

Effective and Legitimate Enforcement of Competition Law: An Overview

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This volume presents contributions prepared for the 18th edition of the Annual EU Competition Law and Policy Workshop, held on 19–20 July 2013 at the European University Institute in Florence. On that occasion the Workshop focused on the closely connected themes of effective enforcement and legitimate enforcement of competition law in national, European and international settings. The subjects are intertwined in the sense that they are mutually dependent. If a competition authority is granted far-reaching enforcement powers in the name of the public interest and uses them aggressively, for example, but if those powers are not tempered by adequate due process constraints protecting undertakings, including but *not limited* to independent and demanding *ex post* scrutiny, these enforcement arrangements would hardly be legitimate—there is no ‘output’ legitimacy in this context if output is taken to be the only relevant criterion. The legitimacy of *process* is thus an essential complement.¹ Indeed, if the quality of process is sacrificed to ensure effectiveness and output, then trust in the regime is apt to break

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¹ Schmidt has introduced the notion of ‘throughput’ legitimacy, although this requires a certain corruption of the term throughput. See Vivien Schmidt, *Democracy and Legitimacy in the European Union Revisited: Input, Output and ‘Throughput’*, 61 *Political Studies* 2, 5–9 (2013). Of course, ‘throughput’ legitimacy is not a new concept: it refers to mechanisms of, for instance, efficacious operations (as opposed to efficient output), accountability, openness/transparency, inclusiveness, and in general the quality of governance processes and of (‘constructive’) interactions among relevant actors. It is however a new, and perhaps dubious, nomenclature. A better umbrella term for this variety of elements would be *process* legitimacy.

down; this in turn is likely to generate perverse consequences and raise the risk of long-term damage to the cause of enforcement.² For example, any ‘compliance’ with decisions (leaving aside incentives to circumvent them or to comply with them in bad faith) would in those circumstances be involuntary, a decidedly unsatisfactory situation in a world where a voluntary, *internalized* compliance culture is badly needed. Furthermore, if ‘users’ of the system as well as the broader public lose confidence in the competition authority and its powers, there may be a distinct risk that the authority will be substantially emasculated, and that over-enforcement will be supplanted by its opposite. In short, the effectiveness of enforcement can only be assured if legitimacy is assured. On the other hand, applying a counterpart logic, if a regime fails to prevent and sanction anticompetitive conduct effectively—if it fails to protect the public interest due to design or execution flaws or due to flawed policies, decision-making or institutions—that regime will likewise have no claim to legitimacy. As the present initial chapter will discuss, the rest of this book addresses the themes of both effectiveness and legitimacy from a variety of perspectives and by reference to a diverse range of dimensions.

Background. The EU Competition Law and Policy Workshop is an ongoing program that explores topical policy and enforcement issues in the area of competition law, economics and governance.³ Each year the Workshop brings together a group of top-level EU and international policy makers, judges, legal practitioners, economic experts and scholars to take part in intensive debates that explore specific competition-related issues in an informal and non-commercial environment. Our hope is to stimulate critical reflection on the part of both the Workshop participants and the broader public.

Structure of this chapter. This introductory chapter briefly presents the various contributions provided by the authors that participated in the 2013 Workshop. It is divided into the following sections:

- (1) *Effective enforcement of competition law;*
- (2) *Legitimate enforcement of competition law;*
- (3) *Effectiveness and legitimacy in international enforcement cooperation;*
- (4) *Issues for courts and perspectives on the judicial role.*

² Discussing this and related themes, see, eg Tom Tyler, ‘The Psychology of Self-Regulation: Normative Motivations for Compliance’, in Christine Parker and Vibeke Lehmann Nielsen, eds., *Explaining Compliance: Business Response to Regulation*, Edward Elgar, 2011, chapter 4. On the links between the rule of law and accountability mechanisms where power has been delegated to independent agents, see also Imelda Maher, ‘Functional and Normative Delegation to Non-Majoritarian Institutions: The Case of the European Competition Network’, *7 Comparative European Politics* 414, 419–410 (2009), with references.

³ In this series, published by Hart of Oxford (see <http://www.hartpub.co.uk/SeriesDetails.aspx?SeriesName=European+Competition+Law+Annual>), we have discussed, to name only a few topics: regulation and public policies, the interaction of public and private enforcement, judicial review by the EU Courts, and cartel settlements and commitment decisions. The next volume will address the subject of institutional change as numerous competition authorities see their structure, missions and powers being transformed.

