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The Judicial Review Paradox in a New Enforcement Culture: Still a Fundamental Necessity or ‘Too Much of a Good Thing’?

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The formal commitment and settlement procedures of the European Commission have been well received by both competition authorities and undertakings subject to EU competition investigations. Although these two procedures have worked to the advantage of both parties to the proceedings in enabling a fast and simplified process and ensuring a swift solution through ‘negotiation’, negative implications on the rights of defence and the overall effectiveness of the competition law enforcement cannot be excluded. This article will focus on the implications of the commitments and settlement procedure on the judicial review of such Commission decisions. First, the article will address the qualification of the commitments and settlement procedure within the context of Article 6 ECHR, as the application of the requirements laid down in Article 6 depends on whether the administrative procedure falls within the criminal or the civil limb, and will lay specific emphasis on the particular institutional structure of the Commission. Second, the article will further contribute to the debate on the current level of judicial review of commitment and settlement decisions. Third, the article will briefly explore a number of national procedures and the level of judicial review of national commitments and settlement decisions in order to identify possible alternatives and to address the issue of judicial review in the new enforcement culture of EU competition law.

1. SETTING THE SCENE

During the past decade EU competition policy has had a clear focus: to punish and deter. The European Commission (hereinafter the ‘Commission’) managed to establish an extensive record of high fines and improved its leniency programme aimed at destabilizing cartels. However, enforcement with a focus on detection and punishment is costly and requires resources in terms of people, time and money. The administrative procedure to be followed in order to render a decision finding an infringement (hereinafter ‘infringement procedure’) is burdensome on both the undertakings concerned and the Commission. Moreover, in the majority of cases, infringement decisions are followed by an appeal before the General Court (hereinafter ‘GC’) and possibly the Court of Justice (hereinafter ‘CoJ’) (together the ‘EU courts’).¹

Consequently two formal procedures were introduced aimed at streamlining the administrative procedure and ensuring a swift solution through ‘negotiation’. These

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¹ A study in 2006 showed that in 84% of the cases the fines imposed by the Commission were appealed resulting in an aggregate reduction of 33% of the fine. See C. VELJANOVSKI, “European Commission Cartel Prosecutions and Fines, 1998-2009. An updated statistical analysis of fines under the 1998 Penalty Guidelines”, 3 March 2009, available at ssrn: <http://ssrn.com/abstract=1016014>.

procedures were considered to be part of the trend towards ‘alternative’ enforcement of competition law. The first procedure was the commitments procedure laid down in Article 9 of Regulation 1/2003². In accordance with this provision undertakings subject to an investigation can offer commitments to meet the competition concerns of the Commission. The Commission in its turn may by decision make those commitments binding and will refrain from concluding whether there has been or still is an infringement. The second procedure is the settlement procedure, introduced by Regulation 662/2008³, providing the Commission with the possibility to reward undertakings that are willing to acknowledge their liability and participation in a cartel through a fine reduction of 10%.

In principle these two procedures should work to the advantage of both the Commission and the undertakings. All parties may want the procedure to be fast and simple, without the need for appeal, albeit based on different motives and interests. However, even assuming that these two procedures in fact are more efficient, the negative implications of (over)using these procedures can be substantial. First, the commitments and settlement procedure may directly affect the procedural safeguards and rights of defence that ought to be attributed to the undertakings concerned. Second, the commitments and settlement procedure may indirectly affect the overall effectiveness of the Commission’s competition law enforcement. Effective enforcement of competition law should be based on a combination of tools, public and private, that do not contravene their respective purposes and advantages.

This paper will focus on the implications of the commitments and settlement procedure for the procedural safeguards, and more specifically, the implications for (the need for) judicial review. In chapter two the commitments and settlement procedure will be qualified within the context of Article 6 ECHR. In chapter three both the current level and the required level of judicial review of commitment and settlement decisions will be discussed. In chapter four a few equivalent national procedures and the level of judicial review of national commitments and settlement decision will be briefly set out in order to identify possible alternatives.

2. SETTLEMENTS, COMMITMENTS AND ARTICLE 6 ECHR

The EU courts have used very dynamic methods to interpret the general principles of EU law, laid down in extensive caselaw and based on the fundamental rights established by the European Convention for the Protection of Human Rights (hereinafter ‘ECHR’) and their interpretation by the European Court of Human Rights (hereinafter ‘ECtHR’). The Treaty of Lisbon has reaffirmed the status of fundamental rights of European Union law, making the Charter of Fundamental Rights of the EU

² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ* L1/1, 4 January 2003.

³ 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* L171/3, 1 July 2008.

(hereinafter ‘CFR’)⁴ legally binding on the EU. The meaning and the scope of the rights laid down in the CFR will be interpreted in accordance with the ECHR.⁵

The right to judicial review is part of the right to a fair trial laid down in Article 6 ECHR and its equivalent Article 47 CFR. Article 6(1) ECHR provides that, ‘[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.

2.1. In the determination of his civil rights and obligations or of any criminal charge against him

The application and interpretation of the requirements laid down in Article 6 ECHR depends on whether the alleged infringement is of a criminal nature or of a civil nature. The analysis in the paper will be based on the premise that the settlement procedure on the one hand cannot escape a classification as ‘criminal’ in the sense of Article 6(1) ECHR, but the commitments procedure on the other hand appears to fall within the civil limb of Article 6 ECHR.

a. Settlement procedure

In order for the settlement procedure to be qualified as a procedure of a criminal nature it has to satisfy one of the three criteria laid down in the *Engel* judgment of the ECtHR⁶, i.e. (i) the domestic classification as an infringement of criminal nature⁷, (ii) the general nature of the infringement; and, (iii) the severity of the potential penalty which the person concerned risks incurring. The position that the infringement procedure is of a general nature with a deterrent and punitive purpose – thus satisfying the second and third *Engel* criterion – is already generally supported.⁸ The underlying arguments provide an equally solid basis for the qualification of the settlement procedure as criminal in nature.

In evaluating the second criterion, the following (non exhaustive) factors can be taken into account: whether the legal provisions have a generally binding character as opposed to provisions designed to ensure that the members of particular groups

⁴ Charter of Fundamental Right of the European Union, OJ C326/391, 26 October 2012.

⁵ Article 52(3) CFR.

⁶ *Engel and Others v. the Netherlands*, judgment of 8 June 1976, ECLI:CE:ECHR:1976:0608JUD000510071, para. 82-83. The criteria are alternative and not necessarily cumulative. See *Lutz v. Germany*, judgment of 25 August 1987, ECLI:CE:ECHR:1987:0825JUD000991282, para. 55. *Bendenoun v. France*, judgment of 24 February 1994, ECLI:CE:ECHR:1994:0224JUD001254786, para. 47. See also the *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, ECLI:CE:ECHR:1984:0628JUD000781977, paras. 69-73.

⁷ The first criterion is of relative weight and serves only as a starting-point. The fact that the Council has labelled the Commission decisions as ‘administrative’ – the decisions imposing a fine in accordance with Article 23 of Regulation 1/2003 “*shall not be of a criminal law nature*” – is not decisive. The concept of a ‘criminal charge’ bears an autonomous meaning in that it is independent of the qualification by the (national) authorities.

