be considered to foresee a revenue sharing, generated by the used file sale between the platform, the reseller and the rights holders. In the tangible universe and especially in book one, the revenue perceived by the authors is generally between 7 and 12 %[82] of the sale price to the public. In the field of music, the percentage given to the lead artist is of the order of 4 % of the sale price of the disc (in the case of a variety CD).[83] Thus, compensation up to at least 20 % of the price of the sale of the used file in favour of the rights holders could constitute a fair remuneration.

Finally, amongst the areas of reflection, a second-hand chronology imposing for example, upstream, a 4-month delay before the online sale of the new file (as for the video on demand with fee for service) or, downstream, a 4-month delay before the sale of the used file could be imagined.

The principle of exhaustion of rights in the new digital age has not finished to make talk about it. . .

[82] Modèle de contrat d'édition d'une œuvre de littérature générale et commentaires, SGDL, http://www.sgdl.org/phocadownload/contrat_%C5%93uvre.pdf.

[83] Filière de la musique enregistrée: quels sont les véritables revenus des artistes-interprètes?, avril 2006, ADAMI, http://www.irma.asso.fr/IMG/pdf/4063_Etude_remuneration_musique_avril2006.pdf.

25 Germany

Thomas Hoeren

25.1 The Principle of Exhaustion of IP Rights and Copyrights in German Law

25.1.1 General Thoughts

In the German legal system, the principle of exhaustion of intellectual property rights is either particularly stated or at least recognised as a leading principle; in this regard, sections 17(2), 69c no. 3 second sentence of the Copyright Act[1]; section 24 Trademark Act[2]; section 48 Design Act[3] shall be mentioned.[4] In contrast, the German Patent Act[5] lacks an explicit legal basis for the principle of exhaustion; however, its existence is doubted by no means. The German Supreme Court (*BGH*) has repeatedly acknowledged the exhaustion principle as a precautionary principle for the entire IP law.[6]

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[1] Urheberrechtsgesetz, BGBl. (official gazette) I pp. 1273–1293.

[2] Markengesetz, BGBl. I pp. 3082–3125.

[3] Designgesetz, BGBl. I pp. 122–149.

[4] For the sake of completeness, section 10b Plant Variety Protection law shall be mentioned; however, this section will not be of any relevance for this study; for the purpose of enhancement, see OLG Dresden, 23 September 2009—11 U 422/09.

[5] Patentgesetz, BGBl. I 1981 pp. 1–25.

[6] E.g., Supreme Court (BGH), 7 November 1980—I ZR 24/79 (*Kabelfernsehen in Abschattungsgebieten*) = Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 1981, p. 413 (416); 27 February 1981—I ZR 186/78 (*Schallplattenimport I*) = GRUR 1981, p. 587 (589); 6 March 1986—I ZR 208/83 (*Schallplattenvermietung*) = GRUR 1986, p. 736 (737).

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25.1.2 Copyright Law

25.1.2.1 Section 17(2) Copyright Act

In the German case law and also in the literature, the principle of exhaustion of copyrights means that the right holder has exhausted its exclusive rights of use by actually using them; in consequence, following acts of use, especially by third parties, are no longer protected by the right holder's right of use.[7]

The exhaustion of copyrights generally applies when the work protected by copyrights is put on the market in the European Union or within the European Economic Area with the consent of the right holder.[8] Such a disposal generally takes place when it is accompanied by the transfer of ownership.[9] In this regard, the disposal needs to be based on a contract between parties; a transfer of ownership due to statutory law such as sections 946 ff. German Civil Code[10] is inadequate.[11] Furthermore, the definition of disposal is to be understood in a broad sense: every permanent abandonment of an actual possibility of disposal is sufficient.[12] In this context, there are a few situations that have to be differentiated: the transfer by the way of security is not a permanent abandonment of disposal because mostly it is eventually going to end in a retransfer.[13] In contrast, the reservation of proprietary rights grants the seller only a temporary security and is therefore considered a permanent abandonment.[14]

The principle of exhaustion is solely applied to the disposed work.[15] Furthermore, the principle of exhaustion covers the distribution right but not the reproduction right.[16]

This is due to the fact that a distribution allows the right holder to convert its rights into cash.[17] Apart from that, the principle of legal certainty requires that the

[7] BGH, 21 March 1985—I ZR 166/82 (*Schallplattenimport II*) = GRUR 1984, p. 924 (925); G. Schulze. In: Dreier/Schulze, Urheberrechtsgesetz, Kommentar, 4. Auflage München 2013, § 17 UrhG, para. 24.

[8] A. Wiebe. In Spindler/Schuster, Recht der elektronischen Medien, 2. Auflage München 2011, § 17 UrhG, para. 10.

[9] BGH, 3 March 2005—I ZR 133/02 = Zeitschrift für Urheber- und Medienrecht (ZUM) 2005, p. 475 (476).

[10] Bürgerliches Gesetzbuch, BGBl. I pp. 42–341.

[11] BGH, 23 February 1995—I ZR 68/93 (*Mauer-Bilder*) = GRUR 1995, p. 673 (676).

[12] J. D. Heerma. In: Wandtke/Bullinger, Praxiskommentar zum Urheberrecht, 3. Auflage München 2009, § 17 UrhG, para. 14.

[13] J. D. Heerma. In: Wandtke/Bullinger, Praxiskommentar zum Urheberrecht, 3. Auflage München 2009, § 17 UrhG, para. 14.

[14] J. D. Heerma. In: Wandtke/Bullinger, Praxiskommentar zum Urheberrecht, 3. Auflage München 2009, § 17 UrhG, para. 14.

[15] G. Schulze. In: Dreier/Schulze, Urheberrechtsgesetz, Kommentar, 4. Auflage München 2013, § 17 UrhG, para. 25.

[16] U. Loewenheim. In: Schricker/Loewenheim, Urheberrecht, 4. Auflage München 2010, § 17 UrhG, para. 44, 63.

[17] G. Schulze. In: Dreier/Schulze, Urheberrechtsgesetz, Kommentar, 4. Auflage München 2013, § 17 UrhG, para. 28.

buyer is granted the right to engage in any type of transaction with his good.[18] It is thereby intended to prohibit the foreclosure of downstream markets.[19] Thus, the former right holder will no longer be able to restrict the distribution of its work.[20]

Section 17(2) Copyright Act limits the principle of exhaustion in relation to rental contracts. It applies in terms of reselling only. If the buyer wishes to let the work and thus makes a profit from it the right holder's consent is needed.[21] This limitation was introduced by the third amendment of the German Copyright Act in 1995 which was based on the implementation of the European Directive 92/100/EEC[22] on rental right and lending right. In this regard, the term rental is legally defined in section 17(3) sentence 1 Copyright Act as the right to temporarily use the work for direct or indirect commercial purposes.

This limitation of the principle of exhaustion is itself limited in section 17 (3) sentence 2 in accordance to recital (13) of the Directive 92/100/EEC.

25.1.2.2 Section 69c no. 3 Sentence 2 Copyright Act

In addition, the German legislator introduced section 69c no. 3 sentence 2 Copyright Act to regulate the principle of exhaustion regarding computer programs. This section is based on article 4 lit. c sentence 2 of Directive 91/250/EEC,[23] according to which the first sale of a program's copy by the right holder or with its consent in the European Economic Area shall exhaust the distribution right of that copy within the European Economic Area. As far as the rental right is concerned, the same exception applies as in section 17(3) sentence 1 Copyright Act. Incidentally, the distribution right exhausts not until the copy is fully in the control of the new holder of rights of use.[24] Apart from that, the principles contained in section 17(2) Copyright Act remain widely applicable.[25]

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[18] G. Schulze. In: Dreier/Schulze, Urheberrechtsgesetz, Kommentar, 4. Auflage München 2013, § 17 UrhG, para. 25.

[19] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp*., pt. 62 (not yet published); ECJ, case 78/70, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Grossmaerkte GmbH & Co. KG*, ECR 1971, p. 487, pt. 12; BGH, 4 May 2000—I ZR 256/97 (*Parfumflakon*) = GRUR 2001, p. 51 (53); U. Loewenheim. In: Schricker/Loewenheim, Urheberrecht, 4. Auflage München 2010, § 17 UrhG, para. 44.

[20] OLG Frankfurt, 12 May 2009—11 W 15/09 = MultiMedia und Recht (MMR) 2009, p. 544 (545); U. Loewenheim. In: Schricker/Loewenheim, Urheberrecht, 4. Auflage München 2010, § 17 UrhG, para. 44.

[21] A. Wiebe. In Spindler/Schuster, Recht der elektronischen Medien, 2. Auflage München 2011, § 17 UrhG, para. 12.

[22] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346, pp. 61–66.

[23] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122, pp. 42–46.

[24] G. Schulze. In: Dreier/Schulze, Urheberrechtsgesetz, Kommentar, 4. Auflage München 2013, § 17 UrhG, para. 22.

[25] See BGH, 6 July 2000—I ZR 244/97 (*OEM*) = GRUR 2001, p. 153 (154).

25.1.3 Patent Law

Contrary to the Copyright Act, the German Patent Act does not mention the principle of exhaustion at all. Nevertheless, the principle of exhaustion is to be considered as a general principle applicable to patent law in Germany.[26] As far as a definition is concerned, it can be referred to the Copyright Act definition meaning that the patent right exhausts when the covered product is put on market by the right holder or with its consent within the European Economic Area.[27] Consequently, the former right holder cannot prevent the use of the product covered by the patent right.[28] However, the buyer cannot refer to the elementary laws of the acquisition in good faith.[29]

Originally, it was assumed that the principle of exhaustion should only apply if the patented product was put on the market in Germany; however, in accordance with the compatible interpretation of European law and in this regard with the free movement of goods and the corresponding ECJ jurisprudence, the principle of exhaustion must also apply when the product is put on market in the European Economic Area.[30] As far as the situation of an affiliated group is concerned, the product is not put on the market when an affiliated company sells the covered product to another one.[31]

25.1.4 Trademark Law

In the German trademark law, the principle of exhaustion is codified in section 24 (1) Trademark Act. According to section 24(1) Trademark Act, the right holder of a trademark cannot forbid the use of the trademark or trade name with which the product was put on the market. Once again, the principle applies when the product is put on the market within the European Economic Area.[32] The principle of exhaustion in trademark law only applies to goods but not services.[33]

Historically, the principle of exhaustion was already established by usage at times of the former Trademark Act.[34,35] Interestingly, the former Trademark Act referred to a more international approach, meaning that it was sufficient that the

[26] BGH, 14 November 2000—X ZR 137/99 (*Bodenwaschanlage*) = GRUR 2001, p. 223 (224); OLG Düsseldorf, 28 January 2010—2 U 131/08 = Neue Juristische Online-Zeitschrift (NJOZ) 2010, p. 1781 (1785); R. Kraßer, Patentrecht, 6. Auflage, München 2009, p. 794.

[27] See for example BGH, 14 November 2000—X ZR 137/99 = GRUR 2001, p. 223 (224).

[28] C. Koppe, Die urheberrechtliche Erschöpfung, Frankfurt a. M. 2004, p. 94.

[29] R. Kraßer, Patentrecht, 6. Auflage München 2009, p. 794.

[30] ECJ, case 15/47, *Centrafarm BV und Adriaan de Peijper v Sterling Drug Inc.*, ECR 1974, p. 1147, pt. 10–12.

[31] C. Koppe, Die urheberrechtliche Erschöpfung, Frankfurt a. M. 2004, p. 97.

[32] K.-H. Fezer, Markenrecht, 4. Auflage München 2009, § 24 MarkenG, para. 1, 11 f.

[33] K.-H. Fezer, Markenrecht, 4. Auflage München 2009, § 24 MarkenG, para. 1, 13.

[34] Warenzeichengesetz, BGBl. I p. 29.

[35] See, for example, BGH, 22 January 1964—I b ZR 92/64 = Neue Juristische Wochenschrift (NJW) 1964, p. 972 (974).

product was put on the market anywhere in the world. The BGH abandoned this approach after the Trademark Act was introduced.[36] Since the ECJ jurisdiction in re *Silhouette*, there is no more doubt that the principle of exhaustion with regard to trademark law requires that the good is put on the market anywhere within the European Economic Area.[37]

The German jurisprudence acknowledges that the free flow of goods (regardless of different trade levels) should not be hampered by interventions of the right holder once it has put the product on the market.[38]

The exhaustion in trademark law means that a third party may distribute the covered good under its trademark or trade name.[39] At first, there was a broad understanding that this definition would not cover the labeling right, section 14 (3) no. 1 Trademark Act. There only existed a few exceptions to this legal view.[40] This view has changed since the BGH-*Sermion II* decision.[41] In this case, the BGH interpreted the principle of exhaustion in the German trademark law more extensively and concluded in the context of the ECJ decision in re *Bristol-Myers Squibb*[42] that the labeling law was also comprised.[43] Indeed, this BGH decision concerned the secondary packaging of parallel imported medicinal products; however, it is now the prevailing view that in conformity with article 7(1) of Directive 2008/95/EC,[44] there can be no other understanding.[45]

The principle of exhaustion in the German trademark law is restricted in section 24(2) Trademark Act. Accordingly, the right holder can prohibit the further use of the trademark due to legitimate reasons. Legitimate reasons are understood to exist when the condition of the covered goods have changed or worsened after having been put on market. This is because the right holder should not have to deal with reputational risks which are due to the distribution arrangements of the buyer. Those distribution arrangements are likely to redound upon the right holder in practice.[46] The question whether this restriction actually applies is to be answered

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[36] BGH, 14 December 1995—I ZR 210/93 (*Gefärbte Jeans*) = GRUR 1996, p. 271 (273 f.).

[37] ECJ, case 355/96, *Silhouette International Schmied GmbH & Co. KG v Hartlauer Handelsgesellschaft mbH,* ECR 1998, I-4822, pt. 22; for further deepening see K.-H. Fezer, Markenrecht, 4. Auflage München 2009, § 24, para. 7 f.

[38] BGH, 22 January 1964—Ib ZR 92/62 (*Maja*) = GRUR 1964, pp. 372 (374 f.); R. Ingerl/C. Rohnke. In: Ingerl/Rohnke, Markengesetz, 3. Auflage München 2010, § 24, para. 8.

[39] ECJ, case 337/95, *Parfums Christian Dior SA und Parfums Christian Dior BV v Evora BV*, ECR 1997 I-6013, pt. 37; K.-H. Fezer, Markenrecht, 4. Auflage München 2009, § 24, para. 9.

[40] Those exemptions are generally described as "customary situations": see *BT*-Drucks. 12/6581, p. 81; K.-H. Fezer, Markenrecht, 4. Auflage München 2009, § 24, para. 9.

[41] BGH, 10 April 1997—I ZR 65/92 = GRUR 1997, pp. 629 ff.

[42] ECJ, case 427/93, *Bristol-Myers Squibb v Paranova A/S*, ECR 1996, I-3457.

[43] BGH, 10 April 1997—I ZR 65/92 = GRUR 1997, p. 629 (632).

[44] Directive 2008/95/EC of 22 October 2008 to approximate the laws of the Member States relating to trade marks, OJ L 299, pp. 25–33.

[45] K.-H. Fezer, Markenrecht, 4. Auflage München 2009, § 24, para. 9 f.

[46] R. Ingerl/C. Rohnke. In: Ingerl/Rohnke, Markengesetz, 3. Auflage München 2010, § 24, para. 55.

in view of the individual case. This means that the individual interests of the trademark right holder and the requirements of the free movement of goods are to be compared and weighed.[47]

25.1.5 Design Law

In the German design law, the principle of exhaustion of rights is codified in section 48 Design Act, which is almost identical to article 15 of Directive 98/71/EC.[48] Once again, the aim is to secure the free movement of goods by prohibiting the right holder from disrupting the market.[49]

25.2 "Traditional Industry" Versus "Online Industry"

The German legal system does not explicitly refer to the term e-commerce. However, the German legislator did respond to the issues that arose in context with e-commerce. In particular, section 312e Civil Code (in the old version) was introduced, which was then retained by section 312g Civil Code (in the new version). Both are securing the implementation of articles 10 and 11 of Directive 2000/31/EC[50] into German law. Therefore, section 312g Civil Code applies when an entrepreneur uses tele- and media services in order to conclude a contract for the supply of goods or services. This section is intended to provide for a minimum standard in terms of a fair contract handling.[51]

Instead of defining the term e-commerce as information society services in accordance with the definition in Directive 2000/31/EC, the German legislator preferred to introduce the term "tele- and media services" at first; meanwhile, this term was replaced by the term "telemedia".[52] In this context, the German legislator intended to achieve a link between section 2 of the Teleservices Act[53] and section

[47] R. Ingerl/C. Rohnke. In: Ingerl/Rohnke, Markengesetz, 3. Auflage München 2010, § 24, para. 57.

[48] Directive 98/71/EC of 13 October 1998 on the legal protection of designs, OJ L 289, pp. 28–35.

[49] H. Eichmann. In: Eichmann/von Falckenstein, Geschmacksmustergesetz, 4. Auflage München 2010, § 48, para. 2.

[50] Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ 178, pp. 1–16.

[51] C. Wendehorst. In: Münchener Kommentar zum BGB, Band 2 §§ 241–432, 6. Auflage München 2012, § 312g, para. 1.

[52] For further comments, see C. Wendehorst. In: Münchener Kommentar zum BGB, Band 2 §§ 241–432, 6. Auflage München 2012, § 312g, para. 20.

[53] Teledienstegesetz, BGBl. I pp. 1870–1880.

2 of the Interstate Agreement on Media Services.[54,55] Even though the intention of the German legislator to create this link was comprehensible, this approach produced more problems in terms of comprehension and interpretation than it actually contributed to legal certainty. In particular, the consumer (as the addressee) could not be certain how to understand the term “tele- and media services”.[56]

Since the Teleservices Act has been replaced by the Telemedia Act,[57] section 1 (1) sentence 1 of the Telemedia Act contains the term “telemedia”.[58] By legal definition, telemedia comprises every information and communication service as long as they are not subsumed under one of the exceptions in section 1(1) sentence one, second half-sentence of the Telemedia Act.[59]

Since section 312g Civil Code finds its origin in Directive 2000/31/EC, one ought to refer to the Directive in order to interpret this section.[60] It follows that telemedia services at least comprise any service generally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.[61] The German Government pointed out that distribution services should not be part of telemedia. Instead, telemedia refers to services that the user can individually and electronically retrieve in order to place a purchasing order.[62]

Further differentiations between the normal and the online market cannot be found when analysing the laws regarding the intellectual property and the copyright.

[54] Mediendienste—Staatsvertrag, GV NRW 1997 pp. 158–163.

[55] Both the Teleservices Act and the Interstate Agreement on Media Services are no longer in force; the Teleservices Act has been replaced by the Telemedia Act. For further reasoning, see B. Holznagel/T. Ricke In: Spindler/Schuster, Recht der elektronischen Medien, 2. Auflage München 2011, § 1 TMG, para. 1; C. Wendehorst. In: Münchener Kommentar zum BGB, Band 2 §§ 241–432, 6. Auflage München 2012, § 312g, para. 20.

[56] C. Wendehorst. In: Münchener Kommentar zum BGB, Band 2 §§ 241–432, 6. Auflage München 2012, § 312g, para. 21.

[57] Telemediengesetz, BGBl. I pp. 179–185.

[58] H. Schulte-Nölke. In: Schulze, Bürgerliches Gesetzbuch—Handkommentar, 7. Auflage Baden-Baden 2012, § 312g, para. 2.

[59] These exceptions are negligible as far as this contribution is concerned.

[60] C. Wendehorst. In: Münchener Kommentar zum BGB, Band 2 §§ 241–432, 6. Auflage München 2012, § 312g, para. 22; see also G. Thüsing. In: Staudinger, BGB, Buch 2, Berlin 2012, § 312g, para. 9 f., who believes that the German legislator consciously implemented a different term than in directive 2000/31/EC; on this behalf he argues that the EC directive should only be referred to in a second stage.

[61] See article 2 lit. a Directive 2000/31/EC in conjunction with article 1 no. 2 Directive 98/48/EC.

[62] RegE, BT-Drucks. 14/6040, p. 171.

25.3 The Principle of Exhaustion in the Online Industry

25.3.1 Introduction

The application of the principle of exhaustion to the online industry is very disputed in the German case law, as well as literature. The German legislator has been aware of this topic for quite a while[63]; however, there has not been a successful approach to solve this problem so far.[64] Especially, the CJEU decision in re *UsedSoft*[65] could only solve some selected issues. Unfortunately, it also provided some new problems that are now subject to discussions.

We propose to review the legal situation before *UsedSoft* in order to illustrate and tackle these new problems.

In the German online sector, the core of all problems referred to the question whether the download of software should fall under the principle of exhaustion or not.

Generally, software is eligible for protection under section 69a(3) Copyright Act. As mentioned in the beginning, the principle of exhaustion with regard to software is codified in section 69c no. 3 sentence 2 Copyright Act. In this regard, the right holder's distribution right shall exhaust when a copy of the software is put on the market within the European Economic Area by the right holder or with its consent. The idea is that the copyright stands back in order to maintain the free movement of the covered good once it is put in the market with the consent of the right holder.[66] Indeed, the right holder is not obliged to put the good on the market. However, once it has entered the market, the right holder is no longer entitled to decide on its further distribution. Hence, the right holder should not be able to interfere with the free movement of goods by influencing the distribution of the product.[67]

25.3.2 The Principle of Exhaustion with Regard to Immaterial Goods

Basically, there were two major questions to be answered in terms of legal certainty. First, it stood out that in section 69c no. 3 sentence 2 Copyright Act, the term

[63] See, for example, T. Hoeren, Entwurf einer EU-Richtlinie zum Urheberrecht in der Informationsgesellschaft – Überlegungen zum Zwischenstand der Diskussion, MMR 2000, p. 515 (517).

[64] See the draft of a law with regard to enabling the private resale of immaterial goods, *BT*-Drucks. 17/8377; for deepening purposes see J. Marly, Praxishandbuch Softwarerecht, 6. Auflage München 2014, para. 201.

[65] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp*. (not yet published).

[66] BGH, 4 May 2000—I ZR 256/97 = NJW 2000, p. 3783 (3785); 15 May 1986—I ZR 22/84 = NJW-RR 1986, p. 1251 (1251); T. Hoeren, Der Erschöpfungsgrundsatz bei Software – Körperliche Übertragung und Folgeprobleme, GRUR 2010, p. 665 (665).

[67] T. Hoeren, Der Erschöpfungsgrundsatz bei Software – Körperliche Übertragung und Folgeprobleme, GRUR 2010, p. 665 (665).

copy was understood to be a physical good. This raised the question whether the principle of exhaustion should also apply to immaterial goods—possibly by analogy. Second, it became apparent that the copy of a piece of software would actually be a reproduction, which is generally not subject to the principle of exhaustion. Therefore, the question arose whether an exception should be made.[68]

25.3.2.1 Analogous Application of Section 69c no. 3 Sentence 2 Copyright Act

Two different opinions were expressed against the application by analogy of section 69c no. 3 sentence 2 Copyright Act to intangible goods.

According to one opinion, the wording of section 69c no. 3 sentence 2 Copyright Act was considered as crucial, which only refers to tangible goods. In addition, it was pointed out that recital (29) of the Directive 2001/29/EC[69] only refers to tangible goods as well.[70]

Furthermore, some writers said that the principle of exhaustion was meant to be an exception that had to be applied restrictively.[71]

Apart from that, it was argued that the reasoning by analogy was not pertinent. First, the opponents to an analogy said that the legislator did not overlook the problem because it was aware of recital (29) of Directive 2001/29/EC when codifying section 69c no. 3 sentence 2 Copyright Act; nonetheless, it did not react to that matter.[72] Furthermore, a hypothetic oversight could not have been unintended because article 4 of Directive 2001/29/EC solely codified the principle of exhaustion with regard to material goods.[73]

According to the second opinion, no difference should be made between tangible and intangible goods. In particular, it would make no difference regarding the right holder's exploiting interests in which way the good was distributed.[74] Apart from that, it was argued that the right holder could circumvent the effect of section 69c no. 3 sentence 2 Copyright Act just by using online distribution; this was

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[68] See T. Hoeren, der Erschöpfungsgrundsatz bei Software – Körperliche Übertragung und Folgeprobleme, In: GRUR 2010, pp. 665 (667 f.).

[69] Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Copyright Directive), OJ L 167, pp. 10–19.

[70] OLG München, 3 July 2008—6 U 2759/07 = MMR 2008, p. 601 (601); 3 August 2006—6 U 1818/06 = MMR 2006, p. 748 (748); LG München I, 19 January 2006—7 O 23237/05 = MMR 2006, pp. 175 (176 f.).

[71] LG München I, 15 March 2007—7 O 7061/06 = MMR 2007, p. 328 (330).

[72] G. Spindler, Der Handel mit Gebrauchtsoftware – Erschöpfungsgrundsatz quo vadis, CR 2008, pp. 69 (70 f.); differing opinion T. Hoeren, Ergänzungsgutachten in re UsedSoft/Oracle, Münster 2007, http://www.usedsoft.com/assets/Law/ergaenzungsgutachten-hoeren-wg-oracle-2007-04-12.pdf, p. 7, last retrieved 25 February 2016.

[73] LG München I, 15 March 2007—7 O 7061/06 = MMR 2007, p. 328 (330); G. Spindler, Der Handel mit Gebrauchtsoftware – Erschöpfungsgrundsatz quo vadis, CR 2008, p. 69 (70).

[74] LG Hamburg, 29 June 2006—315 O 343/06 = CR 2006, p. 812 (814); M. Grützmacher, Wandtke/Bullinger, Praxiskommentar zum Urheberrecht, 3. Auflage München 2009, § 69c UrhG, para. 31.

distinguished as an unfair outcome.[75] Furthermore, some writers put forward that the principle of exhaustion was not an exception because most of the courts classified it as a generally applicable principle.[76] As a consequence, an analogy of section 69c no. 3 sentence 2 Copyright Act was assumed to be applicable.[77]

25.3.2.2 Exception to the Restricted Act of Reproduction Pursuant to Section 69d(1) Copyright Act

Under the hypothetic assumption that the above analogy was pertinent, one has to deal with the fact that the software is then installed on the hard drive and thus reproduced by the buyer; according to section 69c no. 1 Copyright Act, the principle of exhaustion is not applicable to reproductions.

In this regard, section 69d(1) Copyright Act was considered to be relevant. Section 69d(1) Copyright Act states that acts of reproduction are not conditional on the right holder's consent as long as they are necessary to ensure the intended use of the computer program.

The opponents to the analogy argued that the buyer should not be granted reproduction rights because sections 69c no. 3 sentence 2 and 69d(1) Copyright Act are not applicable in the absence of receipt of a tangible copy.[78]

On the contrary, it was argued that section 69d(1) Copyright Act had to be construed in accordance to its purpose and intention, *i.e.*, to enable the usage of the computer program by allowing necessary reproduction actions.[79] When favouring an analogy, it would only be consistent to understand the reproduction act as mandatory in order to use the computer program as intended.[80]

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[75] M. Grützmacher, "Gebrauchtsoftware" und Erschöpfungslehre; Zu den Rahmenbedingungen eines Second-Hand-Marktes für Software, ZUM 2006, p. 302 (305).

[76] T. Hoeren, Ergänzungsgutachten in re UsedSoft/Oracle, http://www.usedsoft.com/assets/Law/ergaenzungsgutachten-hoeren-wg-oracle-2007-04-12.pdf, p. 7, last retrieved 25 February 2016.

[77] M. Grützmacher, Wandtke/Bullinger, Praxiskommentar zum Urheberrecht, 3. Auflage München 2009, § 69c UrhG, para. 31; M. Grützmacher, Gebrauchtsoftware und Übertragbarkeit von Lizenzen, CR 2007, p. 549 (551); O. Sosnitza, Die urheberrechtliche Zulässigkeit des Handels mit "gebrauchter" Software, K&R 2006, pp. 206 (207 f.).

[78] G. Spindler, Der Handel mit Gebrauchtsoftware – Erschöpfungsgrundsatz quo vadis, CR 2008, p. 69 (75).

[79] T. Hoeren, Der Erschöpfungsgrundsatz bei Software – Körperliche Übertragung und Folgeprobleme, GRUR 2010, pp. 665 (667).

[80] T. Hoeren, Der Erschöpfungsgrundsatz bei Software – Körperliche Übertragung und Folgeprobleme, GRUR 2010, p. 665 (667); it follows that section 34(1) Copyright Act is not applicable in this situation; otherwise it could not be provided that the right holder does not inhibit the following distribution. Section 69d(1) Copyright Act is to be understood as *lex specialis* over section 34(1) Copyright Act: T. Hoeren, Der Erschöpfungsgrundsatz bei Software – Körperliche Übertragung und Folgeprobleme, GRUR 2010, pp. 665 (667 f.): meanwhile LG Hamburg, 25 October 2013—315 O 449/12 = MMR 2014, p. 103 (104); alternate view: H. Haberstumpf, Der Handel mit gebrauchter Software und die Grundlagen des Urheberrechts, CR 2009, p. 345 (352).