The remainder of this chapter discusses the written contributions of the authors, and the standard caveat applies: the remarks made are selective and cannot substitute for a reading of the chapters themselves. Furthermore, no attempt is made to synthesize the transcriptions of the oral debates. The reader is invited to consult those discussions, also included in this book, and to read the Conclusions of Philip Lowe, for a more complete picture of the proceedings.

PART 1: *Effective Enforcement of Competition Law*

A. *Effective sanctions and compliance*

Christine Parker, ‘Effective and Legitimate Enforcement of Competition Law: A Riddle Wrapped in a Mystery Inside an Enigma?’ Parker begins her chapter with the observation that a competition agency bears the quasi-Sisyphean burden of having to face at least one new challenge for every challenge overcome. As she says, the enforcement strategies that must be employed to escape what she calls the ‘deterrence trap’ lure the agency into a ‘compliance trap’, which also implies a ‘legitimacy trap’. In describing this cascading process, Parker draws on previous empirical research focused on the Australian enforcement experience.

The above-mentioned traps are explained as follows. A deterrence trap occurs when, in order to be truly deterrent, fines would actually have to be fixed at a level that exceeds an infringer’s ability to pay.⁴ The argument would also apply where the penalty constraint is imposed not by inability to pay but by a statutory cap, which may only approximate inability to pay or proportionality in a very imperfect way. To the extent this dilemma occurs, it throws serious doubt on systems such as that of the EU which are heavily dependent on the effectiveness of corporate fines.⁵ As Parker points out, however, some of the concerns associated with the deterrence trap may be mitigated or addressed by the reputational effects of condemnation and by—where applicable—individual responsibility. And of course, insofar as an agency can succeed in enhancing the compliance ethos of the business community, the need to rely

⁴ This proposition rests on a variety of factual predicates and should not be taken as universally assured.

⁵ Parker’s deterrence trap is one among several possible weaknesses of a system that relies heavily or exclusively on corporate fines. For a survey of issues, see Damien Geradin, Christos Malamataris and John Wileur, ‘The EU Competition Law Fining System’, in Ioannis Lianos and Damien Geradin, eds., *Handbook on European Competition Law: Enforcement and Procedure*, Edward Elgar, 2013, chapter 6.

on imperfect deterrence mechanisms recedes.⁶ However, as Australia's ACCC (and its pre-1995 predecessor, the Trade Practices Commission) found ways to make compliance a pillar of its enforcement policy (including by means of including mandatory compliance terms such as corporate training and audits) to make up for an overly soft penalty regime, the agency found itself caught in a compliance trap. The essence of this problem seems to be that the acceptance of compliance conditions and mandated systems does not guarantee that a company will internalize a compliance ethic—that its compliance efforts will be motivated by a desire to be a good corporate citizen, and not by a hedonistic instinct to avoid pain and stigma. It seems that the agency may in fact be capable of contributing to this inauthentic form of compliance if it fails to respect the limits of its own powers—that is, if it becomes a bully. If the perception takes hold that compliance is being extracted in this way, one might expect the business community to activate hostile political powers, triggering a political crisis for the agency that could have long-term adverse consequences for its effectiveness. While Parker lays out the links from deterrence policy to compliance policy to the political problem, it may be added that the risk of an agency's wings being clipped by politicians defending industrial interests may arise even without the second link in the chain: it has not been uncommon to see, in the age of the great cartel crusade, attempts to curtail the powers or resources of agencies in direct reaction to their aggressive use. Competition agencies in this regard resemble other organs operating in the complex environment of public policy and politics.

As Parker explains, the strategy of the ACCC in response to the compliance trap was to advocate the criminalization of cartel conduct, which did in fact lead to the introduction in Australia of criminal penalties. But as many jurisdictions have discovered, the adoption of criminal laws does not of itself transform shared norms, values and practices. The roots of resistance may be deep, which can lead to the uncomfortable situation where an institution of doubtful legitimacy is enforcing laws of doubtful legitimacy. This is the legitimacy trap, and manifestations of it are drawn from interviews conducted by Parker and her fellow researchers. Again, the legitimacy trap is presented in terms of the Australian experience yet it would also be relevant in contexts where there is no criminal regime strictly speaking but where acceptance of the enforcement system is lacking, for example because (as alluded to at the beginning of this chapter) severe sanctions are unbalanced by procedural fairness and accountability. Such a legitimacy problem seems particularly corrosive for both the goal of deterrence and the ultimate goal of compliance. Indeed, as Parker explains, the legitimacy trap amplifies the other traps described above. Overall, the model is helpful in that it highlights what have