⁸ See also Opinion of AG Leger in *Baustablgewerbe*, Case 185/95, ECLI:EU:C:1998:37; Opinion of AG Sharpston in *KME Germany*, Case C-272/09 P, ECLI:EU:C:2011:63; Judgment in *JFE Engineering*, Case T-67/00, ECLI:EU:T:2004:221, para. 178.

comply with the specific rules governing their conduct,⁹ whether the public body applying the provisions has statutory powers of enforcement¹⁰ or whether the legal provisions are punitive instead of compensatory¹¹. Applied to competition law, in the *Stenuit* judgment the Human Rights Commission found that provisions intended to maintain free competition within the market affect the general interests of society normally protected by criminal law.¹² The reason for the establishment of the settlement procedure is to speed up process in finding an infringement of competition law, but the core aim of this procedure is the same: to maintain free competition.

The third criterion refers to the maximum potential penalty that the legal rule provides for.¹³ As stated above, fines have increased exponentially during the past decade with an explicit reference to their purpose: deterrence and punishment. Such purpose can be demonstrated by the magnitude of the fines and the constituent elements used by the Commission in determining the level of the fine. For example ‘recidivism’ (which is considered to be an aggravating circumstance that should discourage repeat offenders) is a ‘typical criminal law concept’. Moreover, infringements of competition law are publicly stigmatized and presented by the Commission as a serious form of attack on the public at large and consumer welfare. The purpose of the settlement procedure is not different from the purpose of the infringement procedure, i.e. to deter and punish. The ‘reward’ for undertakings willing to settle is awarded for the acknowledgment of the existence of an infringement and their liability. This type of cooperation may reduce the stigmatization of the undertaking in press releases by the Commission only to a limited extent. Moreover, the Commission still sanctions the illegal behaviour by imposing a fine. The underlying reason for limiting the percentage reduction of the fine to 10% is to preserve the deterrent effect of competition law enforcement and the threat of taking an infringement decision when undertakings are not or no longer willing to settle, remains.

b. Commitments procedure

The commitments procedure seems to fall within the civil limb of Article 6 ECHR. At first instance, it appears difficult to argue that the procedure can pass one of the *Engel* criteria.

On the one hand, although it is a final decision, the Commission does not impose a penalty *stricto sensu* and does not reach a determination as to whether competition law has been infringed. The decision lacks any deterrent or punitive character. The corrective nature of the commitments procedure does not necessarily discourage undertakings from adopting behaviour that may infringe Article 101 or 102 TFEU.

⁹ *Bendenoun v France*, fn 6, para 47.

¹⁰ *Benham v. the United Kingdom*, judgment of 10 June 1996, ECLI:CE:ECHR:1996:0610JUD001938092, para. 56);

¹¹ *Öztürk v. Germany*, judgment of 21 February 1984, ECLI:CE:ECHR:1984:0221JUD000854479, para. 53.

¹² *Societe Stenuit v. France*, Decision of the Commission of Human Rights of 27 February 1992, 67/1991/319/391.

¹³ *Campbell and Fell v. the United Kingdom*, fn 6, para. 72; *Demicoli v. Malta*, judgment of 27 August 1991, ECLI:CE:ECHR:1991:0827JUD001305787, para. 34.

There is no ‘stigma’ as after an infringement decision. The Commission refrains from determining the merits of the case and is rather positive in press releases on undertakings that are willing to commit. Furthermore, the threat of a fine is absent. A commitment decision is not appropriate in proceedings where the Commission intends to impose a fine. The conclusion that the commitments procedure cannot be defined as a ‘criminal charge’ may find support in the *OOO NESTE* case before the ECtHR.¹⁴ In that case the ECtHR found that the second criterion was not satisfied: the application of the Russian competition law was not universal as it was restricted to commodity markets, it aimed in first instance at the restoration of competition and prevention of further distortions of competition instead of punishment and deterrence and the fact that certain behaviour could be authorised if proven to serve common good is usually not possible for genuinely criminal behaviour. The third criterion was not satisfied as well based on the fact that the Russian competition law did not provide for any specific sanctions and the enforcement powers rather belonged to the regulatory field, ranging from a simple warning to stop the behaviour to compulsory division of the company. It was argued that this case had to be distinguished for competition procedures in the EU that intend to apply penalties to the infringement of the competition rules.¹⁵ A similar distinction can be drawn between the commitments procedure and the ‘regular’ infringement procedure in EU competition law.

On the other hand however, the fulfilment of the second condition of the *Engel* criteria may not seem that implausible. The CoJ in *Alrosa* interpreted the aim of Article 9 of Regulation 1/2003 as rather limited by stating that the procedure aims ‘to address the Commission’s concerns following its preliminary assessment’. This interpretation gives the impression that the purpose of a commitment decision is merely to ‘adjust’ minor concerns of the Commission. However, decision-taking practice has shown that the Commission addresses rather novel competition law issues. The approach taken by the Commission in such cases and the way in which certain behaviour is assessed, even though the Commission is very concise in the commitment decisions, may have a considerable impact on the market concerned or even on an entire sector. Such practice comes rather close to the core nature of competition law. The Commission corrects the market and wants to ensure or maintain free competition in the market. A commitment decision could therefore affect the general interest of the public. However, the fulfilment of the second criterion also requires punitive elements, which is still difficult to defend. This is different for the proceedings following the reopening of the case by the Commission where the undertakings have acted contrary to their commitments. In *Benham* for example the refusal to comply with the original penalty could be punished by imprisonment.¹⁶ The punitive element lay within the consequences of refusing to comply. According to Article 9 Regulation 1/2003 the Commission may impose on undertakings that act contrary to their commitments a fine of maximum 10% of the undertaking’s total turnover on the same basis as the fine for an infringement decision.

¹⁴ *OOO NESTE*, judgment of 3 June 2004, ECLI:CE:ECHR:2004:0603DEC006904201.

¹⁵ S. BRAMMER, “Horizontal aspects of the decentralisation of EU competition law enforcement”, 2008, 266.

¹⁶ *Benham v the United Kingdom*, fn 10, para. 56.

Consequently, the proceedings following the reopening of the case appear to be of a criminal nature.

2.2. By an independent and impartial tribunal

In order for competition law procedure to satisfy the requirement of fair trial as laid down by Article 6 ECHR, the decision should be taken by an ‘independent and impartial tribunal’. However, the fact that the Commission both investigates and takes a final decision is a serious hurdle for the requirement of an ‘impartial tribunal’. Although the combination of both the investigative function and the decision-taking function as such is not incompatible with the notion of impartiality, according to the ECtHR in *Dubus*, it is essential that the tribunal may not decide with any ‘prejudgment’ or the appearance thereof.¹⁷ A major point of criticism of the administrative procedure before the Commission is that it cannot avoid that perception. In principle, the same Commission officials that conducted the investigation also draft the Statement of Objections and the final decision.¹⁸ Even though there is extensive supervision and internal checks and balances, this does not eliminate the problem of the combination of multiple powers.

An important factor is the possibility of prosecutorial bias. Undertakings may fear that the view of the Commission, once entrenched in its thinking, cannot be dislodged: ‘I have made up my mind. Do not confuse me with the facts’.¹⁹ Not only could it lead to erroneous prohibition decisions,²⁰ it could also induce parties to acknowledge participation and liability in cases where the finding or qualification of the infringement is not based on a solid theory of harm or to offer disproportionate commitments in order to avoid the finding of an infringement.

The possibility of bias may also adversely affect undertakings that do not want to settle or decide no longer to settle. There is always a risk that negotiations will be unsuccessful. In such circumstances the fact that the same officials conducting the negotiations will also be involved in deciding on the question of infringement will at the least give a perception of confirmation bias. The mere ‘promise’ by the competition authority that it will not use the acknowledgments made during the settlement discussions as evidence does not sufficiently restrict the possibility for bias.²¹

¹⁷ *Dubus v France*, judgment of 11 June 2009, ECLI:CE:ECHR:2009:0611JUD000524204.