25.3.2.3 Key Points Regarding CJEU *UsedSoft*

As is probably known, the legal matter between *Oracle* and *UsedSoft* had its origin in Germany. Despite the fact that the *LG München I*[81] and the *OLG München*[82] initially decided in favour of *Oracle*, *UsedSoft* successfully appealed a non-admission complaint to the *BGH*. At that time, the *BGH* decided to pass the matter on to the CJEU seeking a preliminary ruling.[83] This led to the CJEU decision at issue called *UsedSoft*.[84]

The CJEU first determined whether and under which circumstances the download of a computer program's copy from the Internet—authorised by the dealer—could be a first sale in terms of article 4(2) of Directive 2009/24/EC.[85] It found out that a sale normally is an agreement by which one person transfers his ownership rights in tangible or intangible goods to another person. In terms of the intent and purpose of article 4(2) of Directive 2009/24/EC, the principle of exhaustion of the distribution of a computer program's copy must involve the transfer of the ownership in that copy.[86]

The CJEU underlined that the download of a computer program and the conclusion of a licence agreement formed an indivisible whole because downloading a computer program would not be of any sense if one was not allowed to use the program afterwards.[87] By those means, the CJEU concluded that the transfer of ownership was not different between handing out a tangible medium with a computer program copy and an online download. Furthermore, the CJEU hereby solved the problem how to classify a software contract.[88]

The CJEU underlined that tangible and intangible computer program copies are economically comparable. For that reason, the online download of a program's copy is equivalent to the handing over of the actual copy on a data carrier.[89] The European judges also stressed that when taking the contrary view, the right holder would be eligible for charging a fee for any further distribution by the buyer. The CJEU considered this to be unreasonable.[90]

[81] LG München I, 15 March 2007—7 O 7061/06 = MMR 2007, pp. 328 ff.

[82] OLG München, 3 July 2008—6 U 2759/07 = MMR 2008, pp. 601 ff.

[83] BGH, 3 February 2011—I ZR 129/08 = GRUR 2011, pp. 418 ff.

[84] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp.*

[85] Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs, OJ L 111, pp. 16–22. CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp.*, pt. 35.

[86] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp.*, pt. 42.

[87] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp.*, pt. 44.

[88] The understanding is that the CJEU classifies the software contract as a common purchase contract. However, from a German perspective, it is quite interesting that the CJEU concentrates on the right in rem and not the binding agreement itself: see J. Schneider/G. Spindler, Der Erschöpfungsgrundsatz bei "gebrauchter" Software im Praxistest, Computer und Recht (CR) 2014, p. 213 (214); for deepening reasons, see T. Hoeren, Softwareüberlassung als Sachkauf, München 1989, para. 143.

[89] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp.*, pt. 61.

[90] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp.*, pt. 63.

Interestingly, the CJEU reached that position by calling Directive 2009/48/EC[91] a *lex specialis* compared to Directive 2001/29/EC.[92] This point of view will lead to further discussions in the literature as it indicates that Directive 2009/48/EC is not eligible for analogy with regard to other products than those covered by the Directive.[93] Therefore, one should be cautious to follow the CJEUs opinion. Even though the CJEU called the Directive *lex specialis*, it is by far more important that the CJEU underlined the objective of the principle of exhaustion, which consists in limiting the restrictions of the distribution to what is necessary to safeguard the specific subject matter of the intellectual property concerned.[94] This means that the underlying purpose of the principle of exhaustion is of a higher ranking than the actual statutory situation.[95]

However, by calling Directive 2009/24/EC *lex specialis*, the CJEU clarified that making the software available on a homepage does not lead to a "making available to the public" as stated in article 3(1) Directive 2001/29/EC. Hence, the principle of exhaustion is not foreclosed by the Directive because the Directive is not primarily applicable.[96]

Furthermore, the CJEU concluded that a software maintenance agreement does not foreclose the principle of exhaustion. Thereby, the CJEU intended to point out that the temporary nature of a maintenance agreement would not have any repercussions on the principle of exhaustion. The principle of exhaustion applies to the corrected, altered or added version of the original software.[97]

It is crucial to mention that in the view of the CJEU, the download of the computer program is permitted even without the consent of the right holder. Even though this download has to be regarded as a reproduction in terms of article 4 (1) lit. a 2009/24/EC, it is also necessary to enable the new acquirer to use the computer program in accordance with its intended purpose (see article 5(1) Directive 2009/24/EC).[98] The acquirer then impersonates a "lawful" acquirer.[99]

However, the CJEU required that the seller of the intangible (and also tangible) copy made his own copy unusable at the time of the resale.[100] Even though the

[91] Directive 2009/48/EC of 18 June 2009 on the Safety of toys, OJ L 170, pp. 1–37.

[92] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp.*, pt. 56.

[93] See above Sect. 25.3.2.1.

[94] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp.*, pt. 62; ECJ, case 403/08, *Football Association Premier League and Others v QC Leisure and Others*, ECR 2011 I-9083, pt. 106.

[95] Incidentally, see below Sect. 25.3.3.

[96] T. Hoeren/M. Försterling, Onlinevertrieb "gebrauchter" Software – Hintergründe und Konsequenzen der EuGH-Entscheidung "UsedSoft", MMR 2012, p. 642 (644).

[97] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp.*, pt. 67 f.

[98] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp.*, pt. 81.

[99] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp.*, pt. 85.

[100] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp.*, pt. 70, 78.

CJEU allowed the seller to use technical measures to ensure that the reseller's copy was made unusable,[101] it is predictable that this will lead to serious practical problems in terms of the burden of proof.[102]

25.3.2.4 Conclusions from CJEU *UsedSoft* and the Subsequent Decision of the *BGH*[103]

The most important conclusion to be derived is that the principle of exhaustion does apply to the distribution of digital goods. The question on whether an analogy with regard to section 69c no. 3 sentence 2 Copyright Act should be applicable[104] was answered in the affirmative.[105]

Due to *UsedSoft*, the acquirer is regarded as a lawful acquirer (see article 5 (1) Directive 2009/24/EC).[106] The distribution right exhausts with regard to the updated or altered version of the computer program.[107]

It should also be mentioned that the *UsedSoft* decision has contributed to the discussion on how to classify a software contract. It can be concluded that the era of the licensing agreement construction has come to an end.[108] The CJEU has clarified that the right to use the copy is a permanent one.[109] The specific content and provisions of a software contract shall not interfere with the legislative implementations.[110] In this context, special attention should be paid in the future to the interpretation of contractual terms and constructions: as the principle of exhaustion is not applicable with regard to rental and leasing contracts, the question whether a particular contract is a sale contract will have to be examined.[111]

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[101] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp*., pt. 87.

[102] See, for example, J. Schneider/G. Spindler, Der Erschöpfungsgrundsatz bei "gebrauchter" Software im Praxistest, CR 2014, p. 213 (220).

[103] BGH, 17 July 2013—I ZR 129/08 = MMR 2014, pp. 232–241.

[104] See above Sect. 25.3.2.1.

[105] T. Hoeren/M. Försterling, Onlinevertrieb "gebrauchter" Software – Hintergründe und Konsequenzen der EuGH-Entscheidung "UsedSoft", MMR 2012, p. 642 (644); still in doubt G. Schulze, Werkgenuss und Werknutzung in Zeiten des Internets, NJW 2014, pp. 721 (724 f.), who questions whether the principle of exhaustion is up to date with the problems of the Internet and therefore demands a restrictive usage of this principle. This thought is worth mentioning and basically mirrors the problems the ECJ had to deal with; however, this is a rather dogmatic approach that does not lead to a solution of the actual problem.

[106] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp*., pt. 73.

[107] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp*., pt. 68.

[108] T. Hoeren/M. Försterling, Onlinevertrieb "gebrauchter" Software – Hintergründe und Konsequenzen der EuGH-Entscheidung "UsedSoft" MMR 2012, p. 642 (645).

[109] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp*., pt. 45.

[110] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp*., pt. 58, 60.

[111] M. Biehler/S. Apel, Comment on LG Hamburg, 25 October 2013—315 O 49/12. In: ZUM 2014, p. 74 (74).

However, it will have to be taken into consideration that the term "sale" is now characterised by a broad understanding.[112]

The *BGH*[113] has obviously adopted the CJEU's reasoning in its subsequent decision. However, it is to be noted that no final judgement has been made—the case was referred back to the *OLG München*. Nevertheless, the *BGH* agreed on the applicability of the principle of exhaustion on computer programs[114] even though it seemed to favour the opposite opinion in its order for reference.[115]

Moreover, the *BGH* has acknowledged that certain reproduction acts, such as loading the copy in the working memory, are not subject to authorisation by the right holder (see section 69d(1) Copyright Act). Fortunately, the *BGH* emphasised the mandatory core of section 69d(1) Copyright Act and its equivalent in article 5 (1) Directive 2009/24/EC. This point of view is consequent and more than welcome.

On the contrary, the *BGH* pursued a rather unorthodox approach by stating that a right to use the software was granted to the acquirer by section 69d(1) Copyright Act. The result does comply with the findings of the CJEU. However, the *BGH* seemed to be troubled with section 69d(1) first half-sentence Copyright Act, which allows the assignment of rights when contractually agreed on. Dogmatically, section 69d(1) Copyright Act does not offer a basis for a claim; it is to be understood as a legal exception to section 69c no. 3 sentence 2 Copyright Act. Therefore, it would have been much more understandable and elegant if the *BGH* had identified the contractual exclusion of an assignment right as contradictory to the mandatory core[116] of section 69d(1) Copyright Act and therefore as a breach with the German laws on general terms and conditions of business.[117] Meanwhile, the *LG Hamburg* has favoured this approach.[118]

As mentioned earlier, the CJEU *UsedSoft* decision left one big issue open concerning the proof of the dismantling of the seller's copy. The CJEU skilfully avoided this issue by allowing the implementation of technical measures.[119] According to the principles of the German Code of Civil Procedure,[120] the party who actually relies on the principle of exhaustion carries the burden of proof. Depending on the specific facts of the case, the acquirer may bear the burden of proof. At this stage, it seems inconceivable how the acquirer should give substantial

[112] H.-W. Moritz, Eingeschränkte Zulässigkeit der Weiterveräußerung gebrauchter Software, K&R 2012, p. 456 (458).

[113] BGH, 17 July 2013—I ZR 129/08 = MMR 2014, p. 232.

[114] BGH, 17 July 2013—I ZR 129/08 = MMR 2014, pp. 232 (235 ff.).

[115] BGH, 3 February 2011—I ZR 129/08 = MMR 2011, p. 305 (307).

[116] BGH, 17 July 2013—I ZR 129/08 = MMR 2014, p. 232 (235).

[117] See section 307(2) no. 1 Civil Code, in conjunction with sections 17(2), 69c no. 3 sentence 2, 69d(1) Copyright Act; see also below Sect. 25.3.3.

[118] LG Hamburg, 25 October 2013—315 O 449/12 = MMR 2014, p. 103 (104).

[119] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp.*, pt. 87.

[120] Zivilprozessordnung, BGBl. I pp. 3202–3378.

evidence that the seller has made his copy unusable.[121] In particular, it can barely be thought of a situation in which the acquirer could make use of a technical measure because that would imply that he has to take actions in the sphere of the seller. Obviously, the seller will not authorise such an interference with his technical facilities so that in practice the acquirer will fail to bear the proof.

25.3.2.5 Splitting Up Client-Server Licences Respectively Volume Licences

Problem Identification

In practice, a business generally buys a bunch of licences in order to use the computer program on more than one computer.

In this regard, a distinction needs to be drawn between client-server licences and volume licences. When buying a volume licence, the acquirer receives a digital master copy and may then copy the software to different computers (obviously in accordance with the contractually agreed number of copies). That means that the software is installed on and ran from each computer individually. On the contrary, having bought a client-server licence, the acquirer installs the computer program on his central server. Hereinafter, a user accesses the server on demand and is then able to use the computer program; however, the computer program is run directly on the server. So the difference is that in case of a volume licence, the acquirer is granted permission to reproduce the software to a certain extent, whereas the client-server licence only grants a certain number of rights of use.

As far as selling all volume licences as a whole, including the digital master, is concerned, there is no doubt that this situation is to be treated like the sale of only one piece of software including only one licence. Therefore, section 69d no. 3 sentence 2 Copyright Act is applicable in this respect.[122]

However, problems arise when the rights of use are split in order to sell only a couple of rights of use and retain the others. In this regard, there are two main situations to be examined. First, the seller could make a copy of the digital master and then transfer both the copy and the appropriate number of rights of use to the acquirer. Second, it is possible that the acquirer already possesses the computer program and therefore only needs more rights of use.

Findings from CJEU UsedSoft and Client-Server Licences

The *UsedSoft* decision revived the general discussion on this topic. This leads back to pt. 69 of the decision.[123] Pt. 69 states that if the first acquirer bought a licence that

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[121] See also M. Stieper, comment on the judgement ECJ, case 128/11, *UsedSoft GmbH v Oracle International Corp.* In: ZUM 2012, p. 668 (669).

[122] T. Hoeren/M. Försterling, Onlinevertrieb “gebrauchter” Software – Hintergründe und Konsequenzen der EuGH-Entscheidung “UsedSoft” MMR 2012, p. 642 (645); M. Grützmacher, Gebrauchtsoftware und Übertragbarkeit von Lizenzen, CR 2007, p. 549 (552).

[123] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp.*, pt. 69.

provides for more users than actually needed, he shall not be authorised by the principle of exhaustion to divide the licence and resell only the user rights that are of no future use.

In this context, some writers assumed that this sentence would lead to a prohibition of splitting volume licences.[124]

However, pt. 69 of the decision cannot be over-simplified but has to be understood in context with the facts at issue. In *UsedSoft,* the CJEU had to deal with client-server licences; therefore, it has to be concluded that the pt. 69 does not state a general principle.[125] Especially, pts. 22 and 24 of the *UsedSoft* decision support this assumption because they refer to the facts of issue of the preliminary ruling of the *BGH*—and surely the *BGH* dealt with client-server licences.[126]

Furthermore, in pt. 70, the CJEU stated that the seller would have to make his own copy unusable at the time of resale. This use of words is also an argument in favour of client-server licences because otherwise it would have been indispensable to refer to the copies on the respective desktop computers as well.

In conclusion, the CJEU favoured the prohibition of splitting client-server licences. The outcome is comprehensible. However, it did not decide on volume licences.

Volume Licences

As a result, the discussion on how to deal with volume licences will continue.[127] Having analysed the *UsedSoft* decision, it appears coherent to permit the splitting of volume licences in the future. Generally, it can be argued that a certain copy from the digital master to the correspondent desktop computer is derived with the consent of the right holder because it will normally receive a compensation fee.[128] Assuming that this new copy is retained legally, it seems obvious to equate this copy with a

[124] T. Heydn, comment on ECJ, case 128/11, *UsedSoft GmbH v Oracle International Corp,* MMR 2012, p. 586, 591; J. Schneider/G. Spindler, Der Kampf um die gebrauchte Software – Revolution im Urheberrecht?, CR 2012, p. 489 (493).

[125] T. Hoeren/M. Försterling, Onlinevertrieb "gebrauchter" Software – Hintergründe und Konsequenzen der EuGH-Entscheidung "UsedSoft", MMR 2012, p. 642 (645); J. Marly, Der Handel mit Gebrauchtsoftware, CR 2014, p. 145 (148); H.-W. Moritz, Eingeschränkte Zulässigkeit der Weiterveräußerung gebrauchter Software, K&R 2012, p. 456 (459); H. Redeker, Das Konzept der digitalen Erschöpfung – Urheberrecht für die digitale Welt, CR 2014, p. 73 (75).

[126] J. Marly, Praxishandbuch Softwarerecht, 6. Auflage München 2014, para. 219; T. Hoeren/M. Försterling, Onlinevertrieb "gebrauchter" Software – Hintergründe und Konsequenzen der EuGH-Entscheidung "UsedSoft", MMR 2012, pp. 642 (645 f.).

[127] For deepening reasons and with regard to the dogmatic approaches, see T. Hoeren, Der Erschöpfungsgrundsatz bei Software – Körperliche Übertragung und Folgeprobleme, GRUR 2010, pp. 665 (665 ff.).

[128] J. Schneider/G. Spindler, Der Kampf um die gebrauchte Software – Revolution im Urheberrecht?, CR 2012, p. 489 (497).

copy retained online from the right holder.[129] This result is especially consistent from an economic point of view because simply put, the volume licence is not a whole but a bunch of single licences offered and bought as a package.[130]

Hence, applying the general legal views in *UsedSoft,* it should be concluded that the splitting of volume licences is not prohibited. Obviously, the other requirements regarding the *UsedSoft* decision must be met; especially, it should be paid attention that when already using the full amount of licences, one copy needs to be made unusable in the event of a sale.[131]

In this context, the *OLG Frankfurt a.M.* decided in 2013 that splitting up a volume does not collide with the legal implementations as long the originally granted number of rights of use is not exceeded after the split.[132]

25.3.2.6 Issues in Relation to Maintenance Agreements

Because of the *Usedsoft* decision, some writers betokened that the acquirer would enter into a contractual relationship with the maintenance provider if such a maintenance contract was already concluded before the software sale.[133]

The problem is that in the German literature, some writers argued the maintenance contract would be a service contract.[134]

In my opinion, there is no maintenance contract as such.[135] The parties agree on a “general service contract”, which can be classified as a contract for the performance of continuing obligations. Thereby, the acquirer can demand a certain performance which is then subject to software maintenance.[136] Moreover, it is the responsibility of the acquirer to demand the performance.

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[129] J. Schneider/G. Spindler, Der Kampf um die gebrauchte Software – Revolution im Urheberrecht?, CR 2012, p. 489 (497).

[130] J. Marly, Praxishandbuch Softwarerecht, 6. Auflage München 2014, para. 218; O. Sosnitza, Die urheberrechtliche Zulässigkeit des Handels mit gebrauchter Software, K&R 2006, pp. 206 (208 f.); with the same result M. Grützmacher, Gebrauchtsoftware und Übertragbarkeit von Lizenzen, CR 2007, p. 549 (554).

[131] With the same result T. Hoeren, Der Erschöpfungsgrundsatz bei Software – Körperliche Übertragung und Folgeprobleme, GRUR 2006, p. 665 (670); H. Redeker, Das Konzept der digitalen Erschöpfung – Urheberrecht für die digitale Welt, CR 2014, p. 73 (76).

[132] OLG Frankfurt a.M., 18 December 2012—11 U 68/11 = GRUR 2013, pp. 279 (282 f.).

[133] See J. Schneider/G. Spindler, Der Kampf um die gebrauchte Software – Revolution im Urheberrecht?, CR 2012, p. 489 (493), who have apparently changed their minds in: Der Erschöpfungsgrundsatz bei gebrauchter Software im Praxistest, CR 2014, p. 213 (217).

[134] H. Beise, DB 1979, p. 1214; apart from this classification, there were also writers who classified the maintenance contract as a rental contract: H. P. Löwe, Gedanken zur rechtlichen Einordnung von Wartungsverträgen, CR 1987, p. 219 (220); however, with regard to software which was individually ordered and then custom made, it makes sense to assume a contract to produce a work: for deepening reasons, see T. Hoeren, in. In: Graf von Westphalen, Vertragsrecht und AGB-Klauselwerke, Klauselwerke, IT-Verträge, para. 172.

[135] Obviously, there are differing opinions; see also T. Hoeren/M. Försterling, Onlinevertrieb “gebrauchter” Software – Hintergründe und Konsequenzen der EuGH-Entscheidung “UsedSoft”, MMR 2012, p. 642 (646).

[136] T. Hoeren/M. Försterling, Onlinevertrieb “gebrauchter” Software – Hintergründe und Konsequenzen der EuGH-Entscheidung “UsedSoft”, MMR 2012, p. 642 (646).

Nevertheless, the general principles of the Civil Code continue to apply. That means that the private autonomy has to be taken into account. For that reason, the maintenance provider can still decide with whom he wants to enter into an agreement. Hence, the principle of exhaustion cannot cause a contractual relationship between the acquirer and the maintenance provider.[137]

25.3.2.7 The Significance of Technical Measures

The CJEU pointed out in pt. 79 of the *UsedSoft* decision that the proof that the seller has made his copy of the software unusable could cause some difficulties. Therefore, it concluded that the acquirer was allowed to use technical protective measures such as product keys.[138]

In the German legal system, such technical measures must generally be contractually agreed; otherwise, they are supposed to be a contractual breach.[139] The purpose of the technical measures will be important to assess their lawfulness. In light of the *UsedSoft* decision, certainly all measures which aim at dismantling any copy held by the seller will be lawful.[140]

However, technical measures causing serialisation or requiring activation are not acceptable.[141] It has to be ensured that the principle of exhaustion will not be banned or circumvented by such measures.

In this regard, a change of the German jurisprudence must be expected. In 2010, the *BGH* judged in re *Half Life 2* regarding a technical measure that effectively led to a restriction on disposal. In this case, the usage of the computer game would only be possible if the acquirer created a player's account and logged into it every time he wanted to play the game. However, in the case of the resale of the game, the seller would not be allowed to pass on his player's account or at least the access data.[142] The *BGH* concluded that this condition was acceptable as it would not interfere with the law, especially following the examination of the laws of general terms and conditions, section 307(1) sentence 1, (2) sentence 1 of the Civil Code in conjunction with the principle of exhaustion. The judges argued that the disposal of the copy was effective despite the questionable condition; on the contrary, it would not be decisive whether a potential buyer was actually not interested in buying the copy.[143] They came to the conclusion that a technical measure which modified the

[137] T. Hoeren/M. Försterling, Onlinevertrieb "gebrauchter" Software – Hintergründe und Konsequenzen der EuGH-Entscheidung "UsedSoft", MMR 2012, p. 642 (646).

[138] CJEU, case 128/11, *UsedSoft GmbH v Oracle International Corp*., pt. 79.

[139] J. Schneider/G. Spindler, Der Erschöpfungsgrundsatz bei "gebrauchter" Software im Praxistest, CR 2014, p. 213 (221).

[140] See also T. Hartmann, Weiterverkauf und "Verleih" online vertriebener Inhalte, Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil (GRUR-Int.) 2012, p. 980 (985).

[141] J. Schneider/G. Spindler, Der Erschöpfungsgrundsatz bei "gebrauchter" Software im Praxistest, CR 2014, p. 213 (221).

[142] BGH, 11 February 2010—I ZR 178/08 = MMR 2010, p. 771 (772).

[143] BGH, 11 February 2010—I ZR 178/08 = MMR 2010, pp. 771 (772 f.).

modalities of the computer game's usage would not interfere with the copyright law even if it effectively led to a non-disposability.[144]

In the light of the *UsedSoft* decision, this approach cannot be pursued.[145] It may only be noted in the margin that the disposal of the game is still possible—it is not directly forbidden by law or such. However, considering that the game was bound to the gamer's online account, the economic value of the game tended to zero. In consequence, such a measure effectively seals off (downstream) markets. Obviously and as mentioned earlier, the goal of the European Union is to reduce the restrictions in the Digital Single Market.[146]

Having said so, in a new decision, the *LG Berlin*[147] surprised by relying on the *BGH's* arguments rather than transferring the *UsedSoft* principles to the facts issued. The facts issued were very comparable to those in *Half Life 2*; they comprised a computer game which could be used only after having registered an online player's account. The general terms and conditions contained a clause which prohibited the transfer of the player's account, as well as any relevant data to access the player's transfer. The interesting difference from *Half Life 2* was that the game could not be used as long as the player was not logged into his account. Being logged in was vital to the game because the producers had developed the game in the way that some of the content was allocated on the servers.

The *LG Berlin* judged that this constituted an "additional service" offered by the producers. The court then referred to recital (29) of Directive 2001/29/EC and assumed that the principle of exhaustion was not applicable to services.[148]

Unfortunately, the *LG Berlin* was fatally mistaken by pursuing this dogmatic approach. Surely, the contract between the producers and the acquirer comprises not only elements of a purchase contract but also those of a rental agreement, as well as a service contract. However, following the prevailing view in the German legal system, these contracts comply with the nucleus of the contract. Where necessary, this nucleus has to be determined by interpreting the intention of the

[144] BGH, 11 February 2010—I ZR 178/08 = MMR 2010, p. 771 (773); affirmative: T. Heydn, comment on *BGH*, 11 February 2010—I ZR 178/08 = MMR 2010, p. 773 (774); H.-W. Moritz, Der Handel mit "gebrauchter" Software – Wolkenkuckucksheim ohne tragfähiges Element? In: Festschrift für Benno Heussen, hrsg. von Jochen Schneider, Köln 2009, p. 221 (224).

[145] T. Hartmann, Weiterverkauf und "Verleih" online vertriebener Inhalte, Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil (GRUR-Int.) 2012, p. 980 (985); see also J. Schneider/G. Spindler, Der Erschöpfungsgrundsatz bei "gebrauchter" Software im Praxistest, CR 2014, p. 213 (221), even though they appeared to have a different opinion in: Der Kampf um die gebrauchte Software – Revolution im Urheberrecht?, CR 2012, p. 489 (493).

[146] See recital (4) of the Directive 2009/24/EC as well as recitals (6 ff.) of the Directive 2001/29/EC.

[147] LG Berlin, 21 January 2014—15 O 56/13 = ZUM-RD 2014, p. 504.

[148] LG Berlin, 21 January 2014—15 O 56/13 = ZUM-RD 2014, p. 504.

parties pursuant sections 133, 157, 242 Civil Code.[149] In this regard, it is rather obvious that an objective observer would assume that the parties have agreed on a purchase contract. It is particularly doubtful that a buyer of a computer game knows that he will be depending upon further services to be provided by the producers. This becomes even more apparent when considering the fact that these registry obligations in question normally arise *after* having bought the game. Having said so, the acquirer cannot foresee any further obligations which would actually change the nature of the contract at the time of conclusion.

The bottom line is that the *LG Berlin* should have adopted the CJEU *UsedSoft* view on the exhaustion principle because the questionable contract is a purchase contract. Therefore, the *LG Berlin* should have judged a breach of section 307 (2) no. 1 Civil Code in conjunction with section 69c no. 3 sentence 2 Copyright Act.

25.3.3 Application of the Principle of Exhaustion to Other Digital Goods

At this point, the question should be raised whether the principle of exhaustion, relatively the ruling in re *UsedSoft*, is applicable to other digital goods but computer programs.

It is certainly worth mentioning that the CJEU *UsedSoft* decision was mainly geared by Directive 2009/24/EC.[150] In particular, one could argue that having imposed Directive 2001/29/EC as *lex specialis*, the underlying ideas which motivated the *UsedSoft* decision could not be transferred to issues that are not covered by this Directive.[151]

Moreover, some writers say that other digital goods exist which are different. For example, an eBook is not only a piece of software but also a linguistic creation.[152] The situation of computer games is even more complex[153]: they are generally assembled from computer programs, especially by the "engine" which runs the game, audiovisual contents, obviously meaning graphics and music, as well as other contents dependent on the individual case.

[149] A. Stadler. In: Jauernig, Bürgerliches Gesetzbuch, 15. Auflage München 2014, § 311, para. 30 ff.

[150] See T. Hoeren/M. Försterling, Onlinevertrieb "gebrauchter" Software – Hintergründe und Konsequenzen der EuGH-Entscheidung "UsedSoft", MMR 2012, p. 642 (647).

[151] See S. Krüger/M. Biehler/S. Apel, Keine "Used Games" aus dem Netz – Unanwendbarkeit der "UsedSoft"-Entscheidung des EuGH auf Videospiele, MMR 2013, pp. 760 (762 f.)

[152] For reference reasons see K.-N. Peifer, Vertrieb und Verleih von E-books – Grenzen der Erschöpfungslehre, Zeitschrift für Medien- und Kommunikationsrecht (AfP) 2013, p. 89 (90).

[153] Computer games are also referred to as hybrid works; see W. Bullinger. In: A.-A. Wandtke/W. Bullinger, Urheberrecht, 3. Auflage München 2009, § 2 UrhG, para. 151, 155.

However, detractors of the principle of exhaustion's applicability to other digital goods should fall fairly silent in consideration of the CJEU *Nintendo* decision.[154] In that case, the CJEU concluded that even though computer games comprise different elements, each of which may be covered by different Directives, both Directives 2009/24/EC and 2001/29/EC are applicable at the same time, regardless that Directive 2009/24/EC was called *lex specialis* in *UsedSoft*.[155] As a result, it can no longer be argued that nowadays computer games only include a minor part that actually is a computer program, and therefore Directive 2001/29/EC should solely be applicable.[156]

Nevertheless, the *LG Bielefeld* has anew joined the opponents to the applicability of the principle of exhaustion.[157] The case concerned an online shop offering eBooks and audio books for download. In the general terms and conditions, the online shop included a clause saying that the acquirer was granted a right of use. Apart from that, the acquirer would not be allowed to distribute the product against payment or free of charge, to reproduce it or to use it for commercial reasons.[158]

The *LG Bielefeld* concluded that this condition would not interfere with the laws of the general terms and conditions of a business (see sections 307(1), (2) no. 1 and 2 Civil Code in conjunction with section 17(2) Copyright Act). It argued that the acquirer would receive a right of use which granted permission to listen to or to watch the digital product as often as he wanted. The fact that further rights were not granted was justified by stressing that those rights would not coincide with the primary purpose of the contract.[159] Furthermore, the court pointed out that it was already not possible to gain ownership of an eBook or audio book because it was not an object pursuant section 90 Civil Code.[160]

This decision of the *LG Bielefeld* holds some odd chains of thoughts. It almost seems like the judges wanted to achieve a certain outcome no matter what the cost—or rather the legal justification.

Obviously, the *LG Bielefeld* was right in stating that an eBook or an audio book is not an object pursuant to section 90 Civil Code. However, the court abstained from characterising the contract afterwards. For example, it would have seemed appropriate to discuss a purchase of rights pursuant sections 433, 453 Civil Code,

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[154] CJEU, case 355/12, *Nintendo Co. Ltd., Nintendo of America Inc., Nintendo of Europe GmbH v PC Box Srl, 9 Net Srl* (not yet published).

[155] CJEU, case 355/12, *Nintendo Co. Ltd., Nintendo of America Inc., Nintendo of Europe GmbH v PC Box Srl, 9 Net Srl*, pt. 22 f.