⁶ It is difficult to share the conviction of some agencies that the best means to ensure effective compliance is to rely predominantly on firm deterrence mechanisms such as, specifically, a leniency program and high fines.

been called in a different context ‘equilibrating tendencies’, and it shows how a wide range of stakeholders, including the social structure itself, participate, in varying ways, in the design, execution and dissemination of competition enforcement. On the other hand, it will also be important to evaluate these processes applying a significant time dimension so that it can be gauged, for example, whether the traditional tendency—to view price fixing as the province of regulation and technocracy and not of criminal law—is capable of evolving.⁷ If so, and if the risks to legitimacy are managed in the meantime, then the triple *trap* model will be a valuable admonition but it will not seal the fate of aggressive enforcers if they employ a judicious policy mix in which infringements are prosecuted firmly and deterrence plays a part but voluntary compliance is incentivized to the point where the need for prosecution is minimized.

Konrad Ost, ‘From Regulation 1 to Regulation 2: Enforcement of EU law by National Sanctioning Regimes and the Need for Further Convergence’. The chapter provided by Ost, as summarized in its title, suggests that competition enforcement in the EU is ready to build on the foundations introduced by Regulation 1/2003, and indeed that this is becoming a pressing need.⁸ In particular, Ost advocates a strengthening of the powers of NCAs since they are sometimes hamstrung by the peculiarities of national law, including

⁷ Andreas Stephan has considered how attitudes in the UK have changed or remained constant since 2007. (He also considers current attitudes in Germany, Italy and the United States, but diachronic analysis with regard to the UK is made possible by his earlier survey, where the UK was the focus.) On the one hand, price fixing continues to be perceived by most respondents as less serious than other corporate wrongdoing such as fraud, tax evasion or insider trading (although a significant part of the sample responded otherwise). However, public support for sending price fixers to prison has grown significantly (11% of respondents in favor in 2007; 27% in favor in 2014), a finding which Stephan thinks might be explained by the global financial crisis and the corporate misconduct that likely exacerbated it. It is easy to accept that corporate scandals have not endeared corporate executives to the public but there may be more general processes of evolving attitudes at play, as the UK public over time assimilates messages (such as: price fixing is repugnant) transmitted by public policy actors and various media. While core societal beliefs tend to be very resistant to change, norms and attitudes are more malleable and may change depending on a variety of shifting conditions. On the latter point, see Jingyuan Ma and Mel Marquis, ‘Business Culture in East Asia and Implications for Competition Law’, forthcoming in *51 Texas International Law Journal* ____ (2016).

⁸ The recognition of need for broad legislative action at the level of the EU is growing. For example, see ‘Editorial comments’, 52 *Common Market Law Review* 1191, 1195 (2015). The editorial points out that legislative action would also provide an opportunity to overcome fragmented enforcement (in light of the Commission’s limited resources) by means of attributing to each NCA the power to sanction undertakings for effects beyond the national borders of the NCA concerned. See *ibid*, 1198. No hint of such a move emerges from the pending consultation launched on 4 November 2015 by the European Commission aimed at enhancing NCA powers and independence. (For information, see http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html.) For an early reaction to the consultation process, see Giovanni Pitruzzella, ‘The Public Consultation on Regulation 1/2003: A Stronger Institutional Infrastructure for Fostering the EU Common Competition Culture’, 7 *Journal of European Competition Law and Practice* 1 (2016).

national constitutional law as interpreted by national courts. The case study presented in this regard is German competition law enforcement, for which primary responsibility resides with the Bundeskartellamt. As Ost points out, the German enforcement framework has been defined largely by Regulation 1/2003 and by, in particular, the 2005 amendment to the German competition law, the GWB. Within this framework, it has become increasingly apparent that German enforcement is not as effective as it could be.⁹ Indeed, Ost refers to a number of ‘huge challenges’ to the integrity of enforcement at the national level.

The first problem, briefly, concerns the increased number, duration and administrative burden of cases, which have stretched the BKA’s capacities. A second problem, with a more specifically legal dimension, arises from tensions between, on the one hand, the EU concept of an ‘undertaking’, which permits the Commission to sanction single economic entities as a whole and thus generally to ‘score’ higher fines while also holding parent companies jointly and severally liable; and on the other hand, the more restricted sanctioning powers of the BKA under German law. German administrative penal law recognizes a thick corporate veil, and the actions of a representative of one legal person generally cannot be attributed to another one. Strictly speaking this is true even if, for example, the latter entity exercises decisive influence over the former, although the BKA has partially maneuvered around this impediment by applying a theory of supervisory duty (as distinct from liability for breach of competition law), which is allowed under German law. Of course, where Article 101 is applied there can be no derogation from the EU definition of an undertaking, but from a German law perspective that definition is a matter of substantive law, whereas the sanctions that may be imposed by the BKA are regarded as belonging to national procedural law.¹⁰ One may add that under EU law such a national law would have to be disapplied if it were such as to compromise the effectiveness of EU law. The *VEBIC* judgment of the ECJ appears to be at least indirectly relevant in this respect,¹¹ as does the case law linking the effectiveness of penalties at national