¹⁸ W. WILS, *World Competition* 2004 and *World Competition* 2010, also available at www.ssrn.com. See also OECD, “Procedural Fairness: Competition Authorities, Courts and Recent developments”, 2011, 193.

¹⁹ W. WILS, *World Competition* 2004, referring to A.J. BURNSIDE, Comment: Merger Control Green Paper: SLC”, In *Competition*, December 2001.

²⁰ It must be emphasized that the integrity or diligence of the Commission officials is not called into question. The criticism concerns the Commission as an institution. See also I. Forrester, *European Law Review* 2009, 822: “It would be foolish to say that they always condemn innocent companies. Indeed, the system yields ‘acquittals’ in the sense that allegations in the statement of objections may be abandoned or narrowed in the final decision. Officials do not intend to be unfair, and are careful to respect the interests of the defence within the framework ascribed to them.”

²¹ This was acknowledged by the GC in the judgment in *Akzo Nobel Chemicals and Akros Chemicals v Commission*, Joined Cases T-125/03 and T-253/03, ECLI:EU:T:2007:287, para. 87, upheld in appeal (Judgment in *Akzo Nobel Chemicals and Akros Chemicals v Commission*, Case C-550/07P, ECLI:EU:C:2010:512) in the context of

Furthermore, in case of a hybrid settlement, the non-settling party may fear that their decision not to settle, as opposed to the other undertakings involved in the same investigation, may trigger a biased approach by the authorities in its investigation of the behaviour of the other undertaking(s).²²

3. LEVEL OF JUDICIAL REVIEW

3.1. The settlement procedure

In cases of procedures falling under the criminal head, in principle, the requirements of Article 6(1) ECHR should be complied with in first instance. However, in *Jussila* the ECtHR differentiated the ‘hard core’ criminal offences from other criminal offences ‘not strictly belonging to the traditional categories of criminal law’, referring to *inter alia* competition law.²³ In such cases “the criminal-head guarantees will not necessarily apply with their full stringency”.²⁴ Article 6(1) ECHR may then still be complied with, even though the fines are not imposed by an ‘independent and impartial tribunal’ but by an administrative or non-judicial body which does not itself comply with the requirements of this provision, provided that the decision of that body is subject to subsequent control by a judicial body that has ‘full jurisdiction’ and does comply with

the privilege of legal professional protection, where it considered that ‘the mere fact that the Commission cannot use privileged documents as evidence in a decision imposing a penalty is thus not sufficient to make good or eliminate the harm which resulted from the Commission’s reading the content of the documents’. See also J. RATLIFF in C-D. EHLERMANN and M. MARQUIS (Eds.), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law*, 2010, 313.

²² See for example judgment in *Timab Industries*, T-456/10, ECLI:EU:T:2015:296, paras. 89ff. In this decision, the Commission reached a settlement with all parties except for Timab. This undertaking was fined separately (but on the same day as the settling parties) in accordance with the normal procedure after abandoning settlement talks before the SO. Timab challenged the decision after having received a significantly increased fine compared to the notified range of fines that was part of the settlement procedure, and was of the opinion that it had been ‘penalised’ for having withdrawn from the settlement procedure by a fine which is greater than that which they were entitled to expect. Before dropping out of the settlement discussions Timab learned from the Commission that it would incur a fine in a maximum amount of between €41 and 44 million as a result of its participation in the infringement including, aside from the 10% reduction for entering into a settlement, a 35% reduction for mitigating circumstances, granted for having allowed the Commission to extend the duration of its own participation in the cartel ‘outside the leniency programme’, and a 17% reduction as a result of its leniency application. In its decision however the Commission imposed a fine of €59 million and a mere 5% reduction in the context of their leniency application. The reasoning of the Commission was that, due to retracting their acknowledgment and dispute its participation during the first part of the period, the Commission had to limit the duration of the infringement for Timab as it did not have sufficient evidence to hold Timab liable for the whole period of the infringement. The GC found that the Commission cannot be held to the range of fines proposed during the settlement procedure and was also correct to abandon the reduction for mitigating circumstances: ‘what happens during settlement discussions, stays within the settlement discussions’. Still, 35% as a mitigating circumstance for cooperating outside of the leniency notice is rather high. It at least raises suspension as regards to the mindset of the Commission: did it ‘merely’ offer a rather generous reduction in order to make the settlement procedure attractive – it was only the second settlement case – or could there be more? See also D. BRAULT, *Concurrences* 2-2011, 85.

²³ *Société Stenuit v. France*, fn 12.

²⁴ *Jussila v. Finland*, judgment of 23 November 2006, ECLI:CE:ECHR:2006:1123JUD007305301, para. 43.

those requirements.²⁵ In other words, the form of appeal should remedy the deficiencies in the proceedings at first instance.²⁶

The concept of ‘full jurisdictional review’²⁷ has been defined in various cases of the ECtHR. The ECtHR demands not only a review of the application of the relevant law by the administrative authority, but also an assessment of the facts and evidence used in the proceedings. Full jurisdictional review should cover questions of fact as much as questions of law²⁸ and grant the judicial body the ‘power to quash in all respects, on questions of fact and law, the decision of the [administrative] body’.²⁹ Judicial review restricted to possible legal or manifest factual errors, without the ability to carry out an *ab initio*, independent determination of the criminal charge, does not cure any defects in the proceedings before the administrative court.³⁰

Traditionally the European courts remained rather conservative as to the interpretation of their own competences in the context of competition law.³¹ In Article 101 cases the courts took the view that:

‘although as a general rule the Community judicature undertakes a comprehensive review of the question whether or not the conditions for applying the competition provisions of the EC and ECSC Treaties are met, its review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers’.³²

A similar reasoning can be found in Article 102 cases where the courts recalled that:

‘as the choice of method of calculation as to the rate of recovery of costs entails a complex economic assessment on the part of the Commission, the Commission must be afforded a broad discretion [...]. The Court’s review must therefore be limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated

²⁵ See also *Albert and Le Compte v. Belgium*, judgment of 10 February 1983, ECLI:CE:ECHR:1983:0210JUD000729975, para. 29.

²⁶ See *Belilos v. Switzerland*, judgment of 29 April 1988, ECLI:CE:ECHR:1988:0429JUD001032883, para. 68.

²⁷ For a more in-depth analysis, see D. WAELBROECK and D. FOSSELD, “Should the Decision-Making Power in EC Antitrust Procedures be left to an Independent Judge? – The Impact of the European Convention of Human Rights on EC Antitrust Procedures”, 15 YEL (1995), pp. 111-142,

²⁸ D. SLATER, S. THOMAS and D. WAELBROECK, “Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?”, *GCLC* 04/08, 41.

²⁹ *Albert and Le Compte v. Belgium*, fn 25.

³⁰ *Kyprianou v. Cyprus*, judgment of 27 January 2004, ECLI:CE:ECHR:2005:1215JUD007379701, paras. 43-46

³¹ D. WAELBROECK e.a., fn. 31, 43, citing Judge D. Barrington: the GC is “essentially, a review court. That is to say its function is not to rehear the case or to substitute its own opinion for that of the Commission, but to review the legality of what the Commission has decided”.