[156] In this sense S. Krüger/M. Biehler/S. Apel, Keine "Used Games" aus dem Netz – Unanwendbarkeit der "UsedSoft"-Entscheidung des EuGH auf Videospiele, MMR 2013, p. 760 (762).

[157] LG Bielefeld, 5 March 2013—4 O 191/11 = GRUR-RR 2013, pp. 281 ff.

[158] LG Bielefeld, 5 March 2013—4 O 191/11 = GRUR-RR 2013, p. 281 (282).

[159] LG Bielefeld, 5 March 2013—4 O 191/11 = GRUR-RR 2013, p. 281 (282).

[160] LG Bielefeld, 5 March 2013—4 O 191/11 = GRUR-RR 2013, p. 281 (282).

which are the provisions setting forth the rules of purchase contracts.[161] This is especially awkward because later on the court referred to the primary aim of the contract. It particularly stressed that the aim was not to grant "rights comparable to ownership rights"; in fact, it should only be granted a right of use in terms of the copyright laws.[162] By that the *LG Bielefeld* was probably talking about a licence. But it remains unclear how the court classified the actual contract irrespective of the right of use.

It got even more confusing when the court justified the usage of purchase contract terms in the general terms and conditions by saying that the layperson would be unable to cope with terms from the copyright law; however, he would normally be familiar with the circumstances of an Internet purchase; the buyer would know that he did not receive the same position as a purchase contractor.[163] It seems needless to say that at this stage the level of confusion is at a maximum: on the one hand, the buyer—being a layperson—should not be overburdened with copyright law terms; on the other, he should generally be able to differentiate between a right of use and the conditions of a purchase contract regarding a digital good.

Beyond that, the question arises why it should be unreasonable to use terms of the copyright law in general terms and conditions. Surely, these terms can be deceptive at times. However, the evaluation of such a deception would be subject to the relevant individual case. In general, there is no reason not to use copyright terms in general terms and conditions.

Eventually, the *LG Bielefeld* considered that the principle of exhaustion was neither directly nor by analogy applicable to eBooks or audio books. The judges said that the conditions for an analogy would not apply.[164] Furthermore, it referred to the *lex specialis* argumentation.[165]

In this context, the *LG Bielefeld* remained very technical and close to the wording of Directive 2001/29/EC which surprises considering the creativity displayed when dealing with the principles governing the general terms and conditions. The court neglected that in *UsedSoft*, the CJEU had the foreclosure of downstream markets in mind.[166] This overall goal would have required a more sensitive handling of this matter.

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[161] See also T. Hoeren, Ergänzungsgutachten in Sachen UsedSoft/Oracle, Münster 2007, http://www.usedsoft.com/assets/Law/ergaenzungsgutachten-hoeren-wg-oracle-2007-04-12.pdf, last retrieved 25 February 2016; O. Sosnitza, Die urheberrechtliche Zulässigkeit des Handels mit gebrauchter Software, K&R 2006, p. 206 (208).

[162] LG Bielefeld, 5 March 2013—4 O 191/11 = GRUR-RR 2013, p. 281 (282).

[163] LG Bielefeld, 5 March 2013—4 O 191/11 = GRUR-RR 2013, p. 281 (283).

[164] LG Bielefeld, 5 March 2013—4 O 191/11 = GRUR-RR 2013, p. 281 (284); with regard to the premises of an analogy, see above Sect. 25.3.2.1.

[165] LG Bielefeld, 5 March 2013—4 O 191/11 = GRUR-RR 2013, p. 281 (284).

[166] See J. Schneider/G. Spindler, Der Kampf um die gebrauchte Software – Revolution im Urheberrecht?, CR 2012, p. 489 (497).

Redeker came up with a very plausible example questioning why the owner of an eBook should be treated differently from the owner of an actual book purchased online. Both contain the same, yet only the owner of the actual book is entitled to resell it.[167]

Once again the overall goal of the principle of exhaustion must be examined: First, it protects the right holder's interest to make a profit from the copyrighted work. Once the work has been put on the market it should be able to circulate in order to prevent the foreclosure of markets. In the example stated above, the copyrighted work remains the same, "only" the distribution chain differs. This being said, it is obvious that the recital (29) does not meet the needs of the European Community any more. Quite the contrary, its statement that the problem of the principle of exhaustion would not arise in terms of online services is simply wrong—as the example shows.[168]

Hence, from an economic point of view, it should not make any difference whether the principle of exhaustion applies to computer programs or to other digital goods. In fact, it has to be taken into account that the market for digital goods is rapidly growing and the free movement of goods has to be ensured as a primary goal of the European Community.

This aim can only be achieved by applying the principle of exhaustion to all digital goods.[169]

25.4 Infringement and Remedies

As far as can be ascertained, there is no differentiation between infringements in the regular market in contrast to the online market in the German legal system.

In German copyright law, the infringed party is granted an injunctive relief following section 97(1) Copyright Act. Section 97(1) Copyright Act states a duty to refrain from any infringement to the copyright. In this regard, the infringer is strictly liable. This duty addresses the perpetrator or collaborator of the infringement.[170] The corresponding claim in section 97(1) Copyright Act also covers future infringements as long as a danger of recurrence or even a danger of a first infringement can be proven.[171]

[167] H. Redeker, Das Konzept der digitalen Erschöpfung – Urheberrecht für die digitale Welt, CR 2014, p. 73 (76).

[168] Affirmative: H. Redeker, Das Konzept der digitalen Erschöpfung – Urheberrecht für die digitale Welt, CR 2014, p. 73 (76).

[169] Affirmative: T. Dreier. In: Dreier/Schulze, UrhG, 4. Auflage München 2013, § 69c UrhG, para. 24; T. Hoeren/M. Försterling, Onlinevertrieb "gebrauchter" Software – Hintergründe und Konsequenzen der EuGH-Entscheidung "UsedSoft", MMR 2012, p. 642 (647); K.-N. Peifer, Vertrieb und Verleih von E-books – Grenzen der Erschöpfungslehre, AfP 2013, p. 89 (90); differing view: OLG Stuttgart, 3 November 2011—2 U 49/11 = ZUM 2012, pp. 811 (812 f.).

[170] T. Dreier. In: Dreier/Schulze, UrhG, 4. Auflage München 2013, § 69c UrhG, para. 23.

[171] See J. Marly, Praxishandbuch Softwarerecht, 6. Auflage München 2014, para. 287 ff.

It shall be mentioned that the German legal system also knows the principle of liability for disturbance. The conditions of making the claim are not determined; however, liability for disturbance is generally approved and derived either from section 97(1) Copyright Act[172] or from the analogous application of sections 1004, 823 Civil Code.[173] It can be made when a disturber — without being a perpetrator or collaborator — has contributed to the damage deliberately and causatively.[174]

Furthermore, section 97(2) sentence 1 Copyright Act contains a fault-based damage claim; section 97(2) sentence 2 Copyright Act covers damage claims with regard to intangible damage. Following section 102a Copyright Act, these bases of claims are not exclusive so that other bases of claims are applicable as well. In this regard, sections 823, 1004, 812 ff. Civil Code should be named; among others, section 3 of the German unfair competition law[175] is a good example.

These claims can be pursued by interlocutory proceedings as long as urgency can be proved.[176]

When pursuing any claim, the claimant can also avail himself of a notice following section 97a Copyright Act. Later on, the claimant can claim reimbursement of expenses provided that a legitimate warning was given in accordance with section 97a Copyright Act (see section 97a(3) in conjunction with section 97a(1), (2) Copyright Act. However, the warning is not mandatory. The claimant is rather supposed to make use of this possibility in order to claim his rights. If the claimant does not provide a notice, he is at risk of bearing the court fees provided that the opponent acknowledges the claim following section 93 code of civil procedure.[177]

The claims have to be asserted at ordinary courts (section 104 sentence 1 Copyright Act).

In other IP fields of law, there are similiar duties to refrain from infringements as well as damage claims (see section 14(2) and (6) Trademark Act, section 139(1) and (2) Patent Act, section 42(1) and (2) Design Act).

[172] See T. Dreier. In: Dreier/Schulze, UrhG, 4. Auflage München 2013, § 69c UrhG, para. 33 ff.

[173] See, for example, BGH, 12 July 2012—I ZR 18/11 (*Rapidshare—Alone in the Dark*) = MMR 2013, p. 185 (186); BGH, 11 March 2004—I ZR 304/01 (*Internetversteigerung—Rolex*) = MMR 2004, p. 668 (671); at this stage, there is no need for further pursuance of the liability for disturbance—however, it should be pointed out that this liability principle has caused many discussions because as outlined it is applicable in the case of any causatively contribution. In theory, this is a very extensive liability that is likely to lead to inequitable results. The discussion is particularly vivid in terms of the liability of WLAN-providers; see T. Hoeren/S. Jakopp, WLAN-Haftung – A never ending story?, Zeitschrift für Rechtspolitik (ZRP) 2014, pp. 72 ff.

[174] See, for example, BGH, 11 March 2004—I ZR 304/01 (*Internetversteigerung—Rolex*) = MMR 2004, p. 668 (671).

[175] Gesetz gegen den unlauteren Wettbewerb, BGBl. I pp. 254–263.

[176] OLG Düsseldorf, 22 August 2008—I-2 W 43/08 = GRUR-RR 2009, pp. 157 (158 f.); see also T. Dreier, in: Dreier/Schulze, UrhG, 4. Auflage München 2013, § 69c UrhG, para. 90.

[177] See *BT*-Drucks. 15/1487, p. 25.

25.5 Conclusion and Recommendations

The above remarks are supposed to describe the crucial role of the principle of exhaustion in German and European IP rights sector. Essentially, the principle of exhaustion is aiming to facilitate the free movement of digital goods by prohibiting the foreclosure of downstream markets as well as ensuring the initial rights of the right holder.

Our society faces the extraordinary yet familiar problem that the information technology and the Internet raise legal questions almost every day.

In this context, the jurisprudence is troubled by the fact that the European and also the German legislators (and most likely the other EU Member States' legislators) are not able to cope with the relevant legal issues within a reasonable time. Hence, the courts have to deal with legal issues and fact situations that are always different. At the same time, these legal issues are normally little researched and/or not codified by law.

It should be recalled that Directive 2001/29/EC is more than 13 years old. Bearing this in mind, it becomes more obvious that this Directive can only address problems and topics that were familiar at that time. Needless to say, Directive 2001/29/EC obviously did not deal with the problem of the principle of exhaustion with regard to the online industry because the legislator considered it to be harmless (see recital (29)).

However, the legislator should beware of becoming overzealous and react to or regulate every business model that arises. First, the ordinary legislative procedures take too long in order to handle the problems that come up almost daily. One of my students recently addressed me with the foreword to my textbook where I gave props to the publisher for a possibly record-breaking publishing period of only 6 weeks stating that even "only" 6 weeks could be sufficient to make the textbook outdated. I still believe that the rapid pace of change is one of the key points when analysing the problems with regard to the IT sector and the legal system.

Furthermore, the problems can be faced in a different manner: in this regard, it is crucial that both the CJEU and the courts of the Members States practically use their legal know-how. The principle of exhaustion is one of the most crucial principles in copyright law and IP rights and should therefore not be questioned just because a rather unknown distribution channel occurs. As said earlier, the principle of exhaustion is not about the distribution channel but about free distribution of a good. I certainly agree that the discussion on the principle of exhaustion is justified because when the law says that a principle only applies to the distribution of tangible goods and all of a sudden some writers want to apply the same principle to the distribution of intangible goods, there surely is a reason for controversy. However, this controversy with regard to a topic of such practical relevance cannot be subject to legal pernicketiness. The principle of exhaustion is of huge economic importance and is therefore to be discussed against this background. At this point, the question follows up why an intellectual work should be treated differently just because of its (in-)tangibility. In this context, it is often omitted that copyright law is not only about manifestation of the intellectual good but also about the intellectuality that inheres to the good—and polemically said this intellectual property cannot be subject to a distribution channel.

Having said this, I think it is most crucial that from now on the involved parties make use of well-known and well-tried principles. There is no doubt that the future entails even more problems that are subject to the complexity of the Internet and media law. Once again, the legislators will not be able to tackle these problems adequately. Likewise, the courts will be facing the same problems and needless to say they are already troubled with the challenges they face. For example, the *UsedSoft* case was first pending with the *LG München I* in 2006; now in 2014, the case is still not over. The consequences of this sluggish pace can be perfectly shown using the *UsedSoft* example. Ultimately, *UsedSoft* was forced to file for insolvency.[178] This may be called business risk, but it was an avoidable one.

It seems most promising to tackle future problems by the development of law in courts. For this purpose, the courts and judges must widen their perspective and really take into account the circumstances of the respective matter. Hence, the judges will be left with the recourse to well-known legal principles.

Besides, one should be wary of over-regulating the Internet and the IT sector: regulating a certain matter usually creates loopholes on a different level. This statement is not supposed to be understood as a general refusal of regulation. It is rather a thought-provoking impulse, as well as a warning to be very aware of possible negative outcomes of future regulations. *Sometimes less is more*.

Ultimately, it shall once again be stressed that the principle of exhaustion must be applied to other digital goods. It is crucial to achieve a balance between the copyrights on the one hand and the target of single digital market on the other hand. Especially from an economic point of view, it is by no means acceptable to treat a normal book and an eBook in a different way.

[178] See http://www.heise.de/newsticker/meldung/UsedSoft-meldet-auch-in-Deutschland-Insolvenz-an-1346521.html, last retrieved 26 February 2016.

Hungary

26

Zsófia Lendvai

26.1 Introduction

In recent years, online industry has grown and developed (and is continuing to grow and develop) at an extraordinary rate. According to Eurostat, in the EU-28, businesses reported that 14 % of their total turnover came from e-commerce during 2012, consisting of orders via a website or via EDI-type messages. In fact e-commerce enables businesses to establish their presence on the market at a national level and also to extend their economic activities beyond national borders.

The scope of the Questionnaire is to examine new developments in the application of the principle of exhaustion of IP rights to the online industry in national law.

Recent decisions in Europe and in the Unites States (in Europe, EU Court of Justice C-128/11 of July 3 2012—the Oracle Case; in US, Supreme Court n. 11-697 of March 19, 2013 and US Supreme Court n. 11-796 of May 13, 2013) have brought to new attention the principle of exhaustion of IP rights and, in general, new interest to the online industry in itself and in its relation to IP rights.

26.1.1 Exhaustion of IP Rights

Exhaustion of IP rights means that the holder of an IP right—as a rule—cannot oppose the further sale or commercialization of the subject right (or the pertaining product), provided that the first sale occurred with the IP owner's authorization. In practice, exhaustion provides for the right to resell and advertise a product by

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distributors without the express authorization of the IP owner; however, exhaustion does not hinder the IP owner to control the resale/distribution of its products if it has a legitimate reason to do so. Hungary is a member of the EU; therefore, the exhaustion of IP rights applies to the whole territory of the European Economic Area.

26.1.2 IP Rights Are Subject to the Principle of Exhaustion

Exhaustion of rights is defined by the special legislation applicable to the subject IP right, in particular the following:

(i) Copyright:

Under Section 23 (5) of the Act No. LXXVI of 1999 on Copyright (Copyright Act)

If the copy of the work has been put into circulation by the rightholder or by another person expressly authorized to do so by the rightholder through sale or the assignment of ownership in any other manner within the European Economic Area, the right of distribution, with the exception of the right of rental, lending and importation, shall be exhausted with regard to the copy of the work which has been put into circulation.

(ii) Trademarks:

Act XI of 1997 on the protection of trademarks and geographical indications (Trademark Act) Section 16 (1) Trademark protection shall not entitle the holder to prohibit the use of the trademark in relation to goods which have been placed on the market in the European Economic Area by him or with his express consent.

(2) Paragraph (1) shall not apply where the holder has legitimate reasons to oppose further commercialization of the goods, in particular where the condition of the goods has been changed or impaired.

(iii) Patents:

Act XXXIII of 1995 on the protection of inventions by patents (Patent Act)

Article 20 – The exclusive right of exploitation conferred by patent protection shall not extend to acts concerning a product put on the market in the territory of the European Economic Area by the patentee or with his express consent, except where the patentee has legitimate interests in opposing the further marketing of the product.

Article 20/A (4) The exclusive right of exploitation conferred by patent protection shall not extend to biological material obtained from the propagation or multiplication of biological material put on the market in the territory of the European Economic Area by the patentee or with his express consent, where the propagation or multiplication necessarily results from the application for which the biological material was marketed, provided that the material obtained is not subsequently used for other propagation or multiplication.

(iv) Utility Models:

Act XLVIII of 2001 on the protection of utility models (Act on Utility Models)

Section 17 (2) With respect to the [. . .] limitations and exhaustion of utility model protection, the common provisions of the Patent Act [. . .] on limitations and exhaustion of patent protection shall apply *mutatis mutandis*.

(v) Designs:

Act No. XLVIII of 2001 on the Legal Protection of Designs (Design Act)

Section 18 – The exclusive right of exploitation conferred by design protection shall not extend to acts concerning a product embodying the design put on the market in the European Economic Area by the holder of the design protection or with his express consent.

(vi) Topography of microelectronic semiconductor products:

Act No. XXXIX of 1991 on the Legal Protection of Topographies of Microelectronic Semiconductor Products Section 7 (4) (d) Protection of the topography shall not cover marketing of the topography or of the semiconductor product incorporating the topography, put on the market by the owner or with his consent, in the European Economic Area.

26.1.3 Leading Cases

Unilever vs. V-Contact case (Metropolitan Appellate Court case Nr 8.Pf.20.989/212 and Kúria Nr Pfv.IV.20.166/2013/9) is a leading case in Hungaria. The defendant V-Contact Kft bundled by using transparent foil his own products (Perlux) with Unilever's products branded with reputable trademarks (Domestos and Coccolino). The Court established trademark infringement and held that V-Contact Kft could not invoke the exhaustion of trademark rights since the bundling benefitted the marketing of its own products and such conduct was not necessary to the supply of Unilever's product to the end user. In this case, bundling infringed functions of the trademark, such as identification of commercial source and advertising; moreover, V Contact Kft also took unfair advantage of Unilever's well-known marks.

26.1.4 Limits of the Principle of Exhaustion of IP Rights

Regarding trademark rights and patents, the IP owner may oppose the commercialization of the product if it has a legitimate reasons to do so, for instance, if the condition of the goods have been changed or impaired (notably, this provision is the local transposition of Article 7(2) of the Directive 2008/95/EC (Trademarks Directive)). For instance, change of conditions of the goods may refer to rebranding or repackaging, or the IP owner may restrict or prohibit certain selling arrangements in order to protect the integrity of the brand, which may be necessary in the case of luxury products. Moreover, the IP owner may also oppose the sourcing of goods from parallel imports outside the European Economic Area. The burden of proof always lies with the defendant (reseller) regarding the prerequisites for exhaustion, such as the origin of goods.

Also, the relevant case law of the EUCJ applies.

26.1.5 Influence of EU Principles

Hungary is a member of the European Union; therefore, exhaustion of IP rights is also determined by EU law, which is enshrined in various directives and regulations of the EU. Geographic scope of exhaustion is limited to the territory of the European Economic Area, and IP owners cannot prohibit parallel trade between Members States. Regarding exhaustion, Hungarian case law generally follows the decisions of the CJEU concerning exhaustion of IP rights, such as Dior/Evora, C-337/95 and Copad/Christian Dior, C-59/08 (luxury goods); Viking Gas/Kosan Gas, C-46/10; Portakabin C-558/0; UsedSoft vs Oracle C-128/11, Zino Davidoff SA v A & G Imports, Levi Strauss & Co Ltd, Levi Strauss (UK) Ltd v Tesco Stores, Tesco plc and Costco Wholesale UK Ltd Joined Cases C-414/99, C-415/99 and C-416/99.

26.2 "Traditional Industry" Versus "On-Line Industry"

26.2.1 Definition of "On-Line Industry"

Hungary is considered a growing market with regard to the online industry. According to Eurostat, 35 % of Hungarian Internet users used the Internet in 2012 for purchasing online.[1]

The definition of e-commerce is provided for in the Hungarian E-Commerce Act (E-Commerce Act), which implemented Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive). The Directive operates with the term of information society services which covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data and at the individual request of a recipient of a service. The E-Commerce Act—in addition to transposing the above definition—further specifies the term *electronic commercial service*, meaning any information society service provided in the form of business operations where the purpose is to encourage the sale, purchase, or exchange of and access by other means to any tangible and marketable goods, services, property, or intangible rights. The above definitions are broad enough to comprise new technologies evolving by time such as m-commerce.

[1] http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/4-15102013-AP/EN/4-15102013-AP-EN.PDF.

26.2.2 No Particular Regulation of the "On-Line Industry"

Hungarian IP legislation does not differentiate between the traditional and online industries except for those provisions which specifically regulated the rights and obligations regarding the Internet. However, there are more and more other laws adopted in Hungary which differentiate between the traditional and online industries, mainly from a consumer protection point of view. In particular, for example, specific legislation applies to the online conclusion of contracts, and the new provisions on distance selling have just come into force in Hungary. Also, the E-Commerce Act introduced specific provision related to the liability of the intermediary service providers, including the notice and takedown procedure applicable for content infringing IP rights.

Furthermore, the "country of origin" principle implemented by the E-Commerce Act may also be regarded as a particularity of the regulation of e-commerce with regard to the traditional industry. This is because the principle sets out that the provisions of the E-Commerce Act falling within the scope of the coordinated fields do not apply to those service providers providing services directed to the territory of Hungary that are established in another EEA Member State.

26.3 Exhaustion of IP Rights in the "On-Line Industry"

26.3.1 Case Law

Hungarian courts have interpreted the exhaustion of IP rights with respect to various intellectual property rights. As we elaborated in the answers to the first set of questions, Hungarian law follows EU legislation and case law with respect to exhaustion of IP rights. In the following, we are presenting some of the judgments of Hungarian courts with respect to the principle of exhaustion of IP rights.[2]

26.3.1.1 *Decision Nr. 512/B/2004 (Constitutional Court of Hungary)*

Remarkably, the constitutionality of exhaustion of trademark rights was challenged at the Constitutional Court of Hungary (CCH). The claimant alleged that it breaches the freedom of enterprise, fair competition, and the right to property because it allows the trademark owner to prohibit parallel imports, which is harmful for the rights of the owner of goods.

The CCH pointed out that—contrary to the claimant's argument—exhaustion of IP rights allows the free circulation of goods that have been rightfully put into circulation within the EEA. These rules mitigate the territorial nature of IP rights; therefore, it does not restrict competition but enhances it. The CCH found that there was no direct relationship between the rules regulating exhaustion of trademark and

[2] The description of the Unilever vs. V-Contact case (Metropolitan Appellate Court case 8. Pf.20.989/2012/4.) is presented in our answer to the first set of questions.

the freedom of enterprise and the right to property, so it did not investigate the constitutionality of the trademark law with respect to these rights. Consequently, the CCH reached the conclusion that the rules regulating the exhaustion of trademark rights were in conformity with the Hungarian constitution.

26.3.1.2 *Case Nr 8.Pf.20.136/2009/5. (Metropolitan Court of Appeal)*

The court faced the issue whether recycling of the packing which bears the mark of a trademark owner falls under the scope of exhaustion. The litigation took place between soda water distributors. The defendant acquired empty soda water bottles, which bore the mark owned by the plaintiff. The defendant alleged that it was common in the industry that distributors filled the bottles which were originally sold by other distributors, and the defendant referred to the principle of exhaustion.

The court noted that exhaustion applies to situations in which the resellers, distributors sell the products bearing a trademark that were originally sold by the trademark owner. In this case, however, the defendant did not resell the original product but used the original packaging to sell its own goods. Therefore, the defendant used the marks owned by another company to label its own product. The court reached the conclusion that the principle of exhaustion did not apply to this case and rejected the defense of the respondent.

26.3.1.3 *Case Nr 8.Pf.21.210/2010/5. (Metropolitan Court of Appeal)*

The main issue with respect to the principle of exhaustion in this case was whether "quasi-exhaustion" applies to a situation in which a television organization broadcasts its program free of charge on terrestrial means, and a cable company transmits this channel to its customers for a fee, while the latter does not conclude a contract and pay a fee to the television organization.

The court indicated that the Hungarian law on exhaustion of copyright (which we elaborated above) applies only to cases where a copy has been sold within the EEA, which leads to exhaustion of the right of distribution. Consequently, exhaustion applies only to distribution of actual copies of the original work. Broadcast, however, shall not lead to exhaustion of the right of distribution because the ownership of an actual copy of the work has not been transferred.

26.3.2 Application of the "Principle of Exhaustion of IP Rights" in "Traditional Industry" Versus "On-Line Industry"

We observe that the principle of exhaustion is applied in a similar way in both "traditional" and "on-line" industries. However, it comes from the different nature of such activities that online uses may lead to issues and challenges which are different from traditional uses of IP rights.

The exhaustion of trademark rights has been dealt with by Hungarian courts in relation to domain names.

26.3.2.1 *Case Nr 8.Pf.20.229/2011/4. (Metropolitan Court of Appeal)*

In this case, the defendant registered a domain name which was identical to a trademark of the plaintiff and operated an online shop selling goods that were included in the list of goods designated by the plaintiff's mark. The plaintiff alleged that this conduct breached its trademark rights. The defendant argued that the plaintiff's rights were exhausted because the defendant was also selling the plaintiff's goods as a reseller.

The court pointed out that exhaustion may only be invoked with respect to goods bearing the protected mark and to the distribution of such products. In this case, however, the defendant referred to exhaustion in relation to a domain name, not products that were originally put into circulation by the trademark owner. The court, therefore, rejected the argument of the defendant.

26.3.2.2 *Case Nr 8.Pf.21.062/2008/4. (Metropolitan Court of Appeal)*

The defendant was rightfully selling products bearing the trademark of the plaintiffs. However, the defendant used the same mark for its own commercial activities as the name of the shop, as its domain name, and in its marketing materials, suggesting that its activities were linked to the owner of the mark. The defendant argued that the principal exhaustion applied and that it was entitled to perform such conduct.

However, the court ruled that the defendant breached the plaintiff's trademark rights, as the principal exhaustion did not apply to a situation in which the defendant was using the mark in its own commercial activities, not only in selling the products bearing the protected mark. The court noted, however, that the defendant would have been entitled to communicate that it was specialized to sell these products and to use the marks with respect to aftermarket services offered with respect to the products bearing the mark. However, it was not the case in the particular proceeding; therefore, the defense of the respondent was rejected.

26.3.3 Influence of the EU Case Law

Hungarian law is bound by the preliminary decisions of the EUCJ. Therefore, the Oracle decision must be followed by the courts. We are not aware that the Oracle decision has been applied by the Hungarian courts. In our opinion, based on the fact that the Oracle decision applies to software and the Software Directive is *lex specialis* [as it was also confirmed by the EUCJ in the Nintendo decision (C-355/12, para 23)], the principle laid down in the Oracle decision should only be applicable to software and only under the specific circumstances of that case (that is, only in case of perpetual license) and the decision should not be applied to any other IP rights, including works protected by copyright other than computer programs.

26.3.4 Enforceability of Contractual Restrictions

The distribution right should be exhausted only with respect to the right of transfer of ownership. Therefore, the same principles should be applicable as in case of offline distribution.

26.4 IP Rights and Online industry: Infringements and Remedies

26.4.1 Concept "On-Line Infringement" of IP Rights

The Hungarian IP legislation does not differentiate between online and traditional infringements of IP rights. However, it should be noted that the E-Commerce Act regulates a remedy available for IP right holders only in case of online infringements. This is the so-called notice and takedown procedure, as explained below.

Hungarian IP legislation provides a single regulation both for the online and traditional industries as to what may be considered an IP right infringement. The one exception provided by Hungarian legislation is the limited liability of intermediary service providers as introduced by the E-Commerce Act.

It provides the same remedies in case of online and traditional infringements for the IP right holders. The current forms of remedies available in IP proceedings have been established as a result of the implementation of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

In general, the following remedies are available for IP right holders in case of the infringement of their rights:

1. establishment of the infringement;
2. cease and desist;
3. satisfaction by way of a declaration;
4. provision of information;
5. account of profits;
6. seizure;
7. transfer of infringing goods to a specific person;
8. recall of the infringing goods from the market;
9. definitive removal of the infringing goods from the market;
10. destruction;
11. alteration of infringing goods;
12. damages.

IP right holders are entitled to choose among the available forms of remedies by claiming one or more remedies. Remedies—except for damages—may be claimed irrespective of the culpability of the infringer; only the infringing activity should be established when granting them.

As a special remedy in connection with online infringements, we mention the notice & takedown action as specified in the E-Commerce Act which implemented the E-Commerce Directive.

26.4.2 Interim Proceedings

Preliminary proceedings specified in the Hungarian IP legislation do not differentiate between online and traditional IP infringements. The most commonly used proceedings are undoubtedly the interim injunction. An interim injunction may be granted in order to:

1. prevent imminent damage;
2. maintain the status quo during a legal dispute; or
3. protect the claimant's rights requiring special protection.

Item (3) is presumed if the IP right holder can prove that its IP is protected and he/she is the owner or licensee of IP right. However, this presumption does not apply where 6 months have already elapsed from the beginning of the infringement or 60 days from the date on which the IP right holder became aware of the infringement and of the identity of the infringer.

Furthermore, the court will apply a balance of convenience test as the disadvantages caused to the infringer cannot exceed the benefits achieved by granting the interim injunction.

The IP right holder would also be required to substantiate the legal grounds of the infringement. It is possible to apply for an interim injunction before the filing of the claim. In this case, the court shall decide on the interim injunction "out of turn," but not later than within 15 days from the filing of a request to this effect. The court of second instance shall decide on any appeal filed against the decision on an interim injunction out of turn, but not later than within 15 days from the filing of the appeal.