⁹ Some of the themes discussed by Ost are also raised in the chapter by Wolfgang Kirchhoff. Like Ost (and others—see the editorial above n 8), Judge Kirchhoff considers further harmonization of rules such as those on sanctions (especially as regards legal succession) to be justified and necessary (see below).

¹⁰ If the ECJ were to hold that parental liability flowing from the single economic entity doctrine is to be considered substantively as part of the concept of an undertaking, it would be immaterial that the issue may traditionally have been conceived of at the national level as a rule of enforcement or procedure, and not of substance. The primacy of EU law—which includes primacy of the interpretations given to EU law by the Court—would be decisive.

¹¹ Case C-439/08 *Vlaamse federatie van verenigingen van Brood- en Banketbakers, Ijsbereiders en Chocoladebewaterkers (VEBIC) VZW* [2012] ECR I-12471 (where the facts concerned the anomalous inability of the Belgian competition authority to effectively defend its own decisions in appellate proceedings).

level to the coherent application of the EU competition rules.¹² Nevertheless, greater clarity with regard to the apparent clash of legal perspectives would be helpful. Ost also points to the traditionally conservative German approach to successor liability, which left open multiple paths to impunity for creative wrongdoers. This problem has been addressed in some respects by the 2013 amendment of the GWB, but certain loopholes remain, such as where an infringer's assets are transferred to another entity, leaving a shell company behind.¹³ Still another idiosyncrasy relates to the application of the 10 per cent fining cap provided for in the GWB. Here the problem stems from the way the application of this cap is understood by the German Federal Court of Justice (Bundesgerichtshof), in particular because it diverges from the way the 10 per cent cap contained in Article 23 of Regulation 1/2003 is understood and applied at the level of the EU. According to the Bundesgerichtshof, the 10 per cent figure cannot be treated as a cap but rather must be construed as the top end of a range, this top end being reserved for the most egregious violations. To any who might propose that weaknesses in the German fining system could be overcome if criminal sanctions (*strict sensu*) were introduced, arguments are provided in opposition to such a move (section IV.3), not least because in Germany it would imply even longer, more cumbersome and more complex procedures.

All of this leads Ost to call for action, including action at the level of the EU, to achieve greater harmonization of national procedures and sanctions. Such action is also made necessary, he says, by the fact that, if an investigation is reallocated within the ECN, the sanctions and procedures that apply to an undertaking may differ considerably and yet the undertaking has no right to challenge the reallocation. It is also apparent that Ost would favor harmonization in the form of a regulation as opposed to a directive, as a regulation could presumably establish greater clarity of obligations. National courts in this case would apply the regulation directly, and would not be applying, in the first instance, transposed laws of national character, which draw naturally on national concepts.

¹² In the context of tax deductibility proceedings, see Case C-429/07 *Inspecteur van de Belastingdienst v X BV* [2009] ECR I-4833, paras 36–37 ('To dissociate the principle of prohibition of anti-competitive practices from the penalties provided for where that principle has not been observed would therefore deprive of any effectiveness the action taken by the authorities responsible for monitoring compliance with that prohibition and punishing such practices. Thus, the provisions of Articles 81 EC and 82 EC would be ineffective if they were not accompanied by enforcement measures provided for in Article 83(2)(a) EC. As the Advocate General stated at point 38 of his Opinion, there is an intrinsic link between the fines and the application of Articles 81 and 82 EC. The effectiveness of the penalties imposed by the *national* or Community competition authorities on the basis of Article 83(2)(a) EC is therefore a condition for the coherent application of Articles 81 EC and 82 EC.' (emphasis added)).

¹³ Ost expects that ultimately the fate of the German rules on succession may be decided in the context of a preliminary reference to the ECJ.

The European Commission has been exploring procedural and institutional issues and suggesting there is some scope for action.¹⁴ However, it is not clear that the Commission is being sufficiently bold in this regard.