³² See for example judgment in *Matra Hachette*, case T-17/93, ECLI:EU:T:1994:89, para. 104. See further judgment in *Remia*, case 42/84, ECLI:EU:C:1985:327, para. 34, judgment in *BAT and Reynolds*, joined cases 142/84 and 156/84, ECLI:EU:C:1987:490, at para; 62, judgment in *Thyssen Stahl*, case C- 194/99 P, ECLI:EU:C:2003:527, at para. 78.

and whether there has been any manifest error of appraisal or a misuse of powers'.³³

In 2011 the ECtHR issued a decision in the context of competition law and decided that the requirement of 'full jurisdictional review' had to be applied to a decision taken by the Italian competition authority.³⁴ This heated the debate on whether the review by the EU courts of Commission decisions enforcing competition law conform with the ECHR. In December 2011 the CoJ rejected the notion of limited judicial review as regards any complex economic assessments in the *KME* and *Chalkor* cases:³⁵

"whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must those Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it."

Since the *KME* and *Chalkor* judgments the EU courts persevere in declaring they have the power to exercise a full jurisdictional review of competition law decisions.³⁶ However, the implementation of this power is more nuanced. The studies by Bernatt³⁷ and Van Cleynebreughel³⁸ have shown that the Commission is still accorded deference in cases of complex economic assessment, in cases where the Commission is awarded a broad margin of discretion and even as regards to fines. It is mainly in

³³ Judgment in *France Télécom*, case T-340/03, ECLI:EU:T:2007:22, para. 129.

³⁴ *Affaire A. Menarini Diagnostics S.R.L. v Italy*, judgment of 27 September 2011, ECLI:CE:ECHR:2011:0927JUD004350908: "58. En l'espèce, la sanction litigieuse n'a pas été infligée par un juge à l'issue d'une procédure judiciaire contradictoire, mais par l'AGCM. Si confier à des autorités administratives la tâche de poursuivre et de réprimer les contraventions n'est pas incompatible avec la Convention, il faut souligner cependant que l'intéressé doit pouvoir saisir de toute décision ainsi prise à son encontre un tribunal offrant les garanties de l'article 6 [...].

59. Le respect de l'article 6 de la Convention n'exclut donc pas que dans une procédure de nature administrative, une « peine » soit imposée d'abord par une autorité administrative. Il suppose cependant que la décision d'une autorité administrative ne remplissant pas elle-même les conditions de l'article 6 § 1 subisse le contrôle ultérieur d'un organe judiciaire de pleine juridiction [...]. Parmi les caractéristiques d'un organe judiciaire de pleine juridiction figure le pouvoir de réformer en tous points, en fait comme en droit, la décision entreprise, rendue par l'organe inférieur. Il doit notamment avoir compétence pour se pencher sur toutes les questions de fait et de droit pertinentes pour le litige dont il se trouve saisi".

³⁵ Judgment in *Chalkor*, case C-386/10 P, ECLI:EU:C:2011:815; judgment in *KME*, case C-389/10 P, ECLI:EU:C:2011:816 and judgment in *KME*, case C-272/ 09 P, *KME v Commission* ECLI:EU:C:2011:810.

³⁶ See e.g. judgment in *Schindler*, case C-501/11, ECLI:EU:C:2013:522.

³⁷ M. Bernatt, "The Compatibility of Deferential Standard of Judicial Review in the EU Competition Proceedings with Article 6 of the European Convention on Human Rights" in Ascola, *Procedural fairness in competition proceedings*, 2014.

³⁸ P. Van Cleynebreugel, "Efficient justice in the service of justiciable efficiency? Varieties of comprehensive judicial review in a modernised EU competition law enforcement context", *Competition Law Review* 2010.

appeals regarding the establishment of the facts and the legal qualification that judicial review is rather comprehensive.

So far, the undertakings party to a settlement decision did not challenge the decision. It is therefore not possible to study the level of review applied by the courts of a settlement decision, but it is not unreasonable to expect that the level of review of settlement decisions will not exceed that of infringement decisions. Even more, in cases of a settlement decision, the number and success rate of the grounds that undertakings can challenge before the courts, is limited. In general, the ‘core’ of most appeals are those based on grounds regarding the infringement of procedural requirements or the misapplication of EU provisions or an error of assessment of facts and circumstances from which legal effects are derived.³⁹ It appears that the grounds for appeal regarding procedural requirements and the assessments of facts in case of settlement decisions will be substantially limited. For example, in the context of the rights of defence, the undertaking has to admit participation in and liability to an infringement as defined by the Commission. They have to agree to a limited access to the file and waive its right to request an oral hearing. This already eliminates one of the most potentially successful pleas.⁴⁰ Moreover, the ‘voluntary’ nature of the procedure – undertakings are not obliged to settle – may work to the disadvantage of the undertakings if it will be used as an argument for the rejection of pleas, based by analogy on the GC judgment in *Archer Daniels Midland*. Here the GC ruled in the context of a leniency application that:

“[w]here [...] the undertaking expressly admits, during the administrative procedure, the substantive truth of the facts which the Commission alleges against it in its statement of objections, those facts must thereafter be regarded as established and the undertaking barred from disputing them during the procedure before the Court.”⁴¹

Based on the premise that the settlement procedure is of a ‘voluntary’ nature, what is left may be the interpretation and application of the law and the infringement of an essential procedural requirement, such as the obligation to motive or non-discrimination.

3.2. Review of commitment decisions

The level of review of commitment decisions may even be more limited if the reasoning of the CoJ in *Alrosa* is used. In this judgment, rather unfortunately, the CoJ limited the application of the principle of proportionality based on a very artificial reasoning. The CoJ distinguished between Article 7 and Article 9 decisions: the Article 9 procedure has been adopted to achieve procedural efficiency thereby enabling undertakings to participate fully in the procedure and putting forward the solutions

³⁹ M. SIRAGUSA and C. RIZZA (eds.), *EU Competition Law. Volume III. Cartel law*, 2007, para. 5.23.

⁴⁰ A recent study has identified the more and less successful grounds for an appeal in the case of cartel decisions by the Commission before the GC and the CoJ. The study concerns the period January 1998 through September 2012. See P. CAMESASCA, J. YSEWYN, T. WECK and B. BOWMAN; “Cartel Appeals to the Court of Justice: the song of the sirens?”, *JECLAP* 2013.

⁴¹ Judgment in *Archer Daniels Midland*, Case T-224/00, ECLI:EU:T:2003:195, para. 227.

which appear to them to be the most appropriate and capable of addressing the Commission's concerns.⁴² Even though the principle of proportionality is applicable to all decisions taken by the Commission in its capacity of competition authority, the CoJ pointed to the different context of and measures available under Articles 7 and 9 as a basis for the difference in extent and content of the application of the principle.⁴³ These two provisions pursue different objectives, "one of them aiming to put an end to the infringement that has been found to exist and the other aiming to address the Commission's concerns following its preliminary assessment".⁴⁴ This would justify that measures considered disproportionate in the context of an Article 7 decision are not automatically disproportionate under Article 9.⁴⁵ Undertakings offering commitments consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination.⁴⁶ Here as well, the 'voluntary' nature was taken into consideration while establishing the level of review, but can be questioned.⁴⁷

The question is whether such limited review is justified taken into account that, in case of administrative procedures that fall within the civil limb of Article 6 ECHR, the ECtHR has acknowledged that the requirement of 'full jurisdiction' will be satisfied where the judicial body has exercised 'sufficient jurisdiction'.⁴⁸ In assessing the sufficiency of a judicial review, regard needs to be taken of the powers of the judicial body and factors such as (i) subject-matter of the decision appealed against, (ii) the content of the dispute, including the desired and actual grounds of appeal and (iii) the manner in which that decision was arrived at.⁴⁹ It can be questioned whether these criteria are satisfied with in the case of the commitments procedure:

(i) In cases where the subject-matter of the decision concerns a specialised field requiring specific technical knowledge, a less intense level of review is allowed. Even in the assumption that a commitment decision involves a 'complex economic and technical assessment' for which the Commission should be granted a margin of appraisal, in accordance with the review (of remedies) in merger control, the current standard set by the CoJ in *Alrosa* appears to be even more limited than the level of

⁴² Judgment in *Alrosa*, Case C-441/07 P, ECLI:EU:C:2010:3779, para. 35, followed by the GC in *Morningstar*, Case T-76/14, ECLI:EU:T:2016:481, para. 39..