In addition, the E-Commerce Act regulates the notice and takedown procedures which is, however, only applicable to online infringements.

In case of the infringement of copyright or trademark rights, caching, hosting, and search engine service providers (but not access and network providers) must follow the notice and takedown procedure laid down in the order to qualify for a liability privilege.

Any IP right holder whose rights relating to any works, performances, phonograms, broadcast program, audiovisual works, or database under copyright and neighboring rights protection, furthermore, whose exclusive rights conferred by the Trademark Act are infringed upon by any information to which a service provider has given access is entitled to notify the hosting, caching, search engine providing intermediary service provider in a private deed with full probative force or in a publicly certified instrument for removing the information in question. The notification must contain:

1. the subject matter of the infringement and the facts supporting the infringement;
2. the particulars necessary for the identification of the illegal information;
3. the IP right holders' name, residence address or registered office, phone number, and email address.

Within 12 h following receipt of the notification, the service provider shall take the necessary measures for removing the information indicated in the notification, or for disabling access thereto, and shall concurrently inform in writing the recipient of the service who has provided the information that infringes upon the IP right holder's right (hereinafter referred to as "recipient of the service affected") within three working days and shall indicate the IP right holder and the IP right holder's notice on the basis of which the information was taken down.

26.4.3 Implementation Difficulties

Enforcement of a decision against a foreign online infringer whose headquarters are located in a country outside of the EU faces a number of challenges. In theory, these difficulties do not exist in case the headquarters of the online infringer are located within the EU by reason of the applicability of Regulation Brussel 1. The same should apply—hypothetically—in case the foreign online infringer is located in a Member State of the Lugano Treaty. In other cases, since basically there are no treaties applicable for the enforcement of decision concluded between Hungary and any non-EU and non-Lugano Treaty member countries, it is usually very difficult to enforce Hungarian decisions.

26.5 Conclusion and Recommendations

In our opinion, the same principles of exhaustion of IP rights should be applied in the traditional industry and the online industry, that is, the exhaustion is only possible with respect of physical products and works and not applicable to online appearances and copies. In other words, only the right of transfer of ownership of the physical copy of work or product should be exhausted. Online exhaustion would simply deprive the IP right holders from the right to utilize their works.

Broad use of Internet does not and more importantly should not change the definition and application of the principle of exhaustion of IP rights. Apparently, such phenomenon has neither changed the IP law fundamentally yet, but rather the court practice applied the already existing terms and rules to the new industry.

Since we consider the exhaustion of IP rights to be an imperative rule, one of the most important limitations of IP rights, court practice should not reach that point that they widen the scope of exhaustion by interpreting the existing rules. We are not in favor of adapting or tailoring the principle of exhaustion of IP rights if that would lead to any broadening of the scope of exhaustion.

Italy

27

Francesca La Rocca

27.1 Overall Principle

Article 5 of the Italian Intellectual Property Code[1] deals with the exhaustion of intellectual property rights (trademarks, patents and designs), whilst with regard to copyright works specific rules are provided by articles 16.2 and 17 of the Italian Copyright Act,[2] respectively on the economic right of communication to the public and distribution.

Indeed, in 2005 a new law came into force regarding trademarks, designs and patents protection, the so-called IP Code. The legislator, thus, combined in one law the issue in relation to all intellectual property right, but the copyright which is still regulated by the Copyright Act, overcoming in this way the old legal system which provided a specific law for each intellectual property right. Moreover, articles 1–6 of the IP Code provide general principles relating to trademarks, patents and designs; indeed, as mentioned above, the issue of exhaustion in relation to trademark, patent and design rights is unified into a single law.

According to the doctrine of exhaustion, the holder of an intellectual property right is not entitled to prevent the use of such intellectual property right in relation to goods which have been placed on[3] the market in Italy (national exhaustion) or in any EU or EEA Member State (community exhaustion) by the owner or with his

[1] Legislative Decree n. 30 of February 2005 as amended by Legislative Decree n. 131 of August 2010, hereinafter IP Code.

[2] Copyright Act dated 22 April 1941 n. 633, hereafter Copyright Act.

[3] Distributed in the case of a copyright work.

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consent, whilst the specific right of communication of a copyright work does not exhaust.

Once the intellectual property right is exhausted, its owner cannot prevent the free movement of the product protected by the intellectual property right, nor can he even the commercial activities connected with the selling, such as advertisement of products bearing his trademark. However, the use of a trademark on advertisements not for the selling of the product bearing the trademark, but for servicing and maintenance of the product, is considered unlawful because those are not services pertaining to the commercialisation of the product but services of a third party. For the same reason, the use of a trademark for the promotion of a franchising activity which is not connected to the one of the trademark owner cannot fall under the principle of exhaustion.[4]

27.2 Conditions

These provisions are concerned with setting the parallel importation from one Member State of the EEA to another by a party other that the intellectual property owner.

In order to apply the principle of exhaustion, two requirements have to be met:

1. the products have been placed on the national or Community/EEA market (no international exhaustion);
2. the goods have been placed on the market by the right holder or with his consent.

According to the doctrine, goods are put on the market when they are sold by the owner or with his consent, whilst importing goods into the EEA and offering them, but not actually selling them, do not exhaust the intellectual property right of those products.[5]

27.2.1 Placing on the Market

Article 5 IP Code and article 17 Copyright Act provide intellectual property right exhaustion, applying the principle to trade both within the Italian territory and between members of the EEA.

However, given the global nature of trade, the issue of international exhaustion in relation to goods placed on the market outside the EEA was raised. The main problem that the courts had to solve was whether these articles should be understood to mean that the intellectual property right entitles a proprietor to prohibit a

[4] Trib. Milano 31 July 2006 (ord.) (not published).

[5] C. Galli., L'esaurimento internazionale, Il Diritto Industriale (Dir. ind.) 2008, p. 369; ECJ, case-16/03, *Peak Holding v Axalin – Elinar,* ECR 2004 I-11313.

third party from using the intellectual property right for goods which have been put on to the market in a state which is not part of the EEA.

Initially, part of the doctrine argued that any placing on the market (inside and outside the EEA) would determine the exhaustion of the intellectual property right. According to these authors, the international exhaustion advantageously avoids a disruption of international trade and allows the requirements of commercial definiteness.[6]

On the other hand, another part of the doctrine argued that only a Community-wide exhaustion would be in line with the scope of free movements of goods whilst at the same time providing intellectual property owners with higher economic rewards for their investments in research, marketing and distribution.[7]

This debate is superseded by the ECJ Silhouette decision,[8] which stated, on the specific matter of trademark exhaustion, that the Trademark Directive[9] neither allowed for international exhaustion nor enabled states within the EEA to adopt their own approach and that only a Community-wide exhaustion would preserve the functioning of the common market.

The ECJ also recognised Community exhaustion throughout the EEA, refusing the international exhaustion, on copyrighted works.[10]

Indeed, now the Italian case law unanimously recognises the Community-wide exhaustion of rights, denying the international exhaustion.[11]

27.2.2 Consent

The second condition to be met for the exhaustion of an intellectual property right is the placing of goods on the market within the EEA by the right owner or with his consent.

The doctrine and jurisprudence encountered difficulties to define when the placing on the market by third parties was made with the owner's consent.

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[6] P. Auteri, Territorialità del diritto del marchio e circolazione di prodotti originali, p. 75 et seq. (Giuffrè 1976); A. Muso., Tre recenti provvedimenti giurisprudenziali in tema di importazione parallele, in Giur. it., 1988, I,2, 365 et seq.

[7] C. Galli, L'esaurimento internazionale, Dir. ind., 2008, p. 369.

[8] ECJ case C-355/96, *Silhouette International Schmied GmbH & Co Kg. V Hartlauer Handelsgesellschaft mbH* ECR 1998 I-4799.

[9] Directive 2008/95 EC.

[10] ECJ case C-479/04, *Laserdisken v Kulturministeriet*, ECR 2006 I-08089.

[11] Supreme Court (Corte di Cassazione) 18 November 1998, n. 11603; Court of Milan, 23 November 1998, La Rivista di diritto Industriale (Riv. Dir. ind.) 2000, II, 33; Court of Firenze, 10 July 2007, Giurisprudenza annotate di diritto industriale (Giur. ann. dir. ind.), 2007, 313 et seq.; Court of Turin, 4 April 2006 (ord.), Giur. ann. dir. ind., 2006, 732 et seq.; Court of Bologna 19 July 2005 Giur. ann. dir. ind., 2005, 988 et seq.; Court of Rome 23 February 2005, Giur. ann. dir. ind., 2006, 289.

A typical case of expressed consent to the placing of goods on the market is given by licensing agreements where the intellectual property right exhausts when the licensee introduces the product on the market.

However, it has been debated as to what happens when the products marketed by the licensee do not comply with the limits set forth in the licensing agreement, such as territorial, temporary and quantitative limits.

The doctrine stated that in such cases, the exclusive rights do not exhaust because the placing on the market of the product was contrary to the consent of the right owner and the licensee or ex-licensee would be considered as an infringer of the intellectual property right. However, some authors argued that when the licensee infringes only quantitative limits stated by the agreements (so-called overproduction), the exhaustion of the right occurs.[12]

In the relation between an intellectual property right owner and a distributor, the exhaustion of the right applies when the right owner delivers the goods to the distributor and not when the last one places the goods on the market.

The Italian doctrine and case law stated that the consent by an intellectual property right owner could also be implied, in the presence of facts and circumstances which unequivocally demonstrate that the proprietor has renounced his right to oppose the placing of the product on the market within the EEA.

The main question is whether it is possible to imply an intellectual property right owner's consent (not expressed) for the importation and sale of its goods in the EEA, when the product is marketed outside of the EEA only.

On this matter, the Italian Courts followed the rules set forth by the ECJ,[13] recognising that the owner's consent may be implied, but it cannot be inferred from the mere silence of the right owner or from the lack of express prohibition to market the products within the EEA.[14]

On the other hand, the consent must be considered implicit when the product was put on the market by an undertaking legally or economically bound to the intellectual property owner (for example, from companies of the same group).

27.3 Limits to the Exhaustion Principle

According to article 5.2 of the IP Code, an intellectual property right owner may object to the further marketing of his goods because of the way they are being marketed.

[12] V. Di Cataldo, Di Cataldo, V., Prerogative del marchio, quantità del prodotto e segmentazione del mercato, Studi in onore di Gerhald Schricker, Quaderni AIDA, 2005, p. 88 et seq.

[13] ECJ joined cases C-414/99 to C 416/99, Zino *Davidoff SA v A&G Imports Ltd*; *Levi Strauss & Co Ltd v Tesco Store Ltd, Tesco Plc and Costco Wholesale Uk Ltd*, ECR 2001 I-8691.

[14] Court of Milan, 13 September 2004, Giur. ann. dir. ind., 2005, 480 et seq.; Court of Turin 18 July 2006, Giur. ann. dir. ind., 2007, 1501.

Regarding trademarks, this issue mainly concerns changes to the physical condition of the goods and particularly the matter of relabeling and repackaging.

From the ECJ and Italian case law, it is clear that the re-labelling or repackaging of the product in a new external packaging is allowed when it is necessary to enable the marketing of the products. This is mainly an issue in relation to parallel imports.

Sometimes the change brought by any repackaging of product can create the risk of interference with the original condition of the product and therefore may be prohibited by the intellectual property owner when its legitimate interest is not safeguarded.[15]

As to the "necessity" requirement, in principle it is difficult to deny it, in particular when the repackaging pertains to pharmaceutical products, the packaging of which bears a lot of information, which should be very complete to allow a full understanding by the consumers (this is even more so for the products imported from countries whose language is unknown in Italy).[16]

Problems also arise when different trademarks identify a product in the original market and in Italy and the importer replaces the original trademark with the one used in Italy.

Under the perspective of the national trademark law, this policy conflicts with article 20.3 of the industrial property rights code, which provides that *a merchant may affix his own trademark to the goods he puts on sale, but may not remove the mark of the producer or merchant from whom he has received the products or goods*.

However, the adoption of different trademarks in each of the Member States for the same good may give rise to artificial partitioning of the markets between Member States. Therefore, according to case law, of both the Court of Justice of the European Union and Italian Courts, the importer has the right to substitute the "original" trademark with the one used in the Member State of import in the event such replacement has to be considered "objectively necessary" (for example, due to the presence on the Italian market of a product bearing an identical or similar trademark to the one registered in the imported state).[17] In this event, it would be difficult to prevent the product in question from being marketed in Italy under the Italian trademark because the substitution of the trademark satisfies the condition of necessity.

Furthermore, the marketing of the goods could be resisted by a trademark proprietor also if the way they are marketed damages the reputation of the

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[15] Court of Milan, 21 February 1977, Giur ann. dir. ind., 1979, 148 et seq.; Court of Milan 1990, Giur. ann. dir. ind., 1991, 179; Court of Milan 18 May 2004, Giur. ann. dir. ind., 2004, 1112.

[16] ECJ case C-102/77, *Hoffman La Roche c. Centrafarm*, ECR 1978—01139; ECJ cases C-427/93, C-429/93, C-436/93 *Bristol Myers Squib* ECR 1996 I-03457; Trib. Milano, 23 October 2009; Trib. Milano 29 September 2009; Trib. Milano 6 April 2010.

[17] ECJ, case 349/95, *Frits Loendersloot, trading as F. Loendersloot Internationale Expeditie v George Ballantine & Son Ltd and Others*, ECR 1997 I-6227; Court of. Milan, 23 October 2009, Giur. dir. ind., 2009, 1274; Court of Milan 29 September 2009, not published; Court of Milan 6 April 2010, not published.

trademark, impairs or changes the image of the goods rather than their physical condition. In particular, harm may occur when the reseller advertises the product in a manner which departs from the original image of the product which the trademark owner successfully created.[18]

However, the courts specified that the trademark proprietor cannot oppose the use of the trademark just because the reseller advertises the product in a different way. It is necessary that the use of the trademark seriously damages the reputation of the trademark.[19]

In the presence of a selective distribution system, the trademark owner may object and oppose the use of his trademark by any reseller who does not belong to the network but advertises the products in a way that induces the public to believe that he is an authorised member of the system. In itself, the mere existence of a selective distribution network does not hamper the application of the exhaustion principle.[20] Regarding patented goods, a debated issue is whether the exhaustion applies for the whole product when only spare parts or elements of the machinery are placed on the market.[21]

27.4 "Traditional Industry"/"Online Industry"

The expression *electronic commerce* or *e-commerce* defines the buying and selling of goods and services, at distance, by electronic means.[22]

The same definition may be found in the Italian legislative decree implementing the Directive on electronic commerce.[23]

A specific form of e-commerce is the *online commerce*, which regards the buying and selling of the goods and services made through the Internet.

The Internet represents the main "electronic means" used in the commercial and industrial activities at distance. The buying and selling at distance can be made by exchange of e-mail or through the so-called *point and click* method, which allows with a mere "click" the conclusion of a contract.

[18] ECJ case C-337/95, *Parfums Christian Dior SA v Evora BV*, ECR 1997 I-6013; Court of Catania, 29 September 2009, Giur. ann. dir. ind., 2010, 275.; Court of Rome, 29 October 2012 and Court of Rome 10 January 2013 in Riv. dir. ind. II, 2013, 151.

[19] Court of Bologna, 13 October 1999, Giur. ann. dir. ind., 2000, 422.

[20] Court of Trieste, 4 December 2003, Giur. ann dir. ind., 2005, 224; Court of Trieste 26 March 2004, Giur. ann. dir. ind., 2004, 272.

[21] Supreme Court (Corte di Cassazione) 9 June 2010, No. 13892.

[22] Law n. 21 June 1986, n. 317, on the procedure of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Legislative Decree 23 November 2000, n. 427, implementing the directives 98/34CE e 98/48/CE.

[23] Legislative Decree 9 April 2003, n. 70, implementing Directive 2000/31/CE, so-called Directive on electronic commerce. The Legislative Decree concerns certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

Unlike traditional commerce, with e-commerce the formation of a contract and commercial relationship occur all in the cyberspace; therefore, the negotiation phase is dematerialised. This can cause more problems in understanding the terms of the agreements and in the assessment of the quality of the goods, and so the law provides a special protection to consumers, stating in particular the importance of information.

The Internet is a powerful tool which reaches a greater number and variety of consumers than by more traditional sales methods. The use of a website may have effects that extend beyond the undertaking's own territory and customer group.

Moreover, the Italian government has recently implemented Directive 2001/83/UE[24] regarding distance and off-premises contracts, as those made *online*, and those supplying digital content. The law provides, like the directive, a definition of "digital content" as *data which are produced and supplied in digital form*, such as computer programs, applications, games, music, videos or texts. Specific rules are provided for online contracts granting particular protection to consumers who buy goods on the Internet.

Furthermore, the Regulation on the protection of copyrighted work on Internet[25] provides, for the first time, a definition of "digital works" as those works available on electronic communication networks and expressly states that those works are protected by the Copyright Act.

27.5 Exhaustion of IP Rights in the "Online Industry"

27.5.1 The Online Exhaustion of Intellectual Property Rights

As mentioned, according to the exhaustion principle, the exclusive rights attributed to the owner of an industrial property right are exhausted once the products protected by the industrial property right have been put on the market by the owner or with his consent in the territory of Italy or in the territory of the Member State of the European Union (hereafter "the EU") or the European Economic Area (hereafter "the EEA").

In the case of traditional commerce, identifying whether the goods are placed in the Italian market or in the EU or EEA does not generally create difficulties, which instead arise when the products are sold and bought on the Internet.

There is no specific legislation that defines the exhaustion of an intellectual property right in the online industry, nor is there any relevant case law.

One of the main issues is whether it suffices that the website of the intellectual property right owner offering the goods for sale in a non-EU or EEA State is accessible from Italy or a territory of the EU or EEA.

[24] Legislative Decree 21 febbraio 2014, n. 21.

[25] The Regulation entered into force the 31 March 2014 and was adopted by the Communications Regulatory Authority (*Agcom*) on 12 December 2013.

The Italian Courts, even if not expressly on the topic of exhaustion, have stated that the mere fact that a website is accessible from the territory of Italy, EU or EEA is not a sufficient basis to conclude that the offers are targeted at consumers in that territory. They require the website to expressly target consumers in Italy or the EU or the EEA, for example because the content of the offer is in Italian or the price is specified in euros instead of the currency of the third country.[26]

However, as explained above, a mere offer to sell is not enough to cause an exhaustion of the intellectual property rights. Thus, to lead to an exhaustion of the right, it is not sufficient that a website be targeted to consumers in Italy or in a Member State of the EU or the EEA, but it is necessary that a proper sale of the imported goods to an Italian consumer actually takes place.[27]

The problem is whether the exhaustion already applies if a consumer visits the website of an undertaking or its distributors, which are located outside the EU and EEA territory, and contacts the undertaking or distributor leading to an actual sale. The main issue is whether, by selling its goods to a consumer in Italy or in another Member State of EU or EEA, the intellectual property owner must be deemed to have given its consent to the placement of its products in such states, regardless of whether it provides also for the delivery of the sold goods or the consumer needs to contact an international carrier for the delivery.

A solution to such question can be found by applying the concepts and definition of active and passive sales, given by Regulation 2010/C 130/01 (Block Exemption Regulation) and the relevant European Commission Guidelines.

Paragraph 56 of the Guidelines states that the criteria imposed for online sales should pursue the same objectives and achieve comparable results to those imposed for offline sales and that the difference between the criteria must be justified by the different nature of these two distribution modes.

The Regulation distinguishes the 'active' sales from the 'passive' sale. 'Active' sales are defined as *actively approaching individual customers by for instance direct mail, including the sending of unsolicited e-mails, or visits; or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory*.

'Passive' sales means *responding to unsolicited requests from individual customers including delivery of goods or services to such customers*.[28]

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[26] Court of Verona, 14 July 1999 Giur. ann, dir. ind., 1999, 1256; Court of Rome 2 February 2000, Giur. ann, dir. ind., 2000, 778; Court of Rome 9 March 2000, Court of Modena, 1 August 2000, Giurisprudenza di merito (Giur. merito), 2001, 329, Court of Turin 26 October 2007, Giur. ann, dir. ind., 2007, 1068. These decisions regard the problem of the use of a trademark on internet and whether such use constitutes an infringement and the issue of defying the Courts jurisdiction in such cases, but the principles stated in this case law can be applied also to the question of the exhaustion of intellectual property rights in the on-line industry.

[27] Contrary I. P. Cimino, Reti affiliate di distribuzione e commercio on line, Diritto dell'Internet e delle nuove tecnologie telematiche, Cedam, 2009.

[28] Paragraph 51 of Guidelines on Regulation No. 330/2010.

Taking into account these two definitions, it may be maintained that the principle of exhaustion should only apply when the online sale made through the website of an undertaking or its distributors which are located outside the EU and EEA territory is a consequence of a so-called active sale of the undertaking.

On the other hand, no exhaustion occurs in the case of a passive sale because in such case the undertaking does not actively approach consumers selling them its products located outside the EU and EEA Member States. Indeed, it is essential that the proprietor of an intellectual property right registered in a Member State can control the first placing of goods protected by an industrial property right on the market in the EEA.[29]

However, when from the selling follows the shipping of the product into an EU or EEA State, the delivery is equivalent to a placement of the good in the EU or EEA territory, which exhausts the intellectual property right, indifferently whether there has been an *active* or a *passive* sale.

27.5.2 The Online Exhaustion of Copyrighted Works

Taking into account the exhaustion of a copyrighted work distributed online, a doctrine, on the basis of Directive 01/29/EC (articles 2, 3.2, consideration n. 29.d) and article 16.2 of the Copyright Act, argued that selling a work online does not exhaust the copyright on the work because making it available online is not an act of distribution but the right of the copyright owner to communicate the work to the public.[30]

Contrary, other authors maintained that also the sale of the work online is an act of distribution to which is applied the principles of national and community exhaustion.[31]

Recently, the ECJ in the Oracle Case[32] construed article 4.2 of Directive 2009/24/EC on the legal protection of computer programs as to mean that the downloading from the Internet of a copy of a computer program and the entering into a user licence agreement relating to that copy amount to a 'sale of a copy' of that program. Thus, the copyright holder's distribution right is exhausted in respect of a copy of software (such that the copyright holder can no longer oppose the resale of a "used" software program).

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[29] ECJ joined cases C-414/99 to 416/99 *Zino Davidoff and Levi Strauss* ECR 2001I-8691; ECJ case 16/03, *Peak Holding AB v Axolin-Elinor AB*, ECR 2004 I-11313; ECJ Case 324/08, *Makro Zelfbedieningsgroothandel CV, Metro Cash & Carry BV and Remo Zaandam BV v Diesel SpA,* ECR 2004 I-1131.

[30] G. Guglielmetti, Il diritto di comunicazione e messa a disposizione del pubblico, AIDA 2010, p. 148; Romano, R., Il diritto di riproduzione nel contesto della convergenza dei media, AIDA 2010, p. 166.

[31] D. Sarti, *Diritti esclusivi e circolazione dei beni*, Giuffrè 1996, p. 379; A.M. Gabino,. Le trasmissioni telematiche del bene immateriale, AIDA 97, p. 507.

[32] ECJ case 128/11, *UsedSoft GmbH v Oracle International Corp,* not yet published.

The Court stated that the principle of exhaustion of the right of distribution applies not only where the copyright holder markets copies of his computer programs on a material medium (such as CD-ROM or DVD) but also where he distributes them by means of a download from his website.

The ECJ based its finding on the rationale that online transmission is the "equivalent" of the supply of a tangible medium.

The Court, however, specified that in order for a resale of "used" software not to infringe the copyright holder's right of reproduction, the original user must render its copy unusable at the time of the resale.

Anyway, as pointed out by the ECJ in the Oracle Case, it should be mentioned that Directive 2009/24 concerns specifically the legal protection of computer programs and therefore constitutes a *lex specialis* in relation to Directive 2001/29.

There have been no Italian cases decided after the Oracle Case, but it is likely that Italian Judges will follow the rule stated by the ECJ.

27.6 Infringement

27.6.1 Online Infringements of Intellectual Property Rights

The Italian law introduces no new criterion to determine the existence of an infringement of intellectual property rights in the online industry; therefore, the general rules provided by the Intellectual Property Code shall apply.

The rules set out in articles 20 (on trademarks), 41 (on designs), 66 (on patents) of IP Code confer on the proprietor of an intellectual property right the exclusive rights entitling him to prevent any third party from importing protected goods, offering the goods or putting them on the market or stocking them for those purposes, whilst article 5 of the IP Code lays down an exception to that rule, providing that the proprietor's rights are exhausted where the goods have been put on the market in Italy, the EU or the EEA by the proprietor himself or with his consent.

The IP Code states that also the offer for sale of goods and services, bearing a trademark, protected as a design or a patent, constitutes an act of infringement,[33] whilst the mere offer to sell does not exhaust the intellectual property rights.

Such rules apply both to traditional industry and the online industry.

No specific problems arise when the website selling online goods protected by intellectual property rights is located in Italy or in an EU or an EEA country since the Italian law provides for a Community-wide exhaustion. Indeed, in this case, an online sale would be the same as a traditional sale and the issues connected would

[33] Article 20.2 on trademarks, article 41.2 on designs, article 66.2 on patents. It must be underlined that the latter does not expressly provide that the patent owner has the exclusive right to prohibit third parties to "offer" the patented product without his consent, however doctrine and case law unanimously recognise that such act infringes the patent owner's exclusive right.

be solved according to the same rules and principles applied to the traditional industry.

The main difficulty caused by online infringement is to determine whether the offer for sale or advertisement, by means of an online marketplace accessible to Italian consumers, made by a third undertaking, of goods intended by the proprietor of the right for sale only in third States (outside the EU and EEA, where the exhaustion principle is applied), constitutes infringement.

And consequentially, for the proprietor of an intellectual property right to be able to prevent, under the rules set out in the IP Code, the offer for sale or advertisement, on an online marketplace, of goods protected by an intellectual property right, which have not previously been put on the market in Italy, the EU or the EEA, it is sufficient that the offer for sale, or advertisement, made on the website is accessible to consumers located in the territory covered by the intellectual property right.

Italian Courts have held that the accessibility of a website by Italian consumers—website which sells goods that the proprietor of the trademark intended for sale in third states—does not infringe the intellectual property rights owned in Italy. Infringement only occurs when it is clear that the offer for sale through the third undertaking's website or online advertising of a product which is protected by an intellectual property right, located in a third State, is targeted to consumers in the territory covered by the intellectual property right, and the mere fact that a website is accessible from the territory covered by the intellectual property right is not a sufficient basis for concluding that the offers for sale displayed there are targeted to consumers in that territory.[34]

It is interesting to mention a recent case where the Italian Judges stated that just using the English language on the website cannot be an indicia that the website is not targeted to the Italian public because *the use of the English language for a website that particularly addresses its products to young people or in any case to a public that is becoming increasingly familiar with the English language—and especially so for online purchases—does not indicate in itself a limited scope of activity within the boundaries of an English-speaking publ*ic.

The Court also added that even prices in dollars and US sizing conventions do not imply that the website is targeted just to USA consumers because *the public is ever more familiar (due to more frequent travel to the United States and the growth of online commerce) with the US market and "American" pricing and sizes*.[35]

After considering the specific problem of online infringement in relation to the principle of exhaustion, it should be mentioned that the online industry has created

[34] Court of Verona, 14 July 1999, Riv. dir. ind., 2000, II, 162; Court of Rome 2 February 2000, Giurisprudenza Italiana (Giur. it.), 2000, 1677; Court of Rome 9 March 2000, Giur. it., 2000, 1677; Court of Modena 1 August 2000, Giur. merito, 2001, 329; Court of Milan, 16 March 2009, AIDA, 2010, 844; Court of Turin 1 July 2011, database DeJure; Court of Appeal of Milan, 4 May 2012, not published; this principle has been also recognised by the ECJ, case 324/09, *L'Oreal and Others v Ebay*, ECR 2011 I-6011.

[35] Court of Milan, 05 February 2013, database DartsIp.

new forms of trademark infringement. Indeed, the use of a trademark on the Web as domain names, meta-tags and keywords constitutes a trademark infringement. Article 22 of the IP Code expressly provides that it is prohibited to adopt as a domain name a sign that is identical with or similar to another trademark, where such use creates a likelihood of confusion on the part of the public or a likelihood of association between the two signs, or in case of a trademark with reputation, for obtaining an undue advantage from the distinctive character or reputation of the mark or causes harm to the same. Furthermore, this provision applies the protection, initially granted only to trademarks, to all distinctive signs, including domain names, so-called unitary principle (*principio di unitarietà*).

Even if no specific provision prohibits the use of meta-tags or keywords which are identical or similar to a registered trademark, the case law has applied article 20 of the Intellectual Property Code to mean that there is also trademark infringement in the case of such unauthorised and unjustified use of the meta-tags and keywords. Therefore, any meta-tag and keyword which are identical to the trademark and are used for goods or services which are identical for which the trademark is registered, any meta-tag and keyword identical or similar to the registered trademark and which cause a likelihood of confusion by the consumer or an association between the signs, the use of meta-tags and keywords identical or similar to the registered trademark with a reputation where the use of that sign without due cause takes unfair advantage of, or is detrimental to the distinctive character or the reputation of the trademark, do constitute infringements of the registered trademark.