⁴³ *Id.*, paras. 36-38.

⁴⁴ *Id.*, para. 46.

⁴⁵ *Id.*, paras. 43-47.

⁴⁶ *Id.*, para. 48.

⁴⁷ It could be argued that, when "faced with the alternative of long and costly proceedings, in particular, risk-averse undertakings may at the margin still be prepared to offer commitments that go beyond what is proportional and necessary to enforce Articles 81 and 82 EC (now Articles 101 and 102 TFEU)". See e.g. W. Wils, *World Competition* 2006, 352. Wils argued that in order to reduce this risk, undertakings should have the right of access to the Commission's file, so they can achieve an informed consent to the adoption of the commitment decision.

⁴⁸ *Bryan v. The United Kingdom*, Judgment of the ECtHR of 22 November 1995, ECLI:CE:ECHR:1995:1122JUD001917891.

⁴⁹ *Sigma Radio Television v Cyprus*, judgment of 21 July 2011, ECLI:CE:ECHR:2011:0721JUD003218104, paras. 151ff.

review in merger control. According to the CoJ in *Alrosa*, “[t]he General Court could have held that the Commission had committed a manifest error of assessment only if it had found that the Commission’s conclusion was obviously unfounded, having regard to the facts established by it”.⁵⁰ In the context of merger control, on the other hand, the level of review is more demanding:

“the fact that the Commission enjoys broad discretion in assessing whether or not a concentration is compatible with the common market does certainly not mean that it does not have in any case to base its conviction on solid elements gathered in the course of a thorough and painstaking investigation or that it is not required to give a full statement of reasons for its decision, disclosing the various passages of logical argument supporting the decision. The Commission has itself acknowledged in its appeal, moreover, that it is bound to examine the relevant market carefully; to base its assessment on elements which reflect the facts as they really are, which are not plainly insignificant and which support the conclusions drawn from them, and on adequate reasoning; and to take into consideration all relevant factors.”⁵¹

(ii) The judicial body must be able to examine all the complainant’s submissions on their merits, point by point, without declining to examine any of them, and to give clear reasons for rejecting them. As to the facts, the court must be empowered to re-examine those which are central to the complainant’s case. On the one hand, the courts in principle should be competent to review all pleas put forward by the appellant and motivate the rejection. On the other hand, the grounds for challenging the decision are limited. First, a plea arguing an infringement of rights of defence is less probable considering the ‘voluntary’ nature and waivers in the commitments and settlement procedure. Second, the description of past behaviour will not be a ground for appeal. In cases where the Commission takes a commitment decision, it is obliged to refrain from establishing the existence of an infringement. Therefore, the Commission has to be careful not to describe the past conduct in such a way that in practice would be regarded as demonstrating that an infringement had been committed.⁵² If however the Commission erroneously describes the conduct with a high level of detail or removing doubts, the undertaking concerned seems deprived from the possibility to challenge the decision. According to established case law, only the operative part produces binding legal effects and can be challenged before court: the measure is only open to review “if it definitively lays down the position of the Commission on the conclusion of that

⁵⁰ Judgment in *Alrosa*, fn. 42, para. 63.

⁵¹ Opinion of AG Tizzano in *Tetra Laval*, case C-12/03, ECLI:EU:C:2004:318.

⁵² In the *Visa* case for example, the Commission sent a Statement of Objections to Visa “setting out its preliminary view that Visa Europe’s MIFs harmed competition between merchants’ banks, inflated merchants’ costs for accepting payment cards and ultimately increased consumer prices. Moreover, rules and practices such as the “Honour All Cards Rule”, “no surcharge rule”, blending of merchants’ fees, and restrictions on cross-border acquiring reduce merchants’ ability to manage their payment costs and thereby may increase the restrictive effects of the MIFs. In the Commission’s preliminary opinion, such restrictions of competition were in violation of EU antitrust rules (Article 101 of the TFEU).” See EUROPEAN COMMISSION, “Commission makes Visa Europe’s commitments to cut interbank fees for debit cards legally binding”, IP/10/1684, Brussels, 8 December 2010.

procedure; and not a provisional measure intended to pave the way for the final decision”.⁵³ Findings that are the outcome of an analysis of *e.g.* competition on or structure of the market do not have such effects and can therefore not be challenged.⁵⁴

Whether the two first criteria are fulfilled may be disputed. However, the satisfaction of the third criterion, according to which the administrative procedure must provide procedural safeguards satisfying many of the requirements of Article 6 ECHR, is most doubtful. Article 6(1) ECHR provides that “everyone is entitled to a fair and public hearing” and entails the right to an oral hearing. In *Holding and Barnes* the ECtHR found the administrative procedure to sufficiently safeguard the right to a fair and public hearing, where the parties under investigation had the right to be heard during the procedure. Combined with the possibility of a limited judicial review, the procedure at issue was in compliance with Article 6 ECHR.

In principle, the right to an oral hearing is not limited for parties to a commitments procedure. According to Article 15 the parties to a commitments procedure have the right to call upon the Hearing Officer whenever their procedural rights may be infringed upon. However, the following passage of the current Hearing Officer is rather worrying and should be called into question:

“In commitment proceedings under Article 9 of Regulation 1/2003, there is no possibility for the parties concerned to request an oral hearing, unless the preliminary assessment takes the form of a statement of objections.”⁵⁵

It should not be possible that undertakings willing to provide commitments may not have a right to an oral hearing if they receive a ‘preliminary assessment’, while those receiving a Statement of Objections, do. First, the Statement of Objections and the preliminary assessment serve the same purpose. According to the EU courts, the Statement of Objections “must be couched in terms that, even if succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission and to enable them properly to defend themselves, before the Commission adopts a final decision”.⁵⁶ The same is true for a preliminary

⁵³ Judgment in *IBM*, Case 60/81, ECLI:EU:C:1981:264, para. 10.

⁵⁴ Judgment in *Coca-Cola*, Case T-125/97, ECLI:EU:T:2000:84, paras. 81-83. This case concerns a decision taken in the context of Article 102 TFEU. The GC decided that “a finding of a dominant position by the Commission, even if likely in practice to influence the policy and future commercial strategy of the undertaking concerned, does not have binding legal effects as referred to in the *IBM* judgment. Such a finding is the outcome of an analysis of the structure of the market and of competition prevailing at the time the Commission adopts each decision.[...] Moreover, in the course of any decision applying Article [102] of the Treaty, the Commission must define the relevant market again and make a fresh analysis of the conditions of competition which will not necessarily be based on the same considerations as those underlying the previous finding of a dominant position. Thus, in the present case, the fact that, in the event of a decision applying Article 86 of the Treaty [now Article 102 TFEU], the Commission may [...] be influenced by the contested finding does not mean that, for that reason alone, that finding has binding legal effects [however] it is not deprived of its right to bring an action for annulment before the Court of First Instance to challenge any Commission decision finding conduct to be an abuse.”

⁵⁵ W. WILS, “The Oral Hearing in Competition Proceedings before the European Commission”, *World Competition* 2012, available at www.ssrn.com.

⁵⁶ Judgment in *Timab Industries*, case T-456/10, ECLI:EU:T:2015:296, para. 98.

assessment. Second, an analogous interpretation with regard to the rights of defence after having received a request for information may provide further support:

“The Court considers that the requirements set out in paragraphs 53 and 54 above apply independently of the question whether the request for information, which is sent to an undertaking suspected of having committed an infringement, is a formal decision for the purposes of Article 11(5) of Regulation No 17, or an informal letter for the purposes of Article 11(2) thereof. In addition, in the context of the preliminary investigation stage, the opportunity for the undertaking concerned to prepare its defence effectively cannot vary depending on whether the Commission adopts a measure of inquiry under Article 11 or Article 14 of Regulation No 17, since all those measures suggest that an infringement has been committed and may have a significant impact on the situation of the undertakings suspected.”⁵⁷

Third, the refusal only in case of a preliminary assessment may lead to discriminatory treatment of undertakings in similar situations. For example, in the sector of collecting societies, the Commission has taken a number of commitment decisions. In that same context, CISAC, an association of collecting societies, and national collecting societies part of the CISAC agreement, were also investigated by the Commission and CISAC proposed similar commitments. The Commission did not accept the commitments and took an infringement decision instead, without however imposing a fine.⁵⁸ Consequently, the CISAC (and other parties) had received a SO and made use of its right to be heard. In the report of the HO it appears that CISAC had requested (and – to an extent – been granted) access to the file on several occasions.

Even if parties to a commitments procedure have the right to an oral hearing, regardless of having received a Statement of Objections, in practice they appear to waive their right to a hearing. This as such should not be problematic, as long as the waiver was made in an unequivocal manner, of his own free will and does not run counter any important public interest.⁵⁹ However, the practical consequences of the waiver of the right to an oral hearing may have a substantial impact. At EU level, oral hearings are organised and conducted by the Hearing Officer, who has the task to guarantee the effective exercise of the procedural rights of the undertakings. The ‘State-of-Play’ meetings that are held at several ‘key stages’ during a commitments procedure may be considered a substitute of the oral hearing, in particular where the undertakings are able to discuss – and possibly influence – the opinion of the Commission. However, “justice should not only be done, but should manifestly and undoubtedly be seen to be done”.⁶⁰ An oral hearing before an independent and impartial organ may compensate for the perceived lack of conformity with Article 6(1) ECHR. In principle the oral hearing before the Hearing Officer should be conducted in full independence. Still, the oral hearing before the Hearing Officer may not be optimal. First, even if the

⁵⁷ Judgment in *AC Treuhand*, Case T-99/04, ECLI:EU:T:2008:256, para. 55.

⁵⁸ Commission decision of 16 July 2008, COMP/C2/38.698 (*CISAC*).

⁵⁹ *Le Compte v. Belgium*, fn. 29, para. 59.

⁶⁰ J. FLATTERY, “Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing”, *The Competition Law Review* 2010, 71.

oral hearing would be conducted independently and objectively, the powers of the HO are restricted, not being able to hold a hearing “on the full facts, with the full guarantees of a criminal trial, before the person who will ultimately decide the case”. Second, the HO can impose some binding decisions as to the extension of time limits or providing information of the state of investigation, but in the end, the Commission will take the decision on the case itself.

Consequently, based on the above, it appears that the commitments procedure does not in itself provide sufficient guarantees in order to justify a ‘sufficient’ level of review instead of a ‘full jurisdictional’ review.

4. WHAT CAN BE LEARNED FROM THE MEMBER STATES?

Based on the analysis of the previous chapter, the settlement and commitments procedure appear not to satisfy the requirements of Article 6(1) ECHR. As for the commitments procedure, a ‘sufficient’ level of review may be satisfactory, provided the institutional structure of the Commission would be improved in order to satisfy more requirements of Article 6(1) ECHR and the level of review would resemble that of the review in merger control. As for the settlement procedure, ‘full jurisdictional’ review remains a necessity.

This chapter starts from the premiss that an analysis from national competition law enforcement would provide the necessary do’s and don’ts to be taken into account in order for the alternative competition law enforcement by the Commission to improve. The discussion of the commitments and settlement procedures of France and the UK will serve as an initial illustration.⁶¹ The French competition authority (*Autorité de la Concurrence*) (hereinafter ‘ADLC’) has an institutional structure and a decisional practice that will prove to be of high learning value. The institutional structure substantially differs from that of the Commission. The most important feature is the separation between the investigatory organ and decision-making organ within the ADLC. Moreover, together with Germany and Italy, the ADLC takes the lead in the total number decisions.⁶² The UK competition authority (*Competition & Markets Authority*) (hereinafter ‘CMA’) has a monist structure within which there is no separation between the investigatory and decision-making authority. A rather prominent disparity is the low number of case decisions. The number of decisions is situated in the lower range of decisions within the European Competition Network (ECN).

The discussion will focus on (i) the necessity of a significant institutional change as a basis to ensure the procedural rights laid down in Article 6(1) ECHR and, in the absence of such institutional change, (ii) the necessary level of review.

⁶¹ A definite proposal would require a full analysis of competition law enforcement and decisional practice on a national level, including the way in which all procedural rights laid down in Article 6 ECHR are safeguarded. Such an assessment would go beyond the scope of this article.

⁶² Between 1 May 2004 and 31 December 2015 the French, German and Italian competition authority informed the Commission of 119, 113, and 103 envisaged case decisions respectively in accordance with Article 11(4) of Regulation 1/2003. When looking at the number of new case investigations, the French competition authority, which started 236 new case investigations in that period, comes rather close to the number of case investigations of the Commission (281). See ec.europa.eu/competition/ecn/statistics.html.

4.1. The national commitments and settlement procedures

Both the ADLC and the CMA have a commitments and settlement procedure similar to the procedures of the Commission.⁶³ As for the ADLC, Article L464-2 I *Code de Commerce* (hereinafter: ‘CC’) lays down the power to accept commitments proposed by undertakings or association of undertakings and to put an end to anticompetitive practices, in compliance with Article L420-1 and L420-2 CC (the French provisions equivalent to Articles 101 and 102 TFEU). Sections 31A-E of the Competition Act 1998 (hereinafter ‘CA98’) allows the UK competition authority to accept binding commitments offered by the undertaking subject to an investigation. The equivalent provisions of Article 101 and 102 TFEU are laid down in Section 2 resp. Section 18 CA98.

In the category of ‘settlements’, the procedural aspects are more divergent. The ADLC has the so-called ‘non-contest’ procedure (*‘la procédure de la non-contestation des griefs’*) at its disposal. This procedure was established in 2001 and offers undertakings subject to an investigation by the ADLC of an alleged cartel or abuse of dominant position the possibility to come forward. Accordingly, the cooperation in accordance with this procedure consists of an express waiver to contest the competition concerns put forward by the ADLC, without however admitting to the allegations, which may in its turn be rewarded by reductions of the fine between 10 and 25% and halve the maximum fine. Commitments can be appended to the undertaking’s renunciation. In principle, depending on the type of commitments, a further reduction of 10 to 20% is granted.⁶⁴

The analysis of the CMAs practice shows two subtly differing procedures: the ‘early resolution’ agreements (hereinafter ‘settlements’) and the ‘fast track’ procedure. The first most resembles the settlement procedure of the Commission, defined as an agreement “between a party under investigation and the CMA, under which the party admitted liability in respect of the matters set out in that agreement and also agreed, among other matters, to cooperate with the CMA, in return for a reduction in the penalty that might otherwise have been imposed”.⁶⁵ The second was applied in the *Construction* case, the biggest ever UK cartel investigation, involving illegal anti-competitive bid-rigging activities in 199 tenders. Faced with the sheer scale of the investigation, the CMA adopted an innovative approach, developing a so-called “fast-track” procedure. As opposed to settlements, of which ‘settlement discussions’ is an important part of the proceedings, an offer to settle was made publicly on a ‘take-it-or-leave-it’ basis, which undertakings were free to accept or decline but which was not the subject of individual negotiation.