Courts have recognised that even a website of an undertaking selling online genuine goods infringes a trademark when the use by the third party of the sign which is identical to the trademark, as a keyword or meta-tag, creates the impression that there is a material link in the course of trade between the goods or services in question and the proprietor of the trademark. Because of the essential function of a trademark, which, in the area of electronic commerce, consists in particular in enabling Internet users to distinguish the goods or services of the proprietor of that trademark from those which have a different origin when browsing ads displayed in response to a search relating to a specific trademark, trademark proprietors must be entitled to prohibit the display of third-party meta-tags, keywords which Internet users may erroneously perceive as emanating from that proprietor.[36]

No specific remedies are provided by the law to online infringements; therefore, Courts apply the remedies and civil sanctions provided under Articles 124, 125 and 126 of the IP Code to online infringements: injunction, removal or destruction of all the items constituting the infringement; seizure; compensation for damages; restitution of profits of the author of the infringement; publication of the judgment.

[36] Court of Milan, 1 July 2010, not published; Court of Milan, 19 October 2010, not published.

27.6.2 Online Infringements of Copyrights

In the context of infringement of copyright in the online industry, the economic right of distribution to the public is the one which is principally involved.

Following the advent of the Internet, debate ensued, due to its worldwide accessibility, as to whether making protected works available on the Internet without authorisation would infringe the right of distribution to the public, where such right is not exhausted.

Under article 17 of the Copyright Act, an exclusive right is conferred on authors to authorise or prohibit any form of distribution to the public by sale or otherwise of the original of their works or copies thereof.

Distribution to the public is characterised by a series of acts going, at the very least, from the conclusion of a contract of sale to the performance thereof by delivery to a member of the public. Such act may also be made through the downloading of copies from the Internet, which if made without the necessary authorisation accounts as an infringement of the copyright.

When the online infringement regards digital works and it is done by downloading them, consequentially to the development of new file-sharing system, it is often difficult to identify the infringer and to enforce the remedies.

The Italian Copyright Act does not provide an effective protection against infringement of digital copyright works. Indeed, no provision regards expressly the new forms of infringement of copyrighted works such as linking, peer-to-peer file sharing (which includes the BitTorrent file sharing), streaming. Courts therefore, whether an infringement of a copyrighted work occurs on the Web, apply the general rules provided by the Copyright Act to the traditional industry. Specific rules are only provided regarding software protection[37] and the use of digital rights managements.[38]

The legal uncertainty regarding the nature and level of protection of digital works should be overcome with the introduction of a specific rule and consequentially the amendment of the Copyright Act.

A first step in that direction may be seen in the recent adoption of the Regulation on the protection of copyrighted work on Internet, adopted by the Communications Regulatory Authority (*AGCOM*),[39] which provides a specific procedure to protect digital copyright works against online infringements. Such procedure, however, does not involve the judicial authority, but it is carried out in front of the Communications Regulatory Authority (*AGCOM*), an administrative authority.

[37] Art. 64 bis; 64 ter; 64 quater of the Copyright Act.

[38] Art. 102 quater; 102 quinquies of the Copyright Act.

[39] Deliberation 12 December 2013, No. 680/13.

27.7 Conclusion and Recommendations

The online industry through the use of the Internet reaches a greater number and variety of consumers than the more traditional sales methods. The use of a website may have effects that extend beyond the undertaking's own territory and consumer group.

The rules set out by the IP Code and Copyright Act confer on the proprietor of an intellectual property right the exclusive rights entitling him to prevent any third party from importing protected goods, offering the goods or putting them on the market or stocking them for those purposes, whilst article 5 of the Intellectual Property Code and article 17.2 of the Copyright Law have laid down an exception to that rule, providing that the proprietor's rights are exhausted where the goods have been put on the market in Italy, the EU or the EEA by the proprietor himself or with his consent.

Regarding the online exhaustion of intellectual property rights, the problem is whether the exhaustion occurs if a consumer visits the website of an undertaking or its distributors, which are located outside the EU and the EEA territory, and contact the undertaking or distributor and such contact leads to a sale.

The main concern is whether by selling its goods online to a consumer in Italy or in a Member State of the EU or the EEA the intellectual property owner gives its consent to the placement of its products in those States, regardless of whether it provides also for the delivery of the purchased goods or if the consumer needs to contact an international carrier for the delivery.

As previously mentioned, a solution to such question could be found by applying the concepts and definition of both active and passive sales, given by Regulation 330/2010 (Block Exemption Regulation) and the relevant European Commission Guidelines.

Only when the online sale made through the website of an undertaking or its distributors, which are located outside the EU and EEA territory, is a consequence of a so-called active sale of the undertaking that the intellectual properties rights on the sold goods exhaust; indeed, in such case the active approaching of customers by the right owner must be interpreted as its implied consent to the placement of the goods.

On the other hand, no exhaustion occurs in the case of a passive sale because in such case the undertaking does not actively approach consumers selling them its products located outside the Member States of the EU and the EEA. Indeed, it is essential that the proprietor of an intellectual property can control the first placing of goods on the market in the EEA.

As to the specific hypothesis of the exhaustion of copyrighted works, which often are in non-tangible forms, the traditional principle of exhaustion found some limits, due to the difficulty to define whether the downloading of a copy should amount to an act of distribution or an act of communication, which does not exhaust the rights of the copyright owner.

The recent ECJ decision helped by clarifying that, regarding computer programs, the principle of exhaustion of the distribution right applies where the copyright holder distributed his work not only by means of material medium but also by downloads from his website.

Regarding online infringement, the issue concerns whether the offer for sale or advertisement, by means of an online marketplace accessible by Italian consumers, of goods protected by an intellectual property right intended, by the proprietor of the mark, for sale in third States (outside the EU and EEA, where the exhaustion principle is applied) constitutes infringement.

Italian Judges unanimously hold that the mere fact that a website is accessible from the territory covered by the intellectual property right is not a sufficient basis for concluding that the offers for sale or advertisements displayed there are targeted at consumers in that territory.

Otherwise, the fact that an online marketplace is accessible from the Italian territory is sufficient for the advertisements or offer for sale displayed there to infringe the intellectual property right in Italy. Websites and online advertisements which obviously are targeted solely at consumers in third States and nevertheless technically accessible from the Italian territory would wrongly be subject to Italian law.

It must be assessed on a case-by-case basis whether there are any relevant factors on the basis of which it may be concluded that an offer for sale or advertisement displayed on an online marketplace accessible from the territory covered by the trademark is targeted at consumers in that territory.

When the online infringement regards intangible works (usually copyrighted) and those are downloaded without the necessary authorisation, following the development of a new file-sharing system, it is often difficult to identify the infringer and to enforce the remedies provided by law.

Such difficulties are also due to the lack of effective legislation regarding online infringements of digital copyright works.

Therefore, it would be advisable to amend the Copyright Act to overcome the current legal uncertainty regarding the nature and level of protection of digital works. This amendment would allow the copyright owner to effectively enforce its exclusive rights before a court and not just through on administrative procedure.

In conclusion, whilst the protection of trademarks, designs and patents on the online industry under the IP Code rules is adequate and the principles of exhaustion and infringement of the traditional industry are mainly effective to solve problems which arise also in the online industry, the Copyright Act is inadequate to face and regulate the new increasing phenomenon of counterfeiting and piracy of digital works in the online industry.

Switzerland

28

Adrien Alberini

28.1 Introduction

The online distribution of goods is taking off around the globe and in Switzerland. This is true with respect to tangible products (such as sport shoes on eBay) and services (like flights at swiss.com). Increasingly also, people buy software and other goods such as music, videos, and books in purely digital form, *i.e.* without transfer of any tangible medium (sometimes also referred to as material medium).[1] With respect to software, for instance, CDs and DVDs have been largely replaced by downloads from the Internet. In 2011, the amount spent by Swiss consumers in relation to e-commerce reached almost 5 billion Swiss francs; this shows a substantial increase over the past years, and this trend is expected to continue in the future.[2]

Naturally, a secondary market for some goods purchased online is emerging. Such market creates different sets of issues; in particular, it raises the question whether reselling goods purchased online infringes on the intellectual property rights owned by the persons or entities that distributed the goods online in the first place. Put differently, do persons or entities that acquire goods online have a

[1] For an interesting list of digital products and services which are successful in the market, see, for instance, http://explorerhub.com/blog/sell-digital-services-products/.

[2] See the figures provided by the Swiss Federal Statistical Office at http://www.bfs.admin.ch/bfs/portal/fr/index/themen/16/04/key/approche_globale.indicator.30108.301.html?open=1#1. It is worth pointing out that Swiss law—as compared, for instance, to the EU law—contains very few provisions specifically applicable to e-commerce (this concept is moreover not defined in the applicable provisions). In this respect, see, for instance, the specific page available on the website of the federal administration at http://www.kmu.admin.ch/kmu-betreiben/03260/03263/03274/index.html?lang=fr.

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right to operate in the secondary market on the basis of the argument that the IP rights protecting the goods are exhausted?[3]

The present contribution aims to address this question from a Swiss law perspective. If it deals generally with all types of goods and IP rights, it focuses to a large extent on the main issue: the exhaustion of copyright (and neighboring rights) on digital works transferred through the Internet. By contrast, it will be given less consideration to the distribution of physical goods purchased online as this type of distribution does not seem to raise any new issue from an exhaustion perspective. In addition—although they somehow relate to the online distribution of goods—topics such as the access to content using streaming technologies[4] and to software *via* cloud computing technologies (SaaS) are not addressed because they should in principle not raise exhaustion concerns.[5]

Switzerland being largely integrated in the European market from an economic perspective, Swiss law is significantly influenced by legal developments at the European level. Therefore, attention will be paid to the law of the European Union[6] and, in particular, to the quite recent judgment handed down by the Court of Justice of the European Union in the *UsedSoft v. Oracle* case.[7] In the digital environment, moreover, reference to the WIPO Internet Treaties is of essence.[8]

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[3] To illustrate this question, it may be recalled that the issue was brought up in the news in September 2012 when the American actor Bruce Willis stated that he wanted to leave his large music library to his daughters. This was, however, not possible because under the applicable iTunes terms and conditions, Bruce Willis was not the owner but only the borrower of the music files. In this respect, see, for instance, http://www.forbes.com/sites/timworstall/2012/09/03/bruce-willis-to-sue-apple-over-itunes/.

[4] For a recent contribution under Swiss law, see S. Brändli/A. Tamò, Mainstream – Streaming als Nutzungsform der Gegenwart und der Zukunft, in: sic! 2013, p. 651 *et seq*.

[5] It should nonetheless be pointed out that R. M. Hilty/K. Köklü/F. Hafenbrädl, Software agreements: stocktaking and outlook – Lessons from the *UsedSoft v. Oracle* case from a comparative law perspective, in: IIC 2013, p. 263 *et seq*., interestingly argue that cloud computing services could be subject to an implied license (the analysis is close to exhaustion).

[6] Particularly, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 2001 L 167/10 (the "EU Copyright Directive"), and Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ 2009 L 111/16 (the "EU Software Directive").

[7] CJEU, C-128/11, *UsedSoft GmbH v. Oracle International Corp*. For an excellent contribution regarding this case, see R. M. Hilty/K. Köklü/F. Hafenbrädl, Software agreements: stocktaking and outlook – Lessons from the *UsedSoft v. Oracle* case from a comparative law perspective, in: IIC 2013, p. 263 *et seq*. See also R. M. Hilty, Die Rechtsnatur des Softwarevertrages – Erkenntnisse aus der Entscheidung des EuGH *UsedSoft vs. Oracle*, in: Computer und Recht 2012, p. 625 *et seq*. For a general discussion about the *UsedSoft v. Oracle* case from a Swiss perspective, see C. Taufer-Laffer, Urheberrechtsentwicklung durch den EuGH – entfernt sich die EU von der Schweiz, in: sic! 2013, p. 403 *et seq*. (in particular p. 411).

[8] WIPO Copyright Treaty (WCT), adopted in Geneva on December 20, 1996, and WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva on December 20, 1996. Both Treaties can be found on WIPO's website at http://www.wipo.int/treaties/en/. Also, the Agreed Statements concerning the WIPO Copyright Treaty adopted by the Diplomatic Conference on

When appropriate, some attention will also be paid to developments in the United States.[9]

The present contribution is structured as follows: Section 28.2 presents generally the regimes of exhaustion under Swiss law, while Sects. 28.3 and 28.4 deal with the specific issues raised in this respect by the online sector (respectively under copyright law and other IP rights). Section 28.5 addresses the question whether parties can contract around the principle of exhaustion. Some considerations relating to remedies are discussed in Sect. 28.6. Section 28.7 contains the conclusion.

28.2 Exhaustion of IP Rights in the Brick-and-Mortar World

28.2.1 Principle of Exhaustion Across IP Rights

Under Swiss law, the principle of exhaustion is treated differently according to the different intellectual property rights. Moreover, the Swiss market being of a relatively limited size, the exhaustion issue has been essentially addressed from a transnational perspective.

The Copyright Act[10] contains an explicit provision on exhaustion. According to Copyright Act, Article 12(1),[11] "[w]here the author has transferred the rights to a copy of a work or has consented to such a transfer, these rights may subsequently be further transferred or the copy otherwise distributed." Copyright Act, Article 12(2),

December 20, 1996, available at http://www.wipo.int/wipolex/fr/wipo_treaties/text.jsp?file_id=295456 (the "Agreed Statements").

[9] With respect to the doctrine of exhaustion in general, see US Supreme Court, 133 S. Ct. 1351 (2013), *Kirtsaeng v. John Wiley & Sons, Inc*. For a contribution which makes the link between the *Kirtsaeng* case and the online world, see C. D. Asay, Kirtsaeng and the first-sale doctrine's digital problem, in: Stanford Law Review Online 2013, Vol. 66, p. 17 *et seq*. For a recent case about exhaustion in the online world, see US District Court for the Southern District of New York, No. 12 Civ. 95 (RJS), *Capitol Records, LLC, v. ReDigi Inc*. For an interesting discussion about this case, see G. Capobianco, Rethinking ReDigi: How a characteristics-based test advances the "digital first sale" doctrine debate, in: Cardozo Law Review 2013, Vol. 35, p. 391 *et seq*. More generally in this context, see, for instance, also A. K. Perzanowski/J. Schultz, Digital exhaustion, in: University of California Law Review 2011, Vol. 58, p. 889 *et seq*.

[10] Federal Copyright Act of 9 October 1992 *(Loi fédérale sur le droit d'auteur et les droits voisins (LDA)/Bundesgesetz über das Urheberrecht und verwandte Schutzrechte (URG))*, classified compilation of federal law 231.1 (hereafter "Copyright Act").

[11] For the sake of completeness, it may be recalled that WIPO Copyright Treaty, Article 6(2), provides that "[n]othing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in Paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author."

provides for a similar provision for computer programs, with the exception that the author keeps the exclusive rental right (Copyright Act, Article 10(3)).[12]

Following the structure of the law, exhaustion occurs when the author exercised his or her distribution right pursuant to Copyright Act, Article 10(2)(b).[13] This applies *mutatis mutandis* with respect to computer programs. Thus, the plain language and structure of the law excludes exhaustion in relation to the reproduction right[14] or the communication right.[15]

Unlike the Copyright Act, the Trademark Act[16] does not explicitly regulate exhaustion. This principle was, however, recognized by the Swiss Federal Tribunal[17]: once the trademark owner agreed that a product bearing his or her trademark is put on the market, he or she cannot oppose any further resale of the product. Scholars generally agree that exhaustion is excluded with respect to services.[18]

In trademark[19] and copyright[20] law, the Swiss Federal Tribunal decided for the principle of international exhaustion. Thus, if the copy of the work, respectively the trademarked product, are put on the market anywhere in the world by the intellectual property owner or with his or her consent, the right will be deemed exhausted in Switzerland.[21]

[12] E. Philippin, ad LDA, Article 12, in: J. de Werra/P. Gilliéron (ed.), Commentaire romand du droit de la propriété intellectuelle, Basel 2013, § 34 *et seq*. With respect to neighboring rights, Copyright Act, Article 38, provides that "[t]he provisions under Article 1 paragraph 1 [. . .] of this Act apply mutatis mutandis to the rights to which the performers, phonogram and audiovisual fixation producers and broadcasting organisations are entitled."

[13] This provision reads as follows: "The author has the right in particular to offer, transfer or otherwise distribute copies of the work."

[14] Copyright Act, Article 10(2)(a). This provision reads as follows: "The author has the right in particular to produce copies of the work, such as printed matter, phonograms, audiovisual fixations or data carriers."

[15] Copyright Act, Article 10(2)(c). This provision reads as follows: "The author has the right in particular to recite, perform or present a work, or make it perceptible somewhere else or make it available directly or through any kind of medium in such a way that persons may access it from a place and at a time individually chosen by them."

[16] Federal Trademark Act of 28 August 1992 *(Loi fédérale sur la protection des marques et des indications de provenance (LPM)/Bundesgesetz über den Schutz von Marken und Herkunftsangaben (MSchG))*, classified compilation of federal law 232.11 (hereafter "Trademark Act").

[17] Swiss Federal Tribunal, Case (*ATF/BGE*) 122 III 469, *Chanel SA Genève et Chanel SA contre EPA AG*.

[18] P. Gilliéron, ad LPM, Article 13, in: J. de Werra/P. Gilliéron (ed.), Commentaire romand du droit de la propriété intellectuelle, Basel 2013, § 23.

[19] Swiss Federal Tribunal, Case (*ATF/BGE*) 122 III 469, *Chanel SA Genève et Chanel SA contre EPA AG*.

[20] Swiss Federal Tribunal, Case (*ATF/BGE*) 124 III 321, *Imprafot AG gegen Nintendo Co. Ltd und Waldmeier AG*.

[21] Most scholars consider that this solution should also apply to designs. See, for instance, D. Kraus/L. Ghassemi, ad LBI, Article 9a, in: J. de Werra/P. Gilliéron (ed.), Commentaire romand du droit de la propriété intellectuelle, Basel 2013, § 23.

The Patent Act[22] provides for a specific provision regarding exhaustion; the principle is regional exhaustion.[23] According to Patent Act, Article 9a(1), "[i]f the proprietor of the patent has placed patent-protected goods on the market in Switzerland or within the European Economic Area, or consented to their placing on the market in Switzerland or within the European Economic Area, these goods may be imported and used or resold commercially in Switzerland." A similar rule applies to process patents: "[i]f the proprietor has placed apparatus that can be used with a patent-protected process on the market in Switzerland or within the European Economic Area, or consented to its placing on the market in Switzerland or within the European Economic Area, the first and each subsequent person who acquires the apparatus is entitled to use this process."

Patent Act, Article 9a(4), clarifies in substance that when a product is protected by multiple IP rights, the principle of international exhaustion will prevail provided that the protection conferred by the patent for the functional characteristics of the product is of subordinate importance as compared to the trademark, the copyright, or the design.

28.2.2 Some Policy Considerations

28.2.2.1 Interests of IP Owners and End Users

When it came to the choice between national and international exhaustion in Swiss copyright law, the Federal Tribunal balanced the interests of copyright owners and end consumers. Copyright owners, on the one hand, would benefit from national exhaustion as they could thus discriminate in terms of pricing among countries; thus, the incentive to create conferred by copyright would be increased. On the other hand, international exhaustion would increase the fluidity of exchanges and the creation of competition in the interest of end consumers. The balance tipped towards the latter. The Federal Tribunal notably stated that when copyright owners are defining their marketing strategy, they simply have to take into consideration the fact that distribution in countries with low revenues may lead to parallel imports. The Federal Tribunal put more emphasis on the importance of ensuring the access for Swiss people to foreign cultural goods.[24]

It can further be pointed out that the Federal Tribunal rejected the argument according to which copyright owners have to provide Chinese consumers with very

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[22] Federal Patent Act of 25 June 1954 *(Loi fédérale sur les brevets d' invention (LBI)/Bundesgesetz über Erfindungspatente (PatG))*, classified compilation of federal law 232.14 (hereafter "Patent Act").

[23] Patent Act, Article 9a(5), provides for an exception to the principle of regional exhaustion: products for whose price in Switzerland or in the country in which they are placed on the market is fixed by the state (essentially pharmaceutical products) are subject to national exhaustion.

[24] Swiss Federal Tribunal, Case (*ATF/BGE*) 124 III 321, *Imprafot AG gegen Nintendo Co. Ltd und Waldmeier AG*, § 2(i).

cheap copies in order to fight against piracy. The Federal Tribunal held that such considerations are outside the scope of Copyright Act, Article 12.[25]

28.2.2.2 Attention Paid to Foreign Standards

As a general principle, the Federal Tribunal (as well as the federal legislature and the executive branch) takes into account solutions adopted abroad.[26] A particular attention is paid to the law of the European Union. Given the factual integration of the Swiss economy to the European market, the three branches of the federal state are generally aware of the necessity to have Swiss regulations as compliant as possible with EU law. That said, choices which differ from EU law are sometimes made. For instance, the *droit de suite* was rejected under Swiss copyright, whereas it is required under EU law.[27] Recently, Prof. Hilty opened a symposium by recalling again that Switzerland does not automatically adopt EU law but freely transposes European standards into Swiss law when it is deemed appropriate.[28]

28.3 Exhaustion of Copyright in the Online Industry

28.3.1 Preliminary Observations

On the basis of the principles governing exhaustion under Swiss law presented above, the question whether copyright is exhausted when works are exploited online can be addressed.

At the outset, it is worth recalling how works can be technically transferred. The transfer of works can occur through the transfer of the tangible medium (CD, DVD, USB stick, external hard drive) in which a copy of the work is incorporated; the transaction underpinning the transfer may happen in the brick-and-mortar world or online, but the transfer of the tangible medium is by definition made physically. Also—and this way of transferring works is of growing significance in practice—the work can be transferred online, typically via download from the Internet. In case of downloading, a new copy of the digital work is technically created on the hard drive of the acquirer.[29]

[25] Swiss Federal Tribunal, Case (*ATF/BGE*) 124 III 321, *Imprafot AG gegen Nintendo Co. Ltd und Waldmeier AG*, § 2(i) *i.f.*

[26] Interestingly, the Federal Tribunal refers occasionally to opinions of the US Supreme Court. This was notably the case in the *Nintendo* judgment. See Swiss Federal Tribunal, Case (*ATF/BGE*) 124 III 321, *Imprafot AG gegen Nintendo Co. Ltd und Waldmeier AG*, § 2(i).

[27] E. Philippin, ad LDA, Article 12, in: J. de Werra/P. Gilliéron (ed.), Commentaire romand du droit de la propriété intellectuelle, Basel 2013, § 6.

[28] C. Taufer-Laffer, Urheberrechtsentwicklung durch den EuGH – entfernt sich die EU von der Schweiz, in: sic! 2013, p. 403.

[29] This copy stays permanently (at least until it is made unusable) on the hard drive of a computer or the memory of a smartphone or tablet. For the sake of clarity, this situation has to be distinguished from temporary copies. Temporary copies typically occur when video files are streamed and stored for a short period of time in the computer's memory (buffer; RAM). See

To my knowledge, only one case in Switzerland addresses the issue of copyright exhaustion in the context of online distribution: on 4 May 2011, the Zug Cantonal Tribunal handed down a judgment pertaining to the exhaustion of the distribution right when the copy of a computer program is sold online.[30] In substance, the court held that the transfer of a computer program for an unlimited period of time in consideration for a one-time payment qualifies as a transfer within the meaning of the distribution right when the copyright owner loses its rights to the transferred copy and is not entitled to recover it; this applies both to computer programs transferred with the tangible medium and online. Reference to this judgment will be made in the developments below where it is appropriate.

28.3.2 Is the Distribution Right Really at Stake?

28.3.2.1 Conundrum: The Distribution Medium

Opposing Positions in the Swiss Literature

It is generally admitted that copies transferred physically with the tangible medium are subject to the distribution right of Copyright Act, Article 10(2)(b). By contrast, the following question divides scholars in Switzerland: taking into consideration the plain language and the structure of the law, does the online distribution of copies fall within the distribution right or within the communication right set out in Copyright Act, Article 10(2)(c)? It is worth specifying that whatever approach is followed, the regime should be the same for both computer programs and other digital works since, as indicated in Sect. 28.2.1 above, the conditions for exhaustion are the same for these two categories of goods. Surprisingly, this question was not tackled by the Zug Cantonal Tribunal in *Gebrauchtsoftware*; this court addressed the question only from the distribution right perspective.[31]

According to Cherpillod, the online distribution of copies is exclusively subject to the communication right; the distribution right encompasses only the transfer of the tangible medium incorporating a copy. This scholar motivates his position in light of the 2008 amendment of the Copyright Act (and more specifically of the Federal Council's Message underlying this amendment) which introduced the right

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S. Brändli/A. Tamò, Mainstream – Streaming als Nutzungsform der Gegenwart und der Zukunft, in: sic! 2013.

[30] Judgment of the Zug Cantonal Tribunal of 4 May 2011, *Gebrauchtsoftware*, published in: sic! 2012, p. 99 *et seq*.

[31] A reason which may explain why the court did not discuss whether the communication right was at stake when copies are sold online may be that the plaintiff appears to have argued only from the perspective of the distribution right (the main argument being that the copy had not been transferred within the meaning of Copyright Act, Article 10(2)(b)). See Judgment of the Zug Cantonal Tribunal of 4 May 2011, *Gebrauchtsoftware*, published in: sic! 2012, p. 101.

of making available as a subcategory of the communication right in Copyright Act, Article 10(2)(c).[32] As explained by the Federal Council, this introduction implements in Switzerland the right of making available provided for in WIPO Copyright Treaty, Article 8.[33] The Federal Council also clarified the relationship between the new communication right and the distribution right. For that purpose, the Federal Council referred to the Agreed Statements concerning Articles 6 and 7 and stated that the distribution right applies only to the distribution of fixed copies that can be put into circulation as tangible objects, excluding thus the distribution via digital transmission.[34]

On another hand, other prominent scholars support the application of the distribution right to the online distribution of copies. Gilliéron is of the view that the existence of a tangible medium is not required with respect to the distribution right.[35] Focusing on computer programs, Rigamonti specifies that WIPO Copyright Treaty, Article 8, cannot apply to their online distribution.[36] According to this scholar, if it is true that this provision encompasses the making available by any means or processes, it expressly excludes the distribution of copies.[37] Since the online distribution of software means the exploitation of the work in a tangible way through the distribution of copies of the work (*ein Akt der körperlichen Werkverwertung durch Verbreitung von Werkexemplaren*), the communication right does not apply. By contrast, WIPO Copyright Treaty, Article 6, is applicable to this kind of distribution[38]: as works downloaded from the Internet are necessarily

[32] I. Cherpillod, ad LDA, Article 10, in: J. de Werra/P. Gilliéron (ed.), Commentaire romand du droit de la propriété intellectuelle, Basel 2013, § 15 and 25. See also the authors cited by C. P. Rigamonti, Der Handel mit Gebrauchtsoftware nach schweizerischen Urheberrecht, in: GRUR Int. 2009/1, p. 14 *et seq*., p. 20 (footnote 83).

[33] Federal Council, FF 2006 3263, *Message du 10 mars 2006 concernant l'arrêté fédéral relatif à l'approbation de deux traits de l'Organisation Mondiale de la Propriété Intellectuelle et concernant la modification de la loi sur le droit d'auteur,* p. 3285 (hereafter "Federal Council's Message").

[34] Federal Council's Message, p. 3285.

[35] P. Gilliéron, Le monde de l'audiovisuel à l'ère numérique, in: sic ! 2009, p. 755 (p. 770). See also D. Barrelet/D. Egloff, Le nouveau droit d'auteur – Commentaire de la loi fédérale sur le droit d'auteur et les droits voisins, 3rd ed., Berne 2008, ad LDA, Article 10, § 16, and LDA, Article 12, § 1a. Regrettably, neither Gilliéron nor Barrelet/Egloff refer to the 2008 amendment of the Copyright Act and the underpinning international rules. More specifically, they do not explain how their approach may be compatible with said amendment and rules.

[36] C. P. Rigamonti, Der Handel mit Gebrauchtsoftware nach schweizerischen Urheberrecht, in: GRUR Int. 2009/1, p. 14 *et seq*., p. 20.

[37] The explicit exclusion of the distribution of copies is drawn from the Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference, WIPO Doc. CRCN/DC/4 (August 30, 1996), § 10.14.

[38] C. P. Rigamonti, Der Handel mit Gebrauchtsoftware nach schweizerischen Urheberrecht, in: GRUR Int. 2009/1, p. 14 *et seq*., p. 21.

tangible copies (these copies physically modify the hard drive of the acquirer),[39] they constitute fixed copies that were put into circulation as tangible objects within the meaning of the Agreed Statements concerning Articles 6 and 7. Rigamonti goes on to say that the Federal Council misunderstood the scope of the distribution right set out in the WIPO Copyright Treaty: Article 6 of this Treaty defines only the concept of "copy" and does not impose any limit on the nature of the distribution medium.[40] In light of this latter element, the positions of Rigamonti and Gilliéron seem to be aligned.

A Look at EU Law

In connection with the debate described in the previous section, the *UsedSoft v. Oracle* case handed down quite recently by the CJEU is of significant interest.[41] Oracle, the Governments which have submitted observations to the Court, and the EU Commission argued that the distribution right referred to in the EU Software Directive relates only to tangible property and not to intangible copies of computer programs downloaded from the Internet. In that respect, they referred to WIPO Copyright Treaty, Article 8, and the Agreed Statements concerning Articles 6 and 7, whose transposition is one of the aims of the EU Copyright Directive (which in turn underpins the EU Software Directive).[42] The CJEU did not take explicitly position on the WIPO Copyright Treaty but stated in particular the following:

1. Under the EU Software Directive, the right of distribution of copies of computer programs is not limited to copies of programs on a tangible medium such as a CD or DVD; there is no distinction made according to the tangible or intangible form of the copy in question.[43]
2. The EU Software Directive is a *lex specialis* in relation to the EU Copyright Directive.[44]
3. In conclusion, the distribution right with respect to the copy of a computer program is exhausted when said copy is transferred online.

From the perspective of the existing debate in Swiss law, these statements deserve attention for the following reasons:

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[39] With respect specifically to the concept of tangible copies as the result of downloading, see C. P. Rigamonti, Der Handel mit Gebrauchtsoftware nach schweizerischen Urheberrecht, in: GRUR Int. 2009/1, p. 14 *et seq*., p. 17.

[40] For additional scholars who took the same position as Rigamonti with respect to the interpretation of the WIPO Copyright Treaty, see C. P. Rigamonti, Der Handel mit Gebrauchtsoftware nach schweizerischen Urheberrecht, in: GRUR Int. 2009/1, p. 14 *et seq*., p. 21 (footnote 102).

[41] CJEU, C-128/11, *UsedSoft GmbH v. Oracle International Corp*.

[42] CJEU, C-128/11, *UsedSoft GmbH v. Oracle International Corp*., § 53.

[43] CJEU, C-128/11, *UsedSoft GmbH v. Oracle International Corp*., § 55 and 59. In this respect, the CJEU referred to the wording of EU Software Directive, Article 4(2), which does not make any distinction based on the medium.

[44] CJEU, C-128/11, *UsedSoft GmbH v. Oracle International Corp*., § 56.

1. The CJEU considered that the online distribution of software can fall within the distribution right, contrary to the position adopted by the Federal Council (it being recalled that this position was not limited to software). That said, when the CJEU states that the EU Software Directive is a *lex specialis* in relation to the EU Copyright Directive, it seems to implicitly mean that a different solution would (or at least could) prevail under the EU Copyright Directive. Put differently, the online distribution of copies of digital works other than computer programs would not fall within the distribution right in the EU Copyright Directive; this approach would be in line with the one of the Federal Council.
2. In connection with the previous point, it should be kept in mind that the EU Software Directive does not provide for a communication right. The situation is different in Switzerland since Swiss law does not have a particular body of law applicable specifically to the protection of computer programs.
3. The CJEU said that a copy can be intangible and thus assimilated the nature of the copy with the nature of the medium. Such an approach differs from the position supported notably by Rigamonti according to whom, as indicated above, a copy is necessarily tangible and exploited in a tangible way.

Personal Opinion

In my view, the online distribution of copies of computer programs and other digital works falls under the communication right of Copyright Act, Article 10(2)(c). As a consequence, such distribution cannot lead to the exhaustion of copyright. This conclusion is based on the fact that Swiss law has to comply with WIPO Copyright Treaty; under WIPO Copyright Treaty, the online distribution of copies is subject to the communication right.

The distribution right set forth in WIPO Copyright Treaty, Article 6, does not apply to the online distribution of copies of computer programs and other digital works. True, digital copies transferred online physically modify the hard drive of the acquirer. However, these copies cannot reasonably qualify as fixed copies that are put into circulation as tangible objects. Two arguments can essentially be put forward in that regard. First, the interpretation according to which the concept of tangible objects would encompass modifications of the hard drive when works are downloaded online would stretch the concept of tangible objects to an extreme extent which seems hardly compatible with its literal meaning. It should be noted in that respect that the CJEU explicitly considered copies downloaded from the Internet as intangible copies. Second, the full sentence “fixed copies that are put into circulation as tangible objects” makes clear that it is the tangible objects incorporating copies that are put into circulation; this sentence does not say that tangible objects are created as the result of the fact that copies are put into circulation.

The communication right set forth in WIPO Copyright Treaty, Article 8, applies to the online distribution of copies of computer programs and other digital works. It is correct that this provision excludes the distribution of copies. However, it does so only to the extent that the distribution of copies falls within the distribution right.

If, as it is the case here, the distribution of copies does not fall within the distribution right, nothing prevents the distribution of copies from falling within the communication right.

In light of *UsedSoft*, can or should Swiss law be interpreted in a different fashion (at least with respect to computer programs)? True, the 2008 amendment of the Copyright Act was directly inspired by the respective regulation in the EU. The Federal Council stated that such an amendment of the Copyright Act would largely harmonize Swiss and EU laws in this field.[45] That said, as important or positive the harmonization of Swiss and EU law may be, it does not mean that *UsedSoft* is applicable in Switzerland. In addition, the euro compatibility of Swiss law should not be a valid argument as such, in particular if in so doing Swiss law would violate the WIPO Copyright Treaty.

28.3.2.2 Concept of Transfer: A Relatively Broad Interpretation

Exhaustion requires in addition the transfer of the rights to a copy. The question here should not focus on the technicalities regarding the copy; transfer should not be excluded because in the context of digital distribution a new copy is technically made on the hard drive of the acquirer or, in other words, the same copy is not factually handed over by the owner to the acquirer. The question is rather whether the copyright owner disposes of his or her rights to a copy.[46]

In the context of online distribution of copies, the full transfer of ownership is unlikely, in particular with respect to software. The online transfer of copies typically takes the form of a license, which means that some rights are retained by the copyright owner.[47]

It results from the foregoing that the question boils down to the extent to which rights must be transferred to conclude that the distribution right is exhausted (assuming that this right may be exhausted, which, as indicated in the previous section, should not be possible). In that respect, the agreement between the copyright owner and the acquirer has to be primarily examined. A license of indefinite duration in consideration for a single payment is deemed as a sufficient transfer of the rights within the meaning of Copyright Act, Article 12(1) and (2).[48] This should also be the case when the license is of long duration, *i.e.* a duration equivalent to the commercial life of the software. In this latter situation, the following elements—according to the Zug Tribunal Cantonal—should, however, prevent the transfer of the rights to a copy: obligation imposed on the user to delete the computer program

[45] Federal Council's Message, p. 3281.

[46] See also C. P. Rigamonti, Der Handel mit Gebrauchtsoftware nach schweizerischen Urheberrecht, in: GRUR Int. 2009/1, p. 14 *et seq*., p. 18.

[47] From a terminological perspective, it is sometimes referred in practice to sale agreements. In fact, these sale agreements contain restrictions which assimilate them rather to licenses.

[48] This position is shared by the majority of scholars in Switzerland. See in that respect C. P. Rigamonti, Der Handel mit Gebrauchtsoftware nach schweizerischen Urheberrecht, in: GRUR Int. 2009/1, p. 14 *et seq*., p. 18, and the references cited. Also, Judgment of the Zug Cantonal Tribunal of 4 May 2011, *Gebrauchtsoftware*, published in: sic! 2012, p. 101 *et seq*.

from all its devices and to give the program back to the copyright owner when the contract expires or is terminated, support by the software owner for the duration of the agreement in order to fix bugs or improve the software, maintenance of the software for the duration of the agreement.[49]

In the future—in particular as a response to the *UsedSoft v. Oracle* judgment—copyright owners (software providers and owners of copyright on other digital works) may tend to grant licenses for a limited period of time via a rental model. One may wonder whether such evolution could deprive the exhaustion doctrine of practical interest in the context of online distribution. To some extent, it may well be the case. However, we can also expect from copyright owners that they differentiate their offers: some of them may precisely choose to sell their rights and try to attract consumers on this basis; this may prove successful in particular with respect to consumers willing to create digital libraries of music or movies.

28.3.3 Reproduction Right: No Self-Standing Issue

As indicated above, each online transfer leads to the creation of a new copy of the work.[50] The question then arises whether the second acquirer infringes on the reproduction right when he or she acquires a copy of the work. Similarly, does the first acquirer infringe on the reproduction right when he or she makes the work available to a third party (secondary liability)?[51]

The answer to that question depends essentially on the position adopted with respect to the exhaustion issue discussed above. Should it be recognized that the online distribution falls within the distribution right and exhausts that right, the second acquirer lawfully acquires a copy of the work from the first acquirer. The second copy is technically related to that second acquisition so that it can logically not be considered as infringing on the reproduction right of the copyright owner.

Such reasoning is supported by the plain language of the law as regards computer programs: according to Copyright Ordinance, Article 17(1)(a), the reproduction of the computer program by the lawful acquirer does not violate the

[49] Judgment of the Zug Cantonal Tribunal of 4 May 2011, *Gebrauchtsoftware*, published in: sic! 2012, p. 102. The Zug Cantonal Tribunal specified that restrictions imposed on the acquirer on the resale of copies do not prevent exhaustion. In this respect, see Sect. 28.4 below.

[50] See Sect. 28.2.1 above.

[51] With respect to secondary liability in the IP context under Swiss law, see I. Cherpillod, Violation des droits de propriété intellectuelle: complicité et instigation, in: A. Ragueneau (ed.): Internet 2003, Lausanne 2004, p. 215 *et seq*. In this context, it is worth pointing out that ReDigi—which operated a service billed as an online "used record store" for preowned digital music downloads—was found to be a direct infringer by the US District Court for the Southern District of New York. See US District Court for the Southern District of New York, No. 12 Civ. 95 (RJS), *Capitol Records, LLC, v. ReDigi Inc*, § III.C.1.

reproduction right of the copyright owner when the reproduction is necessary for the use of the computer program.[52]

The law does not provide for similar provisions with respect to other digital works; this lack of applicable provision can be considered as a loophole. However, no reason seems to justify a different treatment from the one applicable to software. For the sake of consistency, it is therefore justified to consider that the copyright owner cannot rely on the reproduction right to prevent the second acquirer from copying the digital work (assuming, again, that the distribution right is exhausted).

As a side note, when the acquirer reproduces the digital work for its private use, he or she benefits from the exception set forth in Copyright Act, Article 19. This defense does, however, not apply to the reproduction of computer programs (Copyright Act, Article 19(4)).[53] Moreover, the private use defense should in principle not apply to the reproduction (if any) by companies acting as intermediaries for the resale of "used" digital works.

28.3.4 Taking into Account the (Dis)similarity of the Physical and Online Transfers

28.3.4.1 Economic Similarity: An Argument for Exhaustion

As indicated in the previous sections, considering the plain language and structure of the law, it is in my view rather unlikely that one can validly argue that the distribution (and reproduction) right of the copyright owner is exhausted when digital copies are transferred online. Thus, the question arises whether the transfer of copies on a tangible medium or online is economically so similar that the doctrine of exhaustion should apply by analogy to the online distribution.[54]

Economic similarity can be supported as follows: in the online environment, the distribution of the tangible medium is simply replaced by the downloading of the digital copy on the hard drive of the acquirer. Thus, if the copy of a work is permanently downloaded with the consent of the copyright owner (download-to-own), the acquirer should benefit from the exhaustion defense and have the right to

[52] Ordinance regarding Copyright and Neighbouring Rights of 26 April 1993 *(Ordonnance sur le droit d'auteur et les droits voisins (ODAu)/Verordnung über das Urheberrecht und verwandte Schutzrechte (URV))*, classified compilation of federal law 231.11. See also C. P. Rigamonti, Der Handel mit Gebrauchtsoftware nach schweizerischen Urheberrecht, in: GRUR Int. 2009/1, p. 14 *et seq*., p. 24.

[53] P.-E. Ruedin, ad LDA, Article 19, in: J. de Werra/P. Gilliéron (ed.), Commentaire romand du droit de la propriété intellectuelle, Basel 2013, § 53 and 98 *et seq*.

[54] As argued by some prominent scholars, it would be more appropriate to address the whole issue of digital transfer from the perspective of the implied license theory. R. M. Hilty/K. Köklü/F. Hafenbrädl, Software agreements: stocktaking and outlook – Lessons from the *UsedSoft v. Oracle* case from a comparative law perspective, in: IIC 2013, p. 263 *et seq*., p. 282. Since the present paper focuses on the principle of exhaustion, the implied license theory will not be addressed.

distribute the copy further. Of course, this latter right would be subject to the fact that the copy downloaded by the acquirer is definitely deleted.[55]

Fundamentally, this approach is underpinned by the argued necessity to redefine the right balance between the appropriate incentive to create and the sufficient access to works. In the analog world, the right balance was found, thanks to the exhaustion doctrine: the distribution right gives potential authors a sufficient incentive to create, while the public may have access to the copies of works which are put in the market. In addition, exhaustion allows the development of competition through the creation of a secondary market; acquirers of copies may compete with copyright owners, notably if they offer used copies for cheaper prices. In the online environment, this equilibrium is arguably breached in the absence of exhaustion: authors getting profits from the first and subsequent sales of copies may be excessively rewarded and competition through the creation of a secondary market prevented.

28.3.4.2 Grounds for Rejection

The argument according to which the physical and online distributions of copies are economically similar is appealing and not deprived of merits. For the reasons explained hereinafter, this argument is, however, not fully persuasive and should be accepted only with caution.

Absence of Loophole in Swiss Law

As an initial matter, the argument fails to take into consideration the fact that the law is clear. On the basis of the WIPO Internet Treaties and the Federal Council's Message,[56] the Swiss legislature amended Copyright Act, Article 10(2)(c)—and not Copyright Act, Article 10(2)(a) or (b) or Article 12—being thus aware that copies distributed online would not be subject to the exhaustion doctrine. Thus, there is no loophole in Swiss law. The law must therefore be applied as it is, even if this application leads to what some scholars and practitioners would consider as an unfortunate outcome.[57]

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[55] See, for instance, E. Philippin, ad LDA, Article 12, in: J. de Werra/P. Gilliéron (ed.), Commentaire romand du droit de la propriété intellectuelle, Basel 2013, § 13; Judgment of the Zug Cantonal Tribunal of 4 May 2011, *Gebrauchtsoftware*, published in: sic! 2012, p. 103 *et seq.* and the cited references; R. M. Hilty/K. Köklü/F. Hafenbrädl, Software agreements: stocktaking and outlook – Lessons from the *UsedSoft v. Oracle* case from a comparative law perspective, in: IIC 2013, p. 263 *et seq.*, p. 280 *et seq.*

[56] Federal Council's Message.

[57] For instance, Philippin states that "*nothing justifies* the ban on the online acquirer of a copy to resell this specific copy" [emphasis added]. E. Philippin, ad LDA, Article 12, in: J. de Werra/P. Gilliéron (ed.), Commentaire romand du droit de la propriété intellectuelle, Basel 2013, § 13. Similarly, the Zug Cantonal Tribunal stated that it does see why online distribution and distribution through the transfer of the tangible medium should be treated differently. Judgment of the Zug Cantonal Tribunal of 4 May 2011, *Gebrauchtsoftware*, published in: sic! 2012, p. 104. At first sight, it seems that one way to avoid the problem of absence of loophole and the related

Technological Differences

One may actually wonder whether the physical and online distributions are economically really similar: isn't there an increased risk of copyright violation by the first and subsequent average acquirers when the copy is initially distributed online, *i.e.* acquirers would disseminate the copy without deleting it from their own devices? If it is the case, it seems then justified to treat physical distribution and online distribution differently.[58] It should be noted that, here, economics and technology are closely interrelated.

The answer to the question depends first on whether technologies ensuring that an existing digital copy is deleted when the copy is transferred to a third party are available (in economic terms, the technology would make the digital copy rivalrous).[59] The *ReDigi* case[60] shows how imperfect technologies may be in that respect. As Capobianco explains: "During the process of uploading a song to ReDigi's Cloud Locker (either for storage or eventual sale) the software automatically checks for remaining copies of the song on the user's computer or connected devices. [. . .] However, the fair use copy a user makes in order to listen to the song on her portable music device cannot be reached by ReDigi's software if the device is not connected to the computer. For example, a user may purchase a song from iTunes, copy it to her iPhone, detach the iPhone, and then upload the song to the ReDigi Cloud Locker. While the software would try to delete all copies of the song except for the one now in the cloud, it could not delete the copy on the iPhone until the device is reconnected."[61]

Second, the efficiency of technologies designed for digital copies and copies incorporated in a tangible medium should be compared. Obviously, a different treatment of online and physical distributions would be justified only if the technologies designed for digital copies are not as efficient as those protecting CDs, DVDs, or Blu-Rays.

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impossibility to apply by analogy the doctrine of exhaustion is to address the issue from the perspective of the implied license theory.

[58] This question is quite extensively discussed by C. P. Rigamonti, Der Handel mit Gebrauchtsoftware nach schweizerischen Urheberrecht, in: GRUR Int. 2009/1, p. 14 *et seq*., p. 19 *et seq*., who further refers to several scholars.

[59] Such technologies must be distinguished from technological protection measures (DRM). According to Philippin, this latter type of measures violates Copyright Act, Article 39a(4), which provides that "[t]he ban on circumvention may not be enforced against those persons who undertake the circumvention exclusively for legal permitted uses." E. Philippin, ad LDA, Article 12, in: J. de Werra/P. Gilliéron (ed.), Commentaire romand du droit de la propriété intellectuelle, Basel 2013, § 13 *i.f.* In my view, assuming that the exhaustion principle can apply, not all DRM measures should be deemed unlawful. DRM measures preventing the acquirer from copying the work should be permitted when the copyright owner does not intend to definitely transfer the copy of the work to the first acquirer.

[60] US District Court for the Southern District of New York, No. 12 Civ. 95 (RJS), *Capitol Records, LLC, v. ReDigi Inc*.

[61] Capobianco, Rethinking ReDigi: How a characteristics-based test advances the "digital first sale" doctrine debate, in: Cardozo Law Review 2013, Vol. 35, p. 418.

This two-part analysis requires the following additional observations:

1. The type of digital work should be taken into account when the efficiency of the technology is evaluated. As indicated above, ReDigi's technology designed for music files does not appear to be addressing all the concerns related to the creation of multiple copies. By contrast, technologies designed for software seem much more efficient.[62]
2. The variety of technologies requires a case-by-case analysis. In addition, one should keep in mind that technologies may evolve (quickly). A legal solution which would be adequate today may not reflect the state of the technological art in the future.[63]
3. Lawyers should recognize that they cannot deal with the present issue without the assistance of experts in technical fields, as it requires a deep understanding of how technologies work. Consequently, lawyers should work in close collaboration with technologists.[64]

Need to Preserve a Level Playing Field

Assuming that efficient technologies ensuring that an existing digital copy is deleted when the copy is transferred to a third party are available, the next problem is the cost that such technologies would represent for creators and startups. These costs may be (excessively) high and burdensome for many potential authors and copyright holders. Only well-established authors and companies would be able to afford such costs. Thus, they would prevent the creation of a level playing field for all participants in the market.

In this connection, the following argument was brought up: if it is indeed true that it is more risky for the copyright owner to distribute copies online (*i.e.*, there is an increased risk of copyright infringement), then the copyright owner remains free to stick to physical distribution.[65] This reasoning is not acceptable as it would prevent the creation of a level playing field. Again, small companies may not afford the costs generated by efficient measures to fight against infringements; such companies would thus primarily be forced to distribute copies physically. As a result, they would be at competitive disadvantage in the market.

[62] Capobianco, Rethinking ReDigi: How a characteristic-based test advances the "digital first sale" doctrine debate, in: Cardozo Law Review 2013, Vol. 35, p. 419 *et seq.*, referring to the entry of an alpha-numeric product code to authenticate prior to the use of the software.

[63] Capobianco, Rethinking ReDigi: How a characteristics-based test advances the "digital first sale" doctrine debate, in: Cardozo Law Review 2013, Vol. 35, p. 420 *et seq*. In this connection, one should never forget that some people may be able to come up with technologies that would have precisely the opposite purpose, namely allowing the first acquirer to both keep his or her copy of the work and sell additional copies of said work.

[64] In addition, the point of view of experts in social sciences would also be useful. It is indeed not unreasonable to assume that average people getting copies online are more willing to disseminate those copies than "more traditional" buyers of copies incorporated in a tangible medium.

[65] C. P. Rigamonti, Der Handel mit Gebrauchtsoftware nach schweizerischen Urheberrecht, in: GRUR Int. 2009/1, p. 14 *et seq.*, p. 20.

28.3.4.3 Lessons from *Nintendo* and *UsedSoft*?

In *Nintendo*,[66] the Federal Tribunal gave priority to free access of end users to copyrighted works as opposed to a stronger protection conferred by copyright. True, the context differed from the one of online distribution. That said, if confronted with the question of exhaustion when copies are distributed online, the Federal Tribunal may follow the past trend and favor once again the free access of end users to copyrighted works over copyright protection.

Furthermore, *Nintendo* is of interest on a more specific point. As indicated, the Federal Tribunal rejected the piracy argument and held that such a consideration is outside the scope of Copyright Act, Article 12. In light of this position, it appears unlikely that the Federal Tribunal would be sympathetic to the argument that copies distributed online should not be subject to exhaustion because there is an increased risk of copyright violation by the first and subsequent acquirers.

As a final note, it is rather surprising to see that the considerations regarding the increased risk of copyright infringement were not tackled by the CJEU in the *UsedSoft v. Oracle* case. Obviously, the CJEU said that "[a]n original acquirer who resells a tangible or intangible copy of a computer program for which the copyright's holder right of distribution is exhausted [. . .] must, in order to avoid infringing the exclusive right of reproduction of a computer program which belongs to its author [. . .] make its own copy unusable at the time of its resale."[67] That said, the CJEU did not address the question whether there might be differences in practice between copies transferred physically and online that would justify a different treatment. Because of this lack of clarification, it is far from certain that the *UsedSoft* holding can be transferred to digital works other than software.

28.4 Exhaustion of Other IP Rights in the Online Industry

Copyright is not the only IP right that is relevant in the digital environment; the protection conferred by trademark can also apply to digital goods. Considering the position in Switzerland on software patents (aligned to the EU), patents should not really play a role in the present context.

In *Gebrauchtsoftware*, the Zug Cantonal Tribunal correctly started by recalling that the purpose of trademark law is to individualize goods and thus to prevent confusion for the consumer.[68] With this element in mind, the court assessed the practice of purchasing a computer program online, incorporating it in a tangible medium, reproducing on the tangible medium the trademarked sign of the software developer, and reselling said medium. The court held that the acquirer is allowed to

[66] See Sect. 28.2.1 above.

[67] CJEU, C-128/11, *UsedSoft GmbH v. Oracle International Corp*. § 70. The CJEU also added some explanation for cases of licenses with multiple users.

[68] Judgment of the Zug Cantonal Tribunal of 4 May 2011, *Gebrauchtsoftware*, published in: sic! 2012, p. 104.

reproduce on the tangible medium the trademarked sign put by the software developer on the software now embodied in the tangible medium; neither the fact that the sign was not put on the tangible medium by the trademark owner nor the fact that the trademark owner could not approve such affixation (because of the choice of distributing the software online) was deemed relevant. According to the court, the behavior does not endanger the individualization function of the trademark.[69]

Also, the court stated that if the acquirer was not entitled to affix on the tangible medium the sign of the trademark owner (and thus refer to the program which is embodied in said medium), he or she would be basically prevented from reselling the copy of software in compliance with the exhaustion principle under copyright law.[70]

One can draw from the above that a trademark should *a fortiori* not be infringed when the good is resold online. In such circumstances indeed, it seems that the individualization function of the trademark should be even less endangered.

As an aside, it may be interesting to mention that the plaintiff in *Gebraucht-software* also raised an unfair competition claim based on the use by the defendant of license certificates (approved by a notary) stating the different companies involved in distribution of the computer program; according to the plaintiff, said license certificates were misleading as they suggested that the defendant had a license allowing the further transfer of the software. The court dismissed the claim on the ground that the copyright was exhausted. Also, the certificates did not provide any information as to the rights granted by the plaintiff to the first company involved in the distribution of the software. Finally, the court pointed out that, assuming the certificates would be misleading, only their use could be enjoined, not the transfer of the computer program.[71]

28.5 Contracting Around Exhaustion

28.5.1 Intellectual Property and Contract Laws

An additional important (and difficult) issue is whether a copyright owner and the acquirer of a copy can contractually agree on a restriction for the acquirer to resell the acquired copy (in case of online transfer, assuming that copyright is exhausted). Generally, this issue has to be addressed from a twofold perspective. From a copyright perspective first, the point is whether any provision in Swiss copyright

[69] Judgment of the Zug Cantonal Tribunal of 4 May 2011, *Gebrauchtsoftware*, published in: sic! 2012, p. 105.

[70] Judgment of the Zug Cantonal Tribunal of 4 May 2011, *Gebrauchtsoftware*, published in: sic! 2012, p. 104.

[71] Judgment of the Zug Cantonal Tribunal of 4 May 2011, *Gebrauchtsoftware*, published in: sic! 2012, p. 105 *i.f.*

law prevents the parties from contracting around the principle of exhaustion. Second, is there any rule under contract law that limits such contractual strategies?

As indicated above, once the rights to a copy are transferred, the copyright owner loses his or her distribution right to the specific copy. That said, nothing in the Copyright Act explicitly prevents the parties from contracting around that rule. In addition, it does not seem that such a prohibition could implicitly result or be drawn from the Copyright Act.[72]

Contract law does not prohibit agreements whose purpose is to counter the effects of exhaustion; according to the Swiss Federal Tribunal, such agreements are generally permitted, it being nonetheless specified that they produce an effect only among the parties to the agreement (and not an *erga omnes* effect based on copyright law).[73] That said, the form of the agreement can matter in this context. Rigamonti correctly points out that restrictions on the resale of copies are often drafted in general terms and conditions. In those circumstances, the restrictions may well be deemed unusual and, consequently, be unenforceable.[74]

28.5.2 Competition Law

28.5.2.1 Material Scope

Considering that arrangements around the principle of exhaustion prevent the acquirer from competing against the copyright owner, they potentially raise—in addition to contract law—competition law concerns.

Restrictions on the resale of copies are likely to fall within the scope of the Federal Act on Cartels.[75] Cartel Act, Article 3(2), which excludes the application of this Act to behaviors that result exclusively from the legislation on intellectual property, should not apply to restrictions on the resale of copies.[76] Indeed, since their purpose is to extend exclusivity where copyright no longer exists (because it is exhausted), restrictions on the resale of copies are out of the scope of copyright and

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72 Rigamonti, who deals with the restriction on the resale of copies, does not say that this practice may be prohibited on the basis of copyright law. See C. P. Rigamonti, Zur Rechtsmässigkeit des Handels mit Softwareproduktschlüsseln, in: Aktuelle Juristische Praxis/Pratique Juridique Actuelle 2010/5, p. 582 *et seq*. (in particular, p. 587 *et seq*.).

73 Swiss Federal Tribunal, Case (*ATF/BGE*) 124 III 321, *Imprafot AG gegen Nintendo Co. Ltd und Waldmeier AG,* § 3.

74 C. P. Rigamonti, Zur Rechtsmässigkeit des Handels mit Softwareproduktschlüsseln, in: Aktuelle Juristische Praxis/Pratique Juridique Actuelle 2010/5, p. 582 *et seq*. p. 588 *et seq*.

75 Federal Cartel Act of 6 October 1995 *(Loi fédérale sur les cartels et autres restrictions à la concurrence (LCart)/Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen (KG))* (classified compilation of federal law 251) (hereafter "Cartel Act").

76 According to the Swiss Competition Commission and the most recent literature, Cartel Act, Article 3(2), is not even invested with any normative force but aims simply at drawing the attention to the fact that the specificities of intellectual property should be taken into account in the competition law analysis. In this respect, see A. Alberini, ad LCart, Article 3(2), in: J. de Werra/ P. Gilliéron (ed.), Commentaire romand du droit de la propriété intellectuelle, Basel 2013.

therefore cannot be deemed to result exclusively from the legislation governing this type of IP.

Whether restrictions on the resale of copies violate the Cartel Act is a separate question. Contracts containing such restrictions raise issues from the perspective of both the rules on unlawful agreements and abuses of a dominant position.

28.5.2.2 Unlawful Agreements

To the extent that restrictions on the resale of copies fully prevent the acquirer from reselling the copy, they go further than agreements imposing full territorial or customer restrictions on the counterparty. Put differently, the acquirer of the copy is prevented not only from fully competing against the copyright owner or other acquirers in a specific territory or with respect to a defined group of customers but also from competing at all. Consequently, restrictions on the resale of copies should not benefit from a more lenient treatment than territorial or customer restrictions.[77]

Full (or absolute) territorial and customer restrictions generally fall within the presumption of elimination of competition provided for in Cartel Act, Article 5 (3) or (4).[78] In light of the foregoing, restrictions on the resale of copies should be subject to the same treatment.[79] Traditionally, falling within one of these presumptions practically meant that the restrictions were *per se* unlawful. Recently though—this is in my view a positive evolution[80]—the Swiss Competition Commission adopted a more economic approach and held in substance that hardcore restrictions such as the ones at stake here are not unlawful if they do not significantly impede competition.[81]

With respect to the restrictions on the resale of copies, determining the significant impediment to competition essentially requires an assessment of the position

[77] A question which arises in this context is whether an agreement between a company providing digital goods and an end consumer qualifies as an agreement within the meaning of competition law. It may be recalled that the concept of agreement encompasses only agreements between undertakings, *i.e*. among entities operating in the market on a regular basis. At first glance, the end consumer cannot be considered as an undertaking. That said, end consumers increasingly tend to resell products on the Internet. It may therefore not be unreasonable to rethink the concept of undertaking in light of this evolution. If the concept of undertaking is broadly interpreted, an agreement between a company providing digital goods and an end consumer may qualify as an agreement within the meaning of competition law.

[78] Cartel Act, Article 5(3), applies to agreements between competitors, while Cartel Act, Article 5 (4), applies to agreements between noncompetitors.

[79] It can be argued that Cartel Act, Article 5(4), should not apply to most restrictions on the resale of copies in online agreements because this provision, according to the language of the law, applies only to distribution agreements implementing an absolute territorial protection mechanism. This limitation to distribution agreements is, however, often perceived as a drafting mistake; thus, the provision should generally apply to all types of vertical agreements.