⁶³ Between 2005 and 2015 the ADLC took 51 commitment decisions and 43 settlement decisions. The CMA took 7 commitment decisions and 9 settlement decisions.

⁶⁴ Only very innovative commitments could be rewarded with a higher percentage reduction. See www.globalcompetitionreview.com/reviews/47/sections/164/chapters/1833/france-cartel-regulation/#fosup29.

⁶⁵ *Imperial Tobacco and Others v OFT* [2011] CAT 41.

4.2. At the administrative level

A significant institutional change may be the necessary basis – but not the sole required modification – for the administrative procedures of the Commission to satisfy Article 6(1) ECHR. The institutional structure of the competition authorities in the EU can be divided into three main models: (i) the monist administrative model,⁶⁶ where one body investigates cases and takes all types of decisions, (ii) the dualist administrative model,⁶⁷ where the functions are divided between two bodies, one in charge of the investigation and another, often a college in charge of the decision making and (iii) the judicial model,⁶⁸ where prohibition and fining decisions can only be taken by a court, while the competition authority functions as a prosecutor.⁶⁹ Within the monist administrative model, two different structures can be further distinguished: the ‘non-unitary’ structure, where the investigative and decision-making activities are separated functionally and the ‘unitary’ structure. For example, the ADLC belongs to the first model, the Commission and the CMA to the second.

The reform of the Commission’s institutional structure into a non-unitary monist structure may already be a significant improvement and enable it to qualify as an ‘independent and impartial tribunal’. For example, due to its structure the ADLC can be considered a textbook example of an ‘independent and impartial tribunal’ as regards to competition authorities.⁷⁰ The investigatory function is attributed to the general rapporteur and the decision-making function to the College. During the French settlement procedure investigatory functions remain strictly separated from the decision-making functions. In these cases the possible reduction of the fine and supplementary commitments is only discussed with the general rapporteur whose ‘authority’ only goes as far as proposing a percentage reduction of the fine and possibly commitments provides at the end of the investigation. The College will then take a decision in which it can still deviate from the proposal of the general rapporteur.⁷¹ The French commitments procedure is a bit more nuanced. The general rapporteur and the College work closely together in order to guarantee that the proposal negotiated beforehand with the Rapporteur will be accepted by the College as a basis for

⁶⁶ According to an ECN report of 2012, monist administrative models could be found in Bulgaria, Cyprus, Czech Republic, Germany, Denmark, Estonia, Finland, France, Greece, Hungary, Italy, Lithuania, Luxembourg, Latvia, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Slovakia, Spain, Sweden and the UK.

⁶⁷ The former Belgian competition authority was based on a dual structure. After its reform in 2013 the structure was changed into a monist administrative model.

⁶⁸ According to the 2012 ECN report, the judicial model may be found in Austria, Denmark, Estonia, Finland, Ireland and Sweden.

⁶⁹ Commission Notice on cooperation within the Network of Competition Authorities, *OJ* C101/43, 27 April 2004, para. 2.

⁷⁰ See www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-35/l-entreprise-les-regles-de-concurrence-et-les-droits-fondamentaux-quelle-articulation.105486.html#ANOTEC1200090031.

⁷¹ Autorité de la Concurrence, Communiqué de procédure du 10 février 2012 relatif à la non-contestation des griefs, para. 7.

discussion at the hearing.⁷² The question was raised whether such ‘mingling’ constitutes an interference of the decision-making authority with the investigatory. The Paris Court of Appeal decided it did not.⁷³

The CMA has a ‘unitary’ monist structure. Like the Commission, it is not an ‘independent and impartial’ tribunal. After having issued the SO a three-member Case Decision Group will be appointed by the Case and Policy Committee. This Group may take decisions on (a) whether to issue an infringement decision (with or without directions) or a ‘no grounds for action’ decision; and (b) on the appropriate amount of any penalty or (c) to close the case on the grounds of administrative priorities. The Senior Responsible Officer, who is responsible for authorising the opening of a formal investigation and taking certain other decisions, will not be a member of the Group, to ensure that the final decision is taken by officials who were not involved in the decision to issue the SO.⁷⁴ However, in relation to commitments and settlement, a Case Decision Group may not even be appointed and it is the Senior Responsible Officer, with the advice of the Case and Policy Committee, who will remain in charge of the decision-making process. Furthermore, the specialised lawyers and economists that should review the ‘robustness’ of the legal and economic analysis, although these are persons outside of the case team, may be involved in both the investigatory phase as the decision-making phase. There is a mixture between the investigatory and decision-making functions. Moreover, the internal checks and balances within the UK seem to be focussed rather on the quality of the decision – which of course is essential – but less on the guarantee of procedural rights.⁷⁵ The concerns regarding to the structure of the Commission are therefore also applicable here.⁷⁶

⁷² *Id.* paras. 31-32. See Cour d’Appel de Paris, arrêt du 6 novembre 2007, RG 2006/18379 (Canal 9).

⁷³ Court d’Appel de Paris, arrêt du 6 novembre 2007, RG 2006/18379 (Canal 9): “que le fait que le Conseil a pris une part active à ces débats, qui tient au caractère consensuel de cette phase de la procédure et à ce qu’il apprécie, en définitive, la pertinence des engagements et leur donne force exécutoire, ne caractérise nulle immixtion de sa part dans l’instruction de l’affaire”.

⁷⁴ CMA Guidance on investigation procedures, paras. 11.30-11.33. According to para. 11.34: “The case team, including the SRO, will remain in place to progress the investigation under the direction of the Case Decision Group as appropriate. The case team will remain the primary point of contact for the parties under investigation, complainant(s) and third parties, and will relay information from those parties to the Case Decision Group as necessary. The Case Decision Group should therefore not be contacted directly by those parties or their representatives outside of any oral hearing or state of play meeting.” There should also be a separation between CDG and officials involved in the investigation, otherwise no equality of arms: see decisions French cour de cassation on presence rapporteur at college.

⁷⁵ CMA Guidance on investigation procedures, paras. 9.4-9.12.

⁷⁶ The UK did however have the opportunity to strengthen the independence and impartiality of the competition authority during the latest reform, but in the end, the options that could have served such development were passed by. Three proposals regarding the creation of a single competition authority were brought forward. Option one, the least intrusive one but also the one least in conformity with Article 6 ECHR, was chosen. The first option was that the existing procedures of the OFT would remain but would be improved. One of the proposed improvements of the OFT was the introduction of collective judgement in decision-making with separation between responsibility for the investigation of the case and for the final decision. The second and third options contained more of a constitutional change that would strengthen the independence and impartiality of the decision-making process. The softer approach under option two would have seen the creation of an Internal Tribunal within the competition authority that would act as decision-maker following investigation by case teams. In order to compensate for the effectiveness of the procedure,

In order to counter the problem of prosecutorial bias, the non-unitary monist structure of the ADLC, where the decision-making organ is not – or only to a limited extent – involved, is preferred. A relevant factor as well is the extent the decision-making organ can review – and thus, depart from – the findings of the investigatory organ. In France, the College is not obliged to follow the conclusions of the general rapporteur at the end of its investigation.⁷⁷ Apart from some exceptions the College in principle has followed the proposal of the general rapporteur as regards to the percentage reduction.⁷⁸ Moreover, the decisions of the authority often set out why and how the College departs from the conclusions of the general rapporteur. The review of the College is however a limited review. For example, the general rapporteur has a broad margin of appreciation as to whether or not initiate the non-contest procedure. The College will limit its review to whether the general rapporteur has made a manifest error of appreciation deciding not to initiate a settlement procedure.⁷⁹ Although rather rare, the College is not afraid to overturn the general rapporteur's refusal to initiate a settlement procedure.⁸⁰ Moreover, undertakings are not allowed to try to demonstrate that the objections that they did not contest. Such grounds will be found unfounded before the College.⁸¹ They may however argue for example the gravity of the infringements or their real harm of the economy. In the *calculatrices à usage scolaire* case for example, the parties that did not contest the griefs of the ADLC during the investigatory phase provided an economic study that would support their allegations that its behaviour did not have the effect as presented by the general rapporteur. The College allowed this.⁸² Undertakings have to be cautious however. There is no clear distinction between an argument regarding the objections and an argument regarding the fine or the effect. If the arguments of the undertaking appear to be too ambiguous, implicating a contestation of the settlement, it may be rejected by the College.⁸³

the role of the CAT would be limited to judicial review instead of a review based on the full merits. The more radical approach in option three would change the nature of the competition law proceedings from an administrative approach to a more prosecutorial approach. The competition authority would prosecute the case before the CAT, which would have the competence to decide on the infringement and penalty.

⁷⁷ Cour d'appel, Arrêt de 21 septembre 2004 and Cour de Cassation, Arrêt de 22 novembre 2005.

⁷⁸ Décision 03-D-45 du 25 septembre 2003 relative aux pratiques mises en œuvre dans le secteur des calculatrices à usage scolaire; Décision 04-D-65 du 30 novembre 2004 relative à des pratiques mises en œuvre par La Poste dans le cadre de son contrat commercial.

⁷⁹ Décision 06-D-09 du 11 avril 2006 relative à des pratiques mises en œuvre dans le secteur de la fabrication des portes, paras. 300-306 and Décision 07-D-50 du 20 décembre 2007 relative à des pratiques mises en œuvre dans le secteur de la distribution de jouets, para. 483.

⁸⁰ Décision 14-D-16 du 18 novembre 2014 relative à des pratiques mises en œuvre dans le secteur du déménagement des militaires affectés en Martinique, para. 42 *ff.*

⁸¹ Décision 14-D-16 du 18 novembre 2014 relative à des pratiques mises en œuvre dans le secteur du déménagement des militaires affectés en Martinique, para. 38.

⁸² Décision 03-D-45 du 25 septembre 2003 relative aux pratiques mises en œuvre dans le secteur des calculatrices à usage scolaire, para. 353.

⁸³ Décision 10-D-35 du 15 décembre 2010 relative à des pratiques mises en œuvre dans le secteur de la fourniture d'électrodes de soudure pour les constructeurs automobiles, paras. 238-239, referred to by D. BRAULT, *Concurrences* 2-2011, 83.

4.3. Level of review

As stated above, the commitments and settlement procedure of the Commission are not subject to the required level of review. Judicial scrutiny of commitment and settlement decisions is however essential and, more importantly, possible.

In France the appellate court is competent to annul or reform the decision of the French competition authority.⁸⁴ When the decision of the authority is annulled by the appellate court the latter is competent – and obliged – to rule on the case in fact and in law.⁸⁵ In other words it can substitute the decision with its own, but it is not competent to act as an investigatory entity.⁸⁶ Overall the appellate court has taken its task seriously. In past decisions it has, for example, examined every aspect of the authority or substituted its own economic assessment for the assessment by the authority.⁸⁷ The review of commitment decisions is more nuanced. In principle, the court will check whether or not the authority has committed a manifest error when deciding on market definition or qualification of the alleged unlawful behaviour when a third party challenges the (scope of the) commitments accepted.⁸⁸ As for the non-contest procedure the court does not have the power to impose supplementary commitments.⁸⁹

In the UK the decisions of the competition authority have been subject to strict and intensive review, not only of facts and law, but also of policy. The appellate court is competent to substitute its own assessment to that of the competition authority. Remedies and penalties are subject to strict scrutiny as well, especially compared to the EU level of review.⁹⁰ The level of review of commitment decisions is, in principle, of a reduced level; the decision will not be reviewed ‘on the merits’. As regards to the settlement procedure, the appellate court has in the past proven to be rather active. In the context of the fast-track procedure a wave of appeals were made to the appellate court against this decision, raising several procedural issues. Of particular interest for the fast track procedure was the appeal made by Crest Nicholson (CN). Before the decision of the authority, CN had already lodged an appeal at the High Court, which decided on the fairness of the ‘fast track’ procedure in July 2009. Against the decision, CN appealed to the appellate court on the ground of a breach of the principle of equality and fairness. The court agreed that the authority failed properly to consider the individual circumstances of CN, which it is obliged to do in order to secure consistency of treatment as between the very large number of addressees of the decision. According

⁸⁴ Article L464-7 CC: “La décision de l’Autorité prise au titre de l’article L. 464-1 peut faire l’objet d’un recours en annulation ou en réformation par les parties en cause et le commissaire du Gouvernement devant la cour d’appel de Paris au maximum dix jours après sa notification.”

⁸⁵ Cass. Com., 31 January 2006, Sté Colas Midi-Méditerranée. Cour de Cassation, Annual report of 2006, part 4.

⁸⁶ *Id.*

⁸⁷ For an overview and as a source for the examples given, see N. PETIT and L. RABEUX; “Judicial review in French Competition Law and Economic Regulation – A Post-Commission vs Tetra Laval assessment”.

⁸⁸ Cour d’Appel de Paris, Arrêt de 19 décembre 2013.

⁸⁹ Cour d’Appel de Paris, Arrêt de 23 février 2010.

⁹⁰ I. Lianos, F. Jenny, F. Wagber-von Papp, E. Motchenkova and E. David, “Judicial Scrutiny of Financial Penalties in Competition Law: A Comparative Perspective”, *CLES Research Paper Series* May 2014.

to the court the authority should have granted CN a higher discount to reflect its objectively different position.

5. CONCLUSION

In its current form the administrative procedures before the Commission and the subsequent level of review do not sufficiently comply with the requirements of Article 6(1) ECHR. As stated above the commitments procedure should be subject to a ‘sufficient’ level of review combined with an improvement of the institutional structure of the Commission. As for the settlement procedure, ‘full jurisdictional’ review remains a necessity.

Taking into account that the very goal of the commitments and settlement procedures was to establish an efficient procedure in order to save time and resources, it may be interesting to look into a possible reform of the structure of the Commission. This would significantly improve the protection of procedural rights, thereby reducing the incentive – and especially the need – to appeal. A balanced choice for both procedural safeguards and efficiency could provide for more firmly established alternative enforcement.

An initial analysis of national competition law enforcement suggests that, instead of Member States adjusting the institutional structure of their national competition authorities to that of the Commission, the institutional change of the Commission should take into consideration national competition law enforcement. Moreover, in the current situation, it is up to the European courts to take responsibility for and increase the level of review of commitment and settlement decisions of the Commission.