[80] A. Alberini, Droit des accords verticaux: De l'enfance à l'adolescence, in: Semaine Judiciaire 2010 II, p. 123 *et seq* (in particular p. 130 *et seq*.).

[81] See, for instance, the recent *Kosmetikprodukte* case handed down by the Swiss Competition Commission and summarized in C. Bovet/A. Alberini, Recent developments in Swiss competition law, in: Swiss Review of Business and Financial Market Law 2014/4, p. 435 *et seq.,* § 10.

of the copyright owner in the relevant market. If he or she benefits from market power and said power is protected by barriers to expand or entry, a significant impediment to competition is likely to be admitted. It should be noted that markets for music or videos are typically characterized by imperfect competition; this makes the definition of the relevant market and the identification of market power difficult.[82]

Provided that the parties are in a noncompetitive relationship, one way to minimize the competition law risk is to structure the contracts for the transfer of copies in accordance with the rules applicable to distribution agreements.[83] Another option is to adjust the contracts to the European rules governing technology transfer agreements.[84] The problem related to these options is that the rules provided for distribution agreements or technology transfer agreements make sometimes little economic sense in the context of copyright. With respect more specifically to the European rules on technology transfer agreements, it is in addition unclear to what extent they can be followed in Switzerland; so far, the Swiss Competition Commission has not regulated this category of agreements.

As a last note, one case that should be highly problematic under Swiss competition law is the insulation of the Swiss market. This happens when agreements provide for contractual restrictions according to which the acquirer of a digital copy in the EU is not allowed to resell it to customers located outside the EU, which means notably Switzerland.[85] Such agreements should be avoided.

28.5.2.3 Abuse of a Dominant Position

From the perspective of the abuse of a dominant position, the main question is whether restrictions on the resale of copies qualify as the imposition on business partners of unfair trade terms according to Cartel Act, Article 7(2)(c)—providing of course the copyright owner holds a dominant position. Referring notably to European law, Rigamonti supports that such restrictions are abusive because they are not directly related to the object of the contract they are stipulated in and limit significantly and without material ground the ability of the acquirer to use his or her

[82] For an excellent paper on this topic under US law but whose fundamental principle can be transposed to other jurisdictions, see M. A. Lemley/M. P. McKenna, Is Pepsi really a substitute for Coke? Market definition in antitrust and IP, in: Georgetown Law Journal 2012, Vol. 100, p. 255 *et seq*.

[83] In this respect, see Communication on vertical restraints adopted by the Swiss Competition Commission on 28 June 2010.

[84] Communication from the Commission—Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, OJ 2014 C 89/3 (with respect to copyright, in particular § 47 *et seq*. and 62 *et seq*.).

[85] BMW was, for instance, heavily fined for restricting in its agreements in the EU the ability of end users residing in Switzerland to freely purchase motor vehicles from authorized distributors located in the EEA. In this respect, see C. Bovet/A. Alberini, Recent developments in Swiss competition law, in: Swiss Review of Business and Financial Market Law 2013/2, p. 158 *et seq*., § 9.

property.[86] In my view, the restrictions on the resale of copies are not necessarily abusive in presence of a dominant position. As Clerc/Këllezi explain, a balance must be struck between the interests of the dominant undertaking, the significance of the restrictions for the counterparty, and possible limitations for third parties to compete. These scholars go on to say that trading terms are unfair when they are exceptionally favorable to the dominant undertaking and particularly unfair for trading partners whose ability to compete is seriously reduced.[87] In light of these considerations, whether restrictions on the resale of copies are abusive depends on the circumstances of each case.

28.6 Some (Practical) Considerations Relating to Remedies

If—as argued in this paper—exhaustion is not a valid defense to the claim of violation of the distribution and reproduction rights when digital goods purchased online are resold, the copyright owner can pursue the remedies generally available under Swiss copyright law.[88] A central issue in this context is territoriality.[89]

The *Gebrauchtsoftware* case is instructive as it sheds some light on this specific problem.[90] At the outset, it has to be specified that the plaintiff (the software developer) provided the defendant headquartered in Switzerland with the product *via* two successive German distributors. The defendant then transferred the software to two companies based respectively in Germany and in the UK.[91]

The key element is the following: the Zug Cantonal Tribunal focused on the fact that no Swiss customer had been supplied by the defendant. On this basis, the court held that the alleged infringing activity did not have any impact on the Swiss territory and the plaintiff did not suffer any damage in Switzerland. Therefore, the defendant could not be (temporary) enjoined from reselling copies of computer programs to foreign purchasers.

The approach adopted by the Zug Cantonal Tribunal shows a restrictive interpretation of the principle of territoriality. Discussing whether this interpretation is

[86] C. P. Rigamonti, Zur Rechtsmässigkeit des Handels mit Softwareproduktschlüsseln, in: Aktuelle Juristische Praxis/Pratique Juridique Actuelle 2010/5, p. 582 *et seq*. p. 590 *et seq*.

[87] E. Clerc/P. Këllezi, ad LCart, Article 7(2), in: V. Martenet/C. Bovet/P. Tercier (ed.), Commentaire romand du droit de la concurrence, Basel 2013, § 176.

[88] Copyright Act, Articles 61 *et seq*. With respect to preliminary measures, Copyright Act, Article 65.

[89] From a strict methodological perspective, territoriality relates not to remedies but to the scope of Swiss copyright law. In practice though, territoriality is a question which is often discussed in relation to procedural choices and remedies.

[90] Judgment of the Zug Cantonal Tribunal of 4 May 2011, *Gebrauchtsoftware*, published in: sic! 2012, p. 99 *et seq*.

[91] Judgment of the Zug Cantonal Tribunal of 4 May 2011, *Gebrauchtsoftware*, published in: sic! 2012, p. 99 *et seq*. It should be noted that the Swiss defendant provided its German and UK counterparties with copies of the software incorporated in a tangible medium.

correct or appropriate is beyond the scope of the present contribution.[92] That said, the takeaway for copyright owners is that it may be difficult to enforce their distribution and reproduction rights against individuals and companies located in Switzerland and reselling copies abroad. By contrast, individuals and companies located in Switzerland may be advised—from a Swiss law perspective—to resell copies to purchasers outside this country.

28.7 Conclusion

The main findings of the present contribution can be summarized as follows:

1. At the outset, it is worth emphasizing that Swiss law does not have to comply with EU law and Swiss courts remain free to take into account EU law when they interpret and apply Swiss law.
2. The question whether digital copies transferred online are subject to copyright exhaustion under Swiss law is highly controversial. The discussion essentially focuses on the interpretation of the Swiss Copyright Act in light of the WIPO Internet Treaties. According to the *Gebrauchtsoftware* decision handed down in 2011 by the Zug Cantonal Tribunal, the online transfer of software exhausts the distribution right; it should, however, be noted that the court did not refer to the WIPO Internet Treaties. To date, no case regarding other types of digital works (music, videos) exists in Switzerland.
3. Some scholars suggest that the principle of exhaustion could be applied by analogy to digital copies transferred online. This approach is certainly interesting. Nevertheless, it raises certain issues. Particularly, digital copies may be much more subject to acts of infringement than copies incorporated in a tangible medium. This difference may prevent the application of a reasoning by analogy.
4. IP rights other than copyright should not play a major role in the present context. In the *Gebrauchtsoftware* decision, the assessment under trademark law appeared to be essentially ancillary to the copyright analysis.
5. Contracting around exhaustion raises serious issues from a Swiss competition law perspective, in particular under the rules applicable to unlawful agreements. In order to minimize the competition law risk, contracts relating to the transfer of digital goods should observe the same standards as traditional distribution agreements or technology transfer agreements.
6. Any strategy aiming at pursuing remedies when copies of digital goods are resold by the acquirer to third parties should consider the difficulties that may arise in relation to cross-border transactions. The *Gebrauchtsoftware* case shows that suing a company based in Switzerland may be pointless if the computer programs were transferred by said company to customers located abroad.

[92] On this difficult question, see, for instance, F. Dessemontet, ad LDA, Article 1, in: J. de Werra/P. Gilliéron (ed.), Commentaire romand du droit de la propriété intellectuelle, Basel 2013, § 17 *et seq*.

More fundamentally, considering the nonrivalrous nature of digital goods and the high degree of piracy in the online world, the principle of exhaustion should not be so easily transposed—as it is sometimes argued—to online distribution. Such an extended application of the principle of exhaustion should be conditional upon the availability of efficient technologies ensuring that a digital copy cannot be indefinitely reproduced and disseminated.

29 United Kingdom

Bill Batchelor and Luca Montani

In this section, we discuss how exhaustion of IP rights is addressed by English law, both in the limited case law and in legislation, and how EU principles came to replace similar English concepts emanating from pre-EU case law. We consider the types of IP right which are subject to exhaustion and the few cases which have discussed the limits of the exhaustion principle.

29.1 Introduction

Exhaustion of intellectual property rights was not historically part of the English legal tradition. The concept has its roots in continental jurisdictions[1] and is introduced by EU law into the UK, *via* Art. 34 TFEU (former Art. 28 EC Treaty), EU secondary legislation and case law.

But in common with many legal regimes, English courts have had to grapple with the question of how far the IP holder's monopoly should extend into secondary and subsequent dealings with a protected work. Once appropriately remunerated for the work's initial commercialisation, should the IP holder control all subsequent dealings

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[1] *United Wire Ltd v Screen Repair Services (Scotland) Ltd* (2000) 4 All ER 353, para. 16 ("An alternative explanation, adopted in European patent system, is that of exhaustion of rights", per Lord Hoffmann); *Merck & Co Inc v Primecrown Ltd* (1997) 1 CMLR 83, 119.

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or charge additional royalties? US case law developed the “first sale doctrine” to set limits to the IP holder’s control of secondary dealings.[2] For patents, the English courts used the concept of implied licence to similar effect. In the field of trademarks, UK judges reached a similar conclusion, holding that a trademark owner could prevent *others from selling wares which are not his marked with the trade mark* but could not prevent subsequent dealings.[3] Then the EU-derived exhaustion principles permeated English law, albeit adopted—at least in respect of regional exhaustion—with some reluctance by English judges, who were keen to read “consent to EEA marketing” broadly so as to permit parallel trade from the rest of the world.[4]

As commerce moves online, exhaustion and similar concepts have shown themselves poorly adapted. Online-delivered products by their nature are not physical goods to which exhaustion principles are easily applied. The legal gymnastics in which the *Usedsoft* court had to engage to find exhaustion in online-delivered software illustrates the difficulties well.[5] But for all that, we have a clear signal from the EU Court that it will deal strictly with IP holders whose practices seem to segment the internal market. *Dicta* in *Usedsoft* and *Premier League*[6] suggest a court not afraid to re-cast legislation and discard long-held orthodoxies to achieve a digital single market.

The ambiguity of IP right application to online commercialisation has not helped. It can be unclear whether an online product involves copying, communication to the public, delivery of a service or distribution of a product or all of the foregoing. So we have seen many other copyright and/or EU law concepts prayed in aid of limiting the IP holder’s monopoly. In *Premier League*, the “essential subject matter” doctrine is used to set limits to the IP holder’s ability to restrict cross-broader availability of content. In *Meltwater*, the incidental copying exception is the tool deployed to prevent the IP holder frustrating linking aggregation services related to its content.[7] In *Svensson*, a tweak to the definition of “communication to the public” permits a service aggregating links to freely available websites—since these are not directed at a “new” public, merely to the existing audience of the linked-to websites—and finds any stricter Swedish rule incompatible with EU law.[8]

But the case law has developed piecemeal and cautiously. Not all secondary uses are permitted, particularly where there is a risk that the IP holder will not be

[2] *Bobbs-Merrill Co. v Straus,* 210 U.S. 339 (1908).

[3] *Champagne Heidsieck et cie Monopole Societe Anonyme v Buxton*, (1930) 1 Ch. 330, 339.

[4] The Guardian, 24 June 2005 (Mr Justice Laddie is reported to have said: “If you’ve found a way around Davidoff, I will personally give you a medal”).

[5] Case C-128/11 *UsedSoft GmbH v Oracle International Corp*. (3 July 2012, not yet published in ECR.)

[6] Cases C-403/08 and 429/08, *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-9083.

[7] *Public Relations Consultants Association Ltd v The Newspaper Licensing Agency Ltd & Ors* (2013) UKSC 18, Case C-360/13, Public Relations Consultants Association (5 June 2014, not yet reported in ECR).

[8] Case C-466/12 *Svensson, Sjögren, Sahlman, Gadd v Retriever Sverige* (13 February 2014, not yet reported in ECR).

properly remunerated for its works. So in *TV Catchup*, we see the EU Court loathe to permit secondary dealings in free-to-air broadcasts—by means of Internet retransmission of free-to-air broadcasts—finding an unauthorised communication to the public resulted from retransmitting *via* different technical means, regardless of whether the same audience—and hence not a "new public"—was involved.[9]

29.2 From Implied Licence to Exhaustion

29.2.1 The English Courts' Historical Approach

In early cases, English courts addressed whether the IP holder's monopoly should allow it to control legitimate secondary trade in protected products.

For copyright works, the focus was always copying[10]—the Statute of Anne granted the copyright owner the *sole Liberty of printing and reprinting* [the protected] *Book*[11]—not subsequent dealings. The right granted was to control copying, printing and reprinting of books, with no provision to benefit the owner of this right after the sale.

In relation to patents, implied licence was used to determine whether subsequent dealings were allowed. In *Betts v Willmott*,[12] an English retailer of patented metallic capsules purchased in France was held not to infringe the UK patent. The court concluded that *inasmuch as [the patent holder] has the right of vending the goods in France or Belgium or England, or in any other quarter of the globe, he transfers with the goods necessarily the licence to use them wherever the purchaser pleases.*[13] This implied licence could only be ousted by *some clear and explicit agreement to the contrary to justify the vendor in saying that he has not given the purchaser his licence to sell the article, or to use it wherever he pleases as against himself.*[14]

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[9] Case C-607/11, *ITV Broadcasting Ltd and Others v TV Catch Up Ltd* (7 March 2013, not yet published in ECR).

[10] The Preamble of the Act for the Encouragement of Learning, 1710, 8 Ann., c. 19 (Eng.), the so-called Statute of Anne, reads: "Whereas Printers, Booksellers, and other Persons, have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing therefore such Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful Books; May it please Your Majesty, that it may be Enacted . . .".

[11] Act for the Encouragement of Learning, 1710, 8 Ann., c. 19 (Eng.).

[12] *Betts v Willmott* (1871) L.R. 6 Ch. App. 239, 245. See also *Incandescent Gas Light Co. v Cantelo* (1895) 12 RPC 262, and *National Photograph Co. of Australia v Menck* (1911) AC 336.

[13] *Betts v Willmott* (1871) L.R. 6 Ch. App. 243 (*per* Lord Hatherley L.C.)

[14] *Ibid.*

Manufactures de Glaces SA v Tilghman's patent Sand Blast Company,[15] *Badische Anilin und Soda Fabrik v Isler*[16] and *Gillette v Bernstein*[17] established limits to the doctrine. A patent licensee acquired no right to sell the products manufactured under licence outside the licensed territory.[18] Purchasers from the licensee would infringe if they resold products outside the licensee's territory, but only if licensee's restricted rights were brought to its attention. The cases still have some application in ex-EEA patented subject matter.[19]

As to trademarks, the English courts allowed subsequent dealings in marked goods so long as the reseller was not presenting the goods as its own. In *Champagne Heidsieck v Buxton*,[20] a French champagne producer prohibited sale outside France unless the bottles bore a specific label designed for ex-France sales. Heidsieck claimed that by selling the champagne for the French market, an English importer and reseller, Buxton, had led purchasers to think they were buying a different wine. The court held Heidsieck had no right to prevent resale. Buxton *was in no wise affected by the restrictions sought to be imposed by the plaintiffs against selling or dealing with the Brut wine in England*.[21]

So a mix of English legal tools historically addressed subsequent dealings, some essentially similar to exhaustion and some very different, such as implied licence. Though the latter sought a similar end to exhaustion in limiting the IP holder's rights post first commercialisation, the concepts are plainly different. As a licence, implied licence doctrine permitted limitations, so long as these were express and brought to the attention of subsequent purchasers. Exhaustion breaks all links with the IP holder after first sale, whether or not against the IP holder's express wishes.[22]

29.2.2 Exhaustion

The principle of exhaustion is now incorporated into English law in accordance with EU legislation and case law, as we set out in Annex.

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[15] *Société Anonyme des Manufactures de Glaces v Tilghman's patent Sand Blast Company* (1884) LR 25 Ch D 1.

[16] *Badische Anilin und Soda Fabrik v Isler* (1906) 1 Ch 605 (High Court), (1906) 2 Ch 443 (Court of Appeal).

[17] *Gillette Industries v Bernstein* (1942) Ch 45.

[18] *Société Anonyme des Manufactures de Glaces v Tilghman's patent Sand Blast Company* (1884) LR 25 Ch D 1. (the grant of the license to use the patent in Belgium did not imply permission to sell the manufactured article in England in violation of the Defendants' English patent").

[19] *HTC Corp v Nokia Corp* (2013) EWHC 3247, para. 169 (*as a matter of English law, HTC cannot have acquired greater rights on purchasing the chips from* [the licensee] *than* [the licensee] *was granted by Nokia under the Agreement*).

[20] *Champagne Heidsieck et cie Monopole Societe Anonyme v Buxton*, (1930) 1 Ch. 330.

[21] *Champagne Heidsieck et cie Monopole Societe Anonyme v Buxton*, (1930) 1 Ch. 330, 331.

[22] *United Wire Ltd v Screen Repair Services (Scotland) Ltd* (2000) 4 All ER 353, para. 16.

The limited UK case law around exhaustion addressed whether products first sold outside the EEA may be lawfully imported. In a series of cases referred to the EU Court,[23] the English Courts tested how far a supplier may be held to give implied consent to sale into EEA when supplying counterparties based in non-EEA states. The EU Court's response was unequivocal, as the High Court held in *Levis* noted. "[T]he clear thrust is that only express consent to subsequent marketing within the EEA will suffice" for trademarked goods put on the market outside that area by the trademark proprietor.[24]

In *Zino Davidoff*,[25] Davidoff required its Singapore distributor not to export products abroad and required a similar restriction be passed through to sub-dealers.[26] Davidoff's failure to ensure that this prohibition was passed down the supply chain and evidence that the defendant was not aware of the export prohibition were thought to be persuasive indications of implied consent by the referring court. The EU Court held to the contrary: "consent must be expressed positively and that the factors taken into consideration in finding implied consent must unequivocally demonstrate that the trade mark proprietor has renounced any intention to enforce his exclusive rights".[27] Implied consent "cannot be inferred from the mere silence of the trade mark proprietor",[28] the lack of an explicit opposition to marketing within the EEA and/or the lack of restrictions placed on the reseller.[29]

Later cases have shown defendants equally unsuccessful in showing implied consent.[30] In *Mastercigars Direct Limited v Hunters & Frankau Limited*,[31] the High Court noted that the personal use export limit of GBP 25,000 (around 8000 cigars) strongly suggested the supplier must have been aware of heavy levels of

[23] See, for instance, *Levi Strauss & Co v Tesco Stores Ltd* (2002) EWCH 1556 Ch, *Zino Davidoff SA v A&G Imports Limited* (2002) Ch 109.

[24] *Levi Strauss & Co v Tesco Stores Ltd* (2002) EWCH 1556 Ch, para. 17.

[25] *Zino Davidoff SA v A&G Imports Limited* (2002) Ch 109.

[26] *Zino Davidoff SA v A&G Imports Limited* (2002) Ch 109, respectively paras. 37 and 39 ("There is nothing to support the suggestion that existing case law or Community law creates a presumption that a proprietor shall be taken to object to unfettered distribution of goods which have been sold on the open market outside the EEA unless he expressly consents to such further distribution." "It appears that the goods in issue here were placed on the market in circumstances where the plaintiff *could* have placed, but did *not* place, an effective restraint on their further sale and movement").

[27] Case C-414/99, *Zino Davidoff SA v A&G Imports Limited*, ECR 2001 I-8691, para 53.

[28] Case C-414/99, *Zino Davidoff SA v A&G Imports Limited*, ECR 2001 I-8691, para. 55.

[29] Case C-414/99, *Zino Davidoff SA v A&G Imports Limited*, ECR 2001 I-8691, paras. 56–57.

[30] See, for instance, *Levi Strauss & Co v Tesco Stores Ltd* (2002) EWCH 1556 Ch, *KK Sony Entertainment v Electricbirdland Ltd* (2005) EWHC 2296 Ch, *Hewlett-Packard Development Co LP v Expansys UK Ltd* (2005) E.T.M.R. 111 Ch, *Quicksilver Pty Ltd and Another v Charles Robertson (Developments) Ltd* (2005) 1 CMLR 36, and *Honda Motors Co Ltd v Neesam* (2006) EWCH 1051 Ch.

[31] *Mastercigars Direct Limited v Hunters & Frankau Limited* (2007) EWCA Civ 176.

commercial exports out of Cuba.[32] But this was still not sufficient to infer implied consent to import to the EEA. Moreover, the IP right holder had already showed dissent to parallel import of cigars into the UK in a previous case, so it would have been therefore extremely difficult to prove the existence of implied consent.[33] In *Honda v Neesam*,[34] the court rejected implied consent by Honda because Honda sold large quantities of new motorbikes to KJM without imposing on it any geographical resale restriction. The supplier's knowledge that its dealer was exporting did not equate to knowledge of its parallel import into the EEA.

29.3 Application of Exhaustion Principles to an Online World

Finding a trade off between the IP holder's monopoly and legitimate secondary trade in the protected goods is challenging in an online world. Exhaustion principles were created with physical products in mind such as patented pharmaceuticals, copyright books and records and trademarked luxury brands.

In online commerce, there may be no physical product involved, just a stream of electrons delivering products in electronic form, such as video content, music, text or software. The online product may involve copying, distribution and communication to the public and/or the delivery of a service.

The difficulties of adapting offline principles to an online world are well illustrated by *Usedsoft v Oracle*.[35] There the EU Court considered whether a software licence (in effect a right to download Oracle database software from Oracle's website) could be transferred from first purchaser to a second-hand user. The fact pattern was further complicated by the legal form in which the software was sold, namely a licence of the software copyright, containing strict contractual limitations. The licence was personal and limited to the first user and not transferable to any second-hand user, and indeed breach of these conditions was liable to extinguish the licence.

The Court first needed to address the legal format in which software is made available. Precisely to avoid the US equivalent exhaustion principle, "first sale doctrine" software is not made available by legal sale of the copyright.[36] Rather,

[32] *Mastercigars Direct Limited v Hunters & Frankau Limited* (2007) EWCA Civ 176, para. 119.

[33] *Mastercigars Direct Limited v Hunters & Frankau Limited* (2007) EWCA Civ 176, para. 123.

[34] *Honda Motor Co. Ltd v Neesam* (2008) EWCH 338 Ch.

[35] Case C-128/11 *UsedSoft GmbH v Oracle International Corp.* (3 July 2012, not yet reported.)

[36] In *Davidson v. Internet Gateway*, for instance, the court held that *[t]he first sale doctrine is only triggered by an actual sale. Accordingly, a copyright owner does not forfeit his right of distribution by entering into a licensing agreement* (*Davidson v. Internet Gateway*, 334 F. Supp. 2d 1164, 1178 (E.D. Miss. 2004)). In *Adobe Sys. Inc. v. One Stop Micro Inc.*, it was held that "Virtually all end users do not buy -but rather receive a license for- software. The industry uses terms such as 'purchase', 'sell', 'buy'... because they are convenient and familiar, but the industry is aware that all software ... is distributed under license" (*Adobe Sys. Inc. v. One Stop Micro Inc., 84 F.Suppl. 2d 1086, 1091 (N.D. Cal. 2000)*). See also, among others, *Wall Data Inc. v. L.A. County Sheriff's*

software vendors grant only a limited, personal licence to the end user. US courts have held first sale doctrine inapplicable to these licences.[37] In *ReDigi*, a US District Court has acknowledged that technological progress may have rendered the Copyright Act—and its Section 109(a) on First Sale—obsolete, but *it has not rendered it ambiguous*.[38] It therefore re-affirmed that first sale doctrine does not apply to the sale of digital music files albeit lawfully made and purchased.[39] UK courts have also found that software is licensed, not sold, and therefore attracts none of the covenants applied into a sale of goods.[40]

The EU Court declined to take a similar formalistic analysis. It focussed instead on the transaction's substance. The user was entitled to the permanent use of the software for a one-off fee. That was characteristic of a sale rather than a temporary licence. Hence, this was a first sale in the EEA which exhausted further rights in controlling resale.[41]

Going one step further, the Court also had no difficulty in finding that the promise of a download of software—since Usedsoft traded in surplus licences that had not yet been downloaded from Oracle's website—was also a sale which triggered exhaustion of the right.[42]

Dep't, 447 F.3d 769 (9th Cir. Cal. 2006), *Microsoft Corp. v. Harmony Computers & Electronics*, 846 F. Supp. 208, 212–213 (E.D.N.Y. 1994), TBC -*Novell v. Unicom Sales*, 2004 WL 1839117 at p. 7 (N.D. Cal. 2004) (not reported in F. Supp. 2d); *DSC Communications Corp. v. Pulse Communications Inc.*, 170 F.3d 1354, 1360 (Fed. Cir. 1999); *Novell v. Network Trade Ctr.*, 25 F. Supp. 2d 1218, 1230 (D. Utah 1997); *ISC-Bunker Ramo v. Altech, Inc.*, 765 F. Supp. 1310, 1314 (N.D. Ill. 1990); *Data Products v. Reppart*, 18 U.S.P.Q.2d 1058, 1601 (D. Kan. 1990).

[37] See L. Determann, *Importing Software and Copyright Law*, The Computer and Internet Lawyer, Vol. 30(5), May 2013; L. Determann and B. Batchelor, *Used Software Sales and Copyright Exhaustion*, BNA Electronic Commerce, 17 ECLR 2149 (2012). The argument that the first sale doctrine does not apply because software programs are licensed (and not sold) was also recently applied in *Vernor v. Autodesk*, 555 F. Supp. 2d 1164. The Court of Appeal—reversing what the District Court had previously held—concluded that it was bound by *stare decisis* (*United States v. Wise*, 550 F.2d 1180 (9th Cir. 1977)) and held that the licensee was not entitled to resell under the first sale doctrine. The Court remanded the claim of alleged copyright infringement for further proceedings.

[38] *Capitol Records L.L.C. v. ReDigi Inc.*, 12 Civ. 95(RJS), p. 12.

[39] ReDigi, an online platform selling digital used music asserted that its service was protected by the first sale defence. The Court concluded that first sale was limited to material items commercialised by the IP right owner. It considered that ReDigi did not distribute such material items; *rather it [distributed] reproductions of the copyright code embedded in new material objects, namely, the ReDigi server in Arizona and its users' hard drives* (*Capitol Records L.L.C. v. ReDigi Inc.*, 12 Civ. 95(RJS), p. 12).

[40] *London Borough of Southwark v IBM UK Limited* [2011] EWHC 549 (software licensed subject to a reservation of ownership and expressly stated to be limited to the licensee).

[41] Case C-128/11 *UsedSoft GmbH v Oracle International Corp.* (3 July 2012, not yet reported.), paras. 37–48. Arts. 2 and 4 of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111, 05/05/2009, p. 16–22.

[42] Case C-128/11 *UsedSoft GmbH v Oracle International Corp.* (3 July 2012, not yet reported.), paras. 48 and 72.

The Court then needed to determine whether there had been a "making available" of the software.[43] Under Art. 3(3), Copyright Directive 2001/29,[44] exhaustion is stated specifically not to apply to the "making available right". The public communication of a work remains within the right holder's monopoly, no matter how many prior public communications have occurred. A second broadcaster cannot pick up the first broadcast and make it available to a new public without the right holder's consent. Dissemination of software *via* Oracle's website was *prima facie* a making available to which exhaustion could not apply. But the Court held the same rule did not apply to software. The Software Directive[45] was a *lex specialis* which contained no similar prohibition on exhausting the making available right.[46]

It went on to find that recital 29 of the Software Directive (stating that exhaustion was inapplicable to online services) could not defeat this interpretation. Distribution of software *via* download or physical media was functionally equivalent. The same principles of exhaustion should apply.[47]

Significantly, the Court did not stop there. In a potentially far broader *dictum*, the Court found that the transfer of a permanent right to use was "distribution" rather than "making available" even under the Copyright Directive.[48] This potentially brought a whole range of services—music, film and e-book downloads—within online exhaustion principles. That further *dictum,* for all that it was clearly *obiter*, is potentially far reaching. Most collecting societies assert fees for performance copyright over *inter alia* music downloads. If the making available right is not engaged, then these fees are improperly claimed. The point is an important one since the ambit of the Software Directive is limited to "pure" software, not including mixed works also involving images or sound protected by the Copyright Directive.[49] If *Usedsoft* is confined to the *lex specialis* of software narrowly defined, then its impact is limited. The only court to look at the point so far is German courts, which decided that *Usedsoft* is confined to software.[50]

[43] Article 3(1) Copyright Directive ("the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them").

[44] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22 June 2001, pp. 10–19.

[45] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111, 05 May 2009, pp. 16–22.

[46] Case C-128/11 *UsedSoft GmbH v Oracle International Corp.* (3 July 2012, not yet reported.), para. 51.

[47] Case C-128/11 *UsedSoft GmbH v Oracle International Corp.* (3 July 2012, not yet reported), paras. 53–63.

[48] Case C-128/11 *UsedSoft GmbH v Oracle International Corp.* (3 July 2012, not yet reported.), paras. 51–52.

[49] See Case C-355/12, *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl* (23 January 2014, not yet published in ECR), para. 23.

[50] See on the point LG Berlin, judgment of 11.03.2014—16 O 73/13 (Computer Games) and OLG Hamm, judgment of 15.05.2014—22 U 60/13 (E-Books). In both judgments it was held that the

Finally, the Court gave short shrift to the contractual provisions in end-user software licences that prohibit transfer of software to a second-hand owner, concluding that any such restriction would be invalid.[51]

A crucial difference between transferring software and physical goods is that for books or CDs, the seller has no further use of the property. Its physical transfer ensures this occurs. In the online world, policing whether the seller has parted with the software or retains—as it inevitably will—all or part of the software copied on a hard drive, server or other medium is nearly impossible. The Court also found no difficulty in constructing the online analogue of a physical transfer. It held that the transfer of second-hand software would be infringing if the first owner did not render the software unusable.[52]

Finally, there were some limits to the Court's preparedness to create an online exhaustion model. Where there was a service, as a distinct to a simple software download, being delivered, then the supplier could not be forced unwillingly to continue to service the second-hand owner. So software maintenance contracts for Oracle software (by which Oracle supplied bug fixes, updates and technical assistance to the end user) were not alienable in the same way.[53]

Though English courts have yet to apply *Usedsoft* in domestic cases, there are already echoes of the *Usedsoft* in current UK legislative proposals. In June 2013, the UK Intellectual Property Office ("UKIPO") started publishing pieces of draft secondary legislation for technical review on proposed changes to the UK Copyright, Designs and Patents Act 1988 ("CDPA"). The draft legislation comprises exceptions for research, libraries and archives and public administration. The amendments entered into force on 1 June 2014. Amendments on exceptions for private copying, quotation and parody will enter into force on 1 October 2014. Among other things, the amendments include an exception on private copying (new Section 28B CDPA), resembling *Usedsoft* principles and addressing the issue of transfer of a copy and retention of a copy by the transferor. An otherwise lawful transfer of a copy may infringe where the user lawfully copies the work but "transfers the individual's own copy of the work to another person (otherwise than on a private and temporary basis) and, after that transfer and without the licence of the copyright owner, retains any personal copy".

Usedsoft doctrine of exhaustion does not apply to computer games—considered as hybrid works comprising of copyright protected works and computer programs—or e-books.

[51] Case C-128/11 *UsedSoft GmbH v Oracle International Corp*. (3 July 2012, not yet reported.), para. 77.

[52] Case C-128/11 *UsedSoft GmbH v Oracle International Corp*. (3 July 2012, not yet reported.), paras. 70 and 79. To make sure that the original acquirer has not made copies of the product in order to continue using it after the resale, the Court adds that *it is permissible for the distributor – whether 'classic' or 'digital' – to make use of technical protective measures such as product keys* (para. 79).

[53] Case C-128/11 *UsedSoft GmbH v Oracle International Corp*. (3 July 2012, not yet reported.), para. 66.

The European Commission's copyright consultation grapples with the same problem.[54] The Commission considers whether *Usedsoft* should be more broadly applied to other digital works.[55] It reaches the provisional conclusion that the current law does not extend *Usedsoft* beyond software and considers whether the law should be changed to allow this. It rightly notes the significant impact on rights holders of allowing resale of perfect and infinitely transferable digital copies of their works.[56]

29.4 Limiting the IP Holder's Control over Secondary and Subsequent Dealings

Exhaustion is often a poor fit for the online world. absent a clear analogy to an offline sale or distribution, as we see in *Usedsoft*, Courts have applied alternative judicial mechanisms to limit the IP holders' control over secondary dealings in their works.

29.4.1 Essential Subject Matter

In *Premier League*,[57] the Court considered whether a right holder may legitimately prevent a cross-border broadcast of sports content. Mrs Murphy, a UK publican, purchased a satellite decoder card from a Greek pay-TV broadcaster to be able to receive satellite broadcasts of English Premier League football matches in her pub. The Greek broadcaster was contractually permitted only to broadcast to Greek subscribers, the UK Premier League broadcasting rights being acquired exclusively by a UK broadcaster.

UK law criminalised the misuse of decoder cards to receive unauthorised broadcasts.[58] The question arose whether that legislation was compatible with EU principles of free movement of services.

[54] See Draft Impact Assessment on the Modernisation of the EU Copyright Acquis, provisional version, available at: http://statewatch.org/news/2014/may/eu-draft-impact-assessment-copyright-acquis.pdf.

[55] "The question arises whether customers should be able to dispose of a digital copy acquired via an online service as they would be with regard to a physical copy", Draft Impact Assessment on the Modernisation of the EU Copyright Acquis, provisional version, p. 164.

[56] See Draft Impact Assessment on the Modernisation of the EU Copyright Acquis, provisional version, p. 165.

[57] Cases C-403/08 and 429/08, *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-9083.

[58] Section 297(1), Copyright Designs and Patents Act 1988 ("A person who dishonestly receives a programme included in a broadcasting service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale").

Based on standing EU precedent, the answer should have been that the legislation was permitted by EU free movement principles. On similar facts, in *Coditel I*,[59] the Court had concluded that a German broadcast could not be retransmitted in Belgium without the right holder's consent. The right holder was entitled to authorise each performance of its work. If it could not, a right holder could not be properly compensated. Without being able to circumscribe the territories in which its content is broadcast or the number of broadcasts, a right holder risked being grossly undercompensated if it gives what it thought was a limited territorial licence to a performance it found retransmitted around Europe.[60]

In *Premier League*, the Court revised its view in *Coditel I*. It found that the UK law criminalising receipt of the broadcast served the same public interest goal of IP protection as intellectual property rights. This was a permitted justification for a restriction on free movement of services. But the court went further to consider whether this restriction was reasonable and proportionate. It applied the "essential subject matter" doctrine.[61]

Where a restriction falls within the essential subject matter of intellectual property protection, then it is considered reasonable and proportionate restriction, and so legal under EU free movement rules.[62] "Essential subject matter" is a judge-made construct by which the legitimate scope of an intellectual property right is defined. In prior cases, including *Coditel I*, the territorial nature of IP performance copyright was recognised as part of its essential subject matter.[63]

In *Premier League*, the Court revisited this conclusion. It added a new gloss to essential subject matter, which subtly, but effectively, entirely rewrote the accepted legal position. Essential subject matter certainly included the right to appropriate remuneration by licensing one licensee in each territory, the Court found.[64] But it did not encompass a right to extract an exclusivity premium from each territory by promising each licensee protection from cross-border broadcasts. Where the right holder could effectively track and calculate the number of subscribers to the licensed service across Europe, then it was not at risk of being under-remunerated. The ECJ held that *reception of a satellite broadcast, such as that at issue in the main proceedings, requires possession of a decoding device. Consequently, it is possible to determine with a very high degree of precision the total number of*

[59] Case C-62/79, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others* [1980] ECR 881.

[60] *Ibid.*, para 16. See also Opinion of Advocate General Reischl, ECJ, in the same case, delivered on 14 September 1982, paras. 2(aa), (bb), (cc), pp. 3411–3413.

[61] Cases C-403/08 and 429/08, *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-9083, paras. 137–138.

[62] Cases C-403/08 and 429/08, *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-9083, paras. 104–106.

[63] Case C-62/79, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others* [1980] ECR 881, paras 15–18.

[64] Cases C-403/08 and 429/08, *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-9083, paras. 108–110.

viewers who form part of the actual and potential audience of the broadcast concerned, hence of the viewers residing within and outside the Member State of broadcast.[65] If the Greek broadcaster, on this view, sold to subscribers across Europe, then this could be tracked because each subscriber would need its own decoder card to decrypt the satellite broadcast. So the right holder could demand royalties for each subscriber no matter where they resided in Europe. To be appropriately remunerated, it did not need to segment EU territories. It could charge a per subscriber fee based on the number of the subscribers buying decoder cards instead.

On the facts, this conclusion did not change the final outcome. Had the content been viewed only privately by Ms Murphy and her family, then that would have been legal. But showing the matches to customers was to show the matches to a "new public" not envisaged by the licensor—who permitted only residential rather than commercial use.[66] This was a potential copyright infringement.[67]

In tandem with the free movement analysis as to whether UK anti-piracy laws made the cross-border broadcast illegal, the Court also considered whether contractual restrictions preventing the Greek broadcaster selling decoder cards into the UK were valid. It concluded they were not. They had the object of restricting resale within the EEA, hence constituted by object infringements of EU competition law.[68] The restrictions were accordingly invalid.

The question arises how broadly *Premier League* applies. The case related to satellite broadcasting, not online dissemination of works. This is not just a cosmetic distinction. The Satellite Directive[69] copyright regime is very different to that of the Copyright Directive applicable to online dissemination of content. The Satellite Directive has a pan-European licensing rule, which holds that copyright is engaged only in the country of uplink, from which the broadcast emanates, rather than all the countries' copyright laws where the broadcast is received.[70] This is not the same for

[65] Cases C-403/08 and 429/08, *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-9083, para. 113.

[66] Cases C-403/08 and 429/08, *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-9083, paras. 198–199.

[67] Based on the ECJ's ruling, the High Court concluded that Ms Murphy's conviction could not stand. The court held in fact that Ms Murphy did not act *with intent to avoid payment of any charge applicable to the reception of the programme*, as she had lawfully purchased the viewing card. For this reason, since the decoder card was not a pirate card, that is to say a card manufactured without the card issuer's authorisation, there was no room to consider Ms Murphy's viewing cards 'illicit devices' within the meaning of Art. 2(e) of Directive 98/84 on the legal protection of services based on conditional access.

[68] Cases C-403/08 and 429/08, *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-9083, para. 140.

[69] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ 248, 6 October 1993 pp. 15–21.

[70] Art. 1(2)b, (i), Council Directive 93/83/EEC: *[I]f the programme-carrying signals are transmitted to the satellite from an uplink situation situated in a Member State, that act of communication*

Internet dissemination, for which copyright clearance in each country of reception is required.[71] In other contexts, indeed, a later Court case held *Premier League* inapplicable within the "context of territory-based copyright protection".[72]

Whether the *Premier League* rule can be read beyond satellite to Internet or other forms of dissemination remains, therefore, an open question.

So too does the question of whether it can be read more broadly than sports content. Prior case law in the audiovisual sector made clear that territorial protection was an essential industry characteristic.[73] Film producers market their works on a territory-by-territory basis, relying on anticipated national receipts, distribution deals or "presales" to fund the creation of the work. They sell content in temporal "windows"—cinema, DVD, pay-TV and so on—which differ from state to state. If the producer cannot offer a local distributor or broadcaster territorial exclusivity over the content, or a specific window, then these deals cannot be done, and content cannot be financed.[74]

29.5 Temporary Copying Exception

We see courts using other legal mechanisms to constrain the breadth of the IP holder's monopoly online. Often an online service can involve nothing more than aggregating and making available content existing elsewhere. The question of whether the right holder should be able to control aggregation and access services was dealt with by the UK Supreme Court in *Meltwater*.[75] Meltwater offered media monitoring service by which it created lists with hyperlinks for its clients based on their preferred search terms. The service "scraped" content from news webpages to offer this service. When Meltwater's clients viewed the linked content, it created a copy of the work on the user's screen and/or computer cache. The question was whether these copies were an infringing reproduction of the protected work or a non-infringing act protected by the temporary copying exemption.

to the public by satellite shall be deemed to have occurred in that Member State and the rights provided for under Chapter II shall be exercisable against the person operating the uplink station.

[71] Case C-170/12 *Peter Pinckney v KDG Mediatech AG* (3 October 2013, not yet reported.), para. 39, and Case C-173/11 *Football Dataco Ltd and Others v Sportradar GmbH and Sportradar AG* (18 October 2012, not yet reported.), paras. 34–35.

[72] Case C-351/12 *Ochranný svaz autorský pro práva k dílům hudebním o.s.("OSA") v Léčebné lázně Mariánské Lázně a.s.* (27 February 2014, not yet reported), para. 73 ("As regards the question whether such legislation goes beyond what is necessary in order to attain the objective of protecting intellectual property rights, it must be pointed out that . . . legislation such as that at issue in the main proceedings forms part of a context of territory-based copyright protection").

[73] Case C-262/81, *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others* [1982] ECR 3381, paras. 16–20.

[74] See Draft Impact Assessment on the Modernisation of the EU Copyright Acquis, provisional version (see footnote above), pp. 26–27.

[75] *Public Relations Consultants Association Ltd v The Newspaper Licensing Agency Ltd & Ors* (2013) UKSC 18.

The Supreme Court held that the 'temporary use exception' of Art. 5(1) of the Copyright Directive 2001/29[76] (implemented by Section 28A CDPA) applies to all copies temporarily retained on screen or in the cache which are incidental to the use of the Internet. This technical limitation was included by the European legislation (and reflected in the CDPA) in order to limit the broad concept of 'right of reproduction' as included in Art. 2 of the Copyright Directive. Temporary acts of reproduction are *transient or incidental and [constitute] an integral and essential part of a technological process* (Art. 5(1)). Such temporary acts of reproduction do not represent infringement of copyright when they are required to enable the lawful intermediaries and end users to use the computer program in accordance with its intended purpose.

It therefore held that a licence was not required. The Court reached this conclusion based on Recitals 33 of the directive, which clearly states it was intended to *include acts which enable browsing as well as acts of caching to take place*. In addition, as required by Art. 5(1) the end users' use of work when browsing the Internet was to be considered 'lawful use'. Finally, the Court found this approach to be consistent with *Premier League*, where the copy of the Premier League broadcast held in the set-top-box cache and television screen was held to fall within the incidental copying exception.[77] Accordingly, Meltwater's service did not involve end users in infringing acts by accessing the content via the Meltwater-aggregated hyperlinks.

While setting out its reasoning in detail, the Court noted that the case's *transnational dimension and that the application of copyright law to internet use has important implications for many millions of people across the EU making use of what has become a basic technical facility*.[78] On a preliminary reference of this question, the ECJ confirmed that temporary copying of content involved in browsing the Internet does not amount to copyright infringement.[79] End user acts which merely constitute opening and reading a web page fall within the EU temporary copy exception and as such do not require authorisation, either expressed or implied, from the relevant copyright owner.

[76] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22 June 2001, pp. 10–19.

[77] Cases C-403/08 and 429/08, *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-9083, paras. 165–179.

[78] *Public Relations Consultants Association Ltd v The Newspaper Licensing Agency Ltd & Ors* (2013) UKSC 18, para. 38 *per* Lord Sumption.

[79] Case C-360/13, *Public Relations Consultants Association* (5 June 2014, not yet published in ECR), para. 63.

29.6 Making Available to the "Same Public"

In *Svensson*, a twist on the definition of "communication to the public" produced the same result. The ECJ considered that the provision of links to protected works that were published and freely accessible in another site did not constitute a 'communication to the public' since such communication was not directed to a new public.[80]

29.7 Retransmission as a New "Making Available"

The English courts have not been so swift to limit the IP holder's control where the EU single market has not been implicated. *TV Catchup*[81] concerned an online TV service provider which streamed UK free-to-air channels to UK subscribers. This was content which, the defendant argued, UK subscribers would have been entitled to watch without charge. The service simply provided an alternative way of receiving the same content.

The court considered whether this retransmission involved a new 'communication to the public' within the meaning of Article 3(1) of the Copyright Directive 2001/29, which only the TV channels could authorise. On referral, the EU Court was unpersuaded by TV Catchup's claims that its Internet service reached precisely the same public as the broadcasters' over-the-air signal (and indeed subscribers' eligibility for the free-to-air service was checked on registration). The Court held the "new public" criterion—the decisive point in *Svensson*—not applicable on these facts where transmission was via a different technical means to the original public communication.[82] Accordingly, the High Court held TV Catchup infringed the broadcaster's copyright. The communication to the public occurred where there was a retransmission by a different means to the original. Where this was the case, it was not relevant whether the same public was targeted.

As a matter of domestic law, this was not the end of the matter, however, since UK law enables cable TV broadcasters to carry the main terrestrial free-to-air channels without infringing copyright. In effect, this constitutes a must-offer obligation on UK free-to-air broadcasters to ensure cable TV operators can offer the main UK free-to-air terrestrial channels alongside their broader product offering.[83] The court found that TV Catchup's carriage of the free-to-air channels via the Internet fell within this provision. "Cable", though commonly associated with the coaxial cable of traditional cable TV franchises, need not be so limited. Its natural

[80] Case C-466/12 *Svenssons and Others* (13 February 2014, not yet published in ECR), paras. 28, 30 and 32.

[81] *ITV Broadcasting Ltd & Ors v TV Catchup Ltd* 2011 EWHC 1874 (Pat).

[82] Case C-607/11, *ITV Broadcasting Ltd and Others v TV Catch Up Ltd* (7 March 2013, not yet published in ECR).

[83] Section 73, Copyright, Designs and Patents Act 1988.

meaning would encompass any service over "cables" in the broader sense of "wire". One such "wire" service was the Internet. Conversely, however, TV Catchup's wireless service—a direct to mobile stream—did not fall within the cable exception.

Similarly, in the recent *Paramount and British Sky Broadcasting* case, the High Court granted an injunction to block access to streaming website for infringing copyright.[84] The targets of the application were four streaming websites which did not host the content but *categorise, reference, moderate or otherwise provide editorial oversight over the content, and provide search facilities to enable visitors [. . .] to quickly find the film or TV programme which they wish to see*.[85] The defendants, six main Internet service providers ("ISPs"), did not oppose to the application and stressed their role of simple intermediaries. The Court granted the injunction as it found that target websites infringed copyright works by making them available to a new audience and used the services of the respondents to do that.

29.8 "Traditional Industry"/"On Line Industry"

In sections 2–4, we draw upon our general themes in part one to answer the pro-forma part of the questionnaire and conclude in section 5.

Neither the expression online industry or e-commerce is a legal term of art in the English case law or legislation on exhaustion, though updating of the UK legislation seeks specifically to address problems encountered in the online space, such as the transfer of private copies without deletion of the original.

29.9 Exhaustion of IP Rights in "On Line Industry"

29.9.1 Online "Exhaustion of IP Rights" Cases

There are no national judgments dealing with exhaustion in the online context.

29.9.2 "Traditional Industry" vs "On-Line Industry"

There are no national judgments dealing with exhaustion in the online context.

[84] *Paramount Home Entertainment International Ltd and others v British Sky Broadcasting Ltd and others* 2014 EWHC 937 (Ch).

[85] Ibid. para. 17.

29.9.3 Local Application of *Usedsoft*

There are no national judgments dealing with exhaustion in the online context or applying the CJEU decision in *Usedsoft*. Planned legislative changes to introduce a private copying exception echo the court's approach in *Usedsoft* to some extent.

29.9.4 Read Across of *Usedsoft* to Non-software Works

There are no national judgments dealing with exhaustion in the online context. Indeed, *Usedsoft* reverses English precedent (*LBC Southwark v IBM*)[86] that treats software supply as a mere licence for use and not a sale.

It is clear that software distribution would be addressed in the same way, but less clear in relation to other electronically distributed products, such as music, video or e-book permanent downloads. Since software is a *lex specialis*, extension of the principles in *Usedsoft* would create new law. Yet there are indications, *obiter dicta* of the *Usedsoft* court, indeed, that would read across to other forms of electronic distribution, provided there were similar features equating to a sale—permanency, a one-off fee, destruction/unusability of the transferor's copy of the work.

Some commentators take comfort from the CJEU's ruling in *Nintendo v PC Box*[87] that videogames are complex multimedia creations containing graphic and sound elements that do not consist solely of computer programs and that accordingly their protection falls within the scope not only of the Software Directive but also of the broader Copyright Directive. Hence this would make many types of software fall, at least in part, outside the software directive and ambit of *Usedsoft*. German courts have taken the same position.[88] The EU draft copyright impact assessment also takes this view.[89]

29.9.5 Contractual Enforceability

Usedsoft states that contractual restrictions on software transfer are invalid.[90] It is questionable whether this is the right approach. The alternative approach in *Premier League* is that contractual arrangements to like effect will be enforceable unless

[86] *London Borough of Southwark v IBM UK Limited* [2011] EWHC 549, paras. 95–98.

[87] Case C-355/12, *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl* (23 January 2014, not yet published in ECR).

[88] See LG Berlin, judgment of 11.03.2014—16 O 73/13 (Computer Games) and OLG Hamm, judgment of 15.05.2014—22 U 60/13 (E-Books) mentioned above.

[89] See Draft Impact Assessment on the Modernisation of the EU Copyright Acquis, provisional version (see footnote above), pp. 164–166.

[90] Case C-128/11 *UsedSoft GmbH v Oracle International Corp*. (3 July 2012, not yet reported.), para. 77.

other rules of law—in that case competition law—dictate otherwise.[91] Copyright only defines intellectual property, it does not pretend to legislate for all possible contractual dealings with that property. Why should contracts for intellectual property be any different to contracts for physical property? The only reason to constrain contractual dealings would be another public interest concern, such as competition law, restraint of trade or some other illegality.

We note, however, that the UK is currently consulting on legislation to invalidate any contractual provision that cuts across copyright exceptions.[92]

29.9.6 Kirtsaeng and Monsanto

These cases have not—as yet—influenced domestic law.

29.9.7 Evidence That "On-Line Industry" Practices Are Impacted

There is limited evidence of impact. Many legacy software licences still contain transfer restrictions. Some already had, or now contain, transfer mechanisms prescribing the various steps the transferor and transferee must take to transfer the software. *Usedsoft* offers no practical guidance on essential matters such as flow down of the end user licence, proof of destruction of the transferor copy and whether the transferee can be bound as to the terms of the end user licence as a condition of transfer. Equally, subsequent cases have cast doubt as to the breadth of *Usedsoft*'s applicability outside of the—post-*Nintendo* increasingly narrow—*lex specialis* of the Software Directive. Hence, software vendors may see little upside in changing from one set of potentially unenforceable arrangements to another, more complicated, set of potentially equally unenforceable arrangements.

29.10 IP Rights and Online Industry: Infringement and Remedies

29.10.1 Online Infringement

The same laws apply to infringement in an online and offline context. As described above, how to apply those laws in an online context has been the subject of much litigation.

[91] Cases C-403/08 and 429/08, *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-9083, paras. 139–146.

[92] Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 s.3 (10): (at http://www.legislation.gov.uk/ukdsi/2014/9780111112700 which will amend the CDPA). Similar amendments are proposed for other exceptions. A copy of the likely post-amendment CDPA is available here: http://www.ipo.gov.uk/cdpa1988-unofficial.pdf.

29.10.2 Digital Platform Infringement

Infringement would be the same whether online or offline. There would remain different issues potentially of jurisdiction, for example, whether a service simply available in the UK via a website, but not targeted there, could be infringing. The CJEU ruling in Pinckney suggests that the UK courts would have jurisdiction over a claim copyright infringement in relation to a website which is accessible in the UK, even if it is not directed towards UK consumers.

29.10.3 Remedies for Online Infringement

The remedies available depend on the IP right concerned. In relation to online infringement of copyright, the available remedies would include damages or an account of profits, an injunction to restrain further infringement or an undertaking to take a licence of the copyright on agreed terms.

29.10.4 Effectiveness of Remedies for Online Infringement

Assessment of damages is likely to be challenging in an online context. Jurisdictional rules mean that if a claimant elects to sue in the Member State where the damage is suffered, damages will be limited to that jurisdiction. In the online context, this may only be a small proportion of the damage suffered. Therefore, claimants may need to consider suing the defendant in their country of domicile or in the country where the damage was caused in order to obtain full damages for infringement.

29.10.5 Preliminary Injunctions

It is possible to obtain interim injunctions and orders for interim damages before a hearing on the merits. It is possible to obtain these remedies before proceedings are started and during proceedings before the trial. If an order is sought before proceedings are started, it must be shown that:

1. the matter is urgent; or
2. it is otherwise desirable to grant the order in the interests of justice.

The conditions for obtaining these orders are as follows:

(a) Interim injunctions:
   1. there must be a serious question to be tried; and
   2. damages would not be an adequate remedy; and
   3. the balance of convenience favours the applicant; and/or

4. there are special factors in favour of granting the injunction.[93]

   The applicant will usually be ordered to pay a cross-undertaking in damages, which will be paid to the respondent in the event that applicant is unsuccessful.

(b) Interim damages:

1. the defendant has admitted liability to pay damages or a sum of money to the claimant; or
2. the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (other than costs) to be assessed; or
3. the court is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant.

The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

In both cases, the claimant may be ordered to pay security for the defendant's costs in the event that the claimant's case is eventually unsuccessful on the merits.

As to the ease of obtaining these orders, the courts are generally willing to grant such orders in IP cases; however, the conditions can be quite difficult to establish and it can be costly to gather the necessary evidence.

29.11 Challenges in Execution

Executing judgments against infringers can be challenging. For example, the Motion Picture Association obtained a judgment of copyright infringement against the index-linking website, Newzbin.[94] Newzbin went into liquidation before paying damages. A new website, Newzbin 2, was then set up with servers in Sweden and registered in the US (it is unclear whether the owners were related as they were anonymous). The MPA chose to tackle Newzbin 2 by seeking an order from the UK courts for the Internet service provider BT to block access to Newzbin 2. This has been a popular remedy for right holders in the UK since this case,

[93] *American Cyanamid Co v Ethicon Ltd* 1975 AC 396.

[94] *Twentieth Century Fox Film Corp v Newzbin Ltd* 2010 EWHC 608 (Ch.), E.C.C. 13. See, among others *Twentieth Century Fox Film Corpn v BT* 2011 RPC 28; *Paramount Home Entertainment International Ltd and others v British Sky Broadcasting Ltd and others* 2013 EWHC 3479 (Ch); *EMI Records Ltd v British Sky Broadcasting Ltd* 2013 EWHC 379 (Ch); *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* 2012 EWHC 268 (Ch).

29.12 Conclusion

Though nominally framed for an information society,[95] EU legislation and its UK derivatives have shown themselves poorly adapted. Questions that are fundamental to online business models were left to the courts to decide, often on the basis of confusing and contradictory recitals and operative provisions. Even the most basic question—whether reading content on a website might infringe—needed to be appealed to the UK Supreme Court in *Meltwater* and thence referred to the EU Court of Justice.

English courts have sought to implement EU concepts and case law diligently, sometimes wanting to take a broader stance on issues such as ex-EEA parallel trade and implied consent but have needed also to make EU referrals on a range of issues, such as cross-border broadcasting, aggregation and retransmission services.

Exhaustion, as we argue in this report, is the tip of the iceberg. Many rights are implicated in online business models that extend well beyond simple distribution. The EU and UK courts alike face challenges in striking the balance. The EU Court may well read legislation so as to further the single market agenda even where this may restrict the scope of intellectual property protection. It can be expected to refine well-worn EU tools such as exhaustion and specific subject matter, as well as adding tweaks to legislative definitions *inter alia* as to distribution, incidental copying and communication to the public. UK courts will approach the legislation and its adaptation to an online world far more cautiously.

As a policy matter, one may question which the right approach is. New creative works or industrial inventions will not be created in a climate of legal uncertainty. The cost is too high, and the risks prohibitive, without security of IP protection. It may be considered inappropriate to have the jurisprudence rewrite the legislator's intentions, however confused they may appear to be. The right place for policy choices on these essentially underpinnings of creativity and the economy is a legislative process for all its occasional imperfections and compromises.

[95] See, among others, Recitals 2, 6 and 7 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. See also Commission of the European Communities (1993), Growth, competitiveness, employment. The challenges and ways forward into the twenty-first century, EU: Brussels (Delors White Paper), pp. 92–93; Commission of the European Communities (1994a), Europe and the global information society. Recommendations to the European Council, EU: Brussels (High-level group on the information society—Bangemann Report); Soete L. (1997), Building the European Information Society for us all. Final policy report of the high-level expert group. Brussels: EU-DGV.

Annex

IP Rights	Case Law	EU Law	UK Law
Patents	Case C-24/67, *Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm* [1968] ECR 81. Case C-15/74, *Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc.* [1974] ECR 1147. Case C-35/87, *Thetford Corporation and others v Fiamma SpA and others* [1988] ECR 3585.	Community Exhaustion will apply by virtue of the TFEU and the European Communities Act. Package still to be implemented (Regulation (EU) No 1257/2012 of the European Parliament and of the Council Council Regulation (EU) No 1260/2012)	No legislative provision. Patent exhaustion is a case law principle.
Trademarks	Case C-56/64, *Établissements Consten S. à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECR 429. Case C-40/70, *Sirena Srl v Eda Srl and others* [1979] ECR 3169. Case C-16/74, *Centrafarm BV and Adriaan de Peijper v Winthrop BV* [1974] ECR 1183. Case C-51/75, *EMI Records Limited v CBS United Kingdom Limited* [1976] ECR 811. Case C-58/80, *Dansk Supermarked A/S v A/S Imerco* ECR [1981] 181.	Art. 13 of Regulation 207/2009 on the Community trade mark Art. 7 of Directive 2008/95/EC to approximate the laws of the Member States relating to trade marks	Section 12 of Trade Marks Act 1994
Copyright	Case C-62/79, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others* [1980] ECR 881. Case C-262/81, *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others* [1982] ECR 3381. Case C-270/80, *Polydor*	Art. 4.2 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society Arts. 2 and 4 of Directive 2009/24/EC on the legal protection of computer programs	Section 18(3) of Copyright Designs and Patents Act 1988

(continued)

IP Rights	Case Law	EU Law	UK Law
	Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited [1982] ECR 329. Case T-69/89, *Radio Telefis Eireann v Commission of the European Communities* [1991] ECR II-485. Case C-241/91P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECR I-743.		