B. *Effective remedies*

Joshua Wright, ‘The Federal Trade Commission and Monetary Remedies’. The background and impetus for this chapter relate to the ambiguity of the FTC’s official position on the conditions in which it is appropriate to seek the equitable remedy of disgorgement in competition cases. The FTC had adopted a Policy Statement in 2003 providing guidance in this respect. According to that document, the FTC was to consider three criteria when deciding whether to pursue disgorgement, namely: whether the case involved a clear violation of the law; whether there was a reasonable basis for calculating the amount to be disgorged; and whether remedies in separate litigation brought against the defendant are likely to fail to fulfill the aims of the antitrust laws. However, in 2012, before Wright became an FTC Commissioner, and notwithstanding the dissent of Commissioner Ohlhausen, the FTC withdrew the Statement. The majority of Commissioners found the announced criteria to be too limiting and insufficiently robust. They also felt that the Statement had made the FTC too hesitant to seek disgorgement, and they intimated that the more rigorous constraints the Supreme Court had imposed on private plaintiffs in recent years justified more aggressive pursuit of this type of remedy.

In this chapter, Wright files his own informal dissent against the FTC’s decision to retract the said Statement. In sections 4 and 5 he refutes the grounds given by the FTC, arguing, *inter alia*, that the available theory and evidence do not support the FTC’s assumptions that private suits have become difficult to win, and that the state of US law results in under-deterrence of anticompetitive conduct. If the Supreme Court has adopted anti-plaintiff decisions, Wright says, those decisions are ‘motivated by economic learning and an acceptance of the error-cost approach to designing liability rules in anti-trust and not out of a concern related specifically to private antitrust suits’.¹⁵ Turning to the circumstances in which Wright considers disgorgement might be appropriate, he points to the following. First, he suggests that disgorgement should only be sought in hard core cartel cases or where a monopolist’s

¹⁴ As of this writing the Commission’s public consultation in this regard is still pending (see above n 8). See also Commission Staff Working Document, Enhancing competition enforcement by the Member States’ competition authorities: institutional and procedural issues (9 July 2014), SWD(2014) 231/2, http://ec.europa.eu/competition/antitrust/legislation/swd_2014_231_en.pdf. The accompanying press release is at http://europa.eu/rapid/press-release_IP-14-800_en.htm.

¹⁵ Page 101.

restrictive conduct has no plausible efficiency justification. Vertical restraints cases, for example, would thus be excluded.¹⁶ He also cautiously embraces the criteria that were established by the FTC in the Statement. Above all, he thinks it is necessary to provide the business community with guidance on when the FTC might pursue disgorgement, without which there may be a risk that efficient activity will be deterred.

Not long ago, Commissioner Ohlhausen and then-Commissioner Wright dissented formally from the FTC's proposed consent order whereby, in addition to injunctive relief, Cardinal Health agreed to disgorge about 27 million dollars of 'ill-gotten gains' derived from the monopolized sale and distribution of low-energy radiopharmaceuticals in various metropolitan areas across the United States.¹⁷ In rather vague terms, the majority of Commissioners offered the following statement as regards its policy on disgorgement: 'As always, the Commission will continue to exercise responsibly its prosecutorial discretion in determining which cases are appropriate for disgorgement. We regard disgorgement as one of many remedial tools at our disposal in competition cases, and will employ it judiciously to protect consumers and promote competition.'¹⁸

Ioannis Lianos, 'The Principle of Effectiveness, Competition Law Remedies and the Limits of Adjudication'. This chapter explores the relationship between the principle of effectiveness, the use of remedies and the issue of the (il)legitimate exercise of public authority. It also offers normative views, from the point of view of legitimacy, as to how broadly the arena of adjudication should be understood, since the radius of interests directly and indirectly affected by a dispute can extend far beyond the interests of the 'parties'.

¹⁶ See also Dissenting Statement of Commissioner Wright in *Cardinal Health, Inc.*, File No. 101-0006 (17 April 2015), https://www.ftc.gov/system/files/documents/public_statements/637771/150420cardinalhealthwright.pdf, page 3 ('I would support a limitation on the Commission's ability to pursue disgorgement only against naked price fixing agreements among competitors or, in the case of single-firm conduct, only if the monopolist's conduct violates the Sherman Act and has no plausible efficiency justification. This latter category would include a monopolist's fraudulent or deceptive conduct, or tortious activity such as burning down a competitor's plant if such conduct violates the Sherman Act. I would also provisionally support disgorgement in a case if there were evidence demonstrating that a particular category of conduct shown to harm consumers was not adequately deterred through private suits and public enforcement actions seeking injunctive relief. This case does not belong in that category. Declining to pursue disgorgement in most cases involving vertical restraints has the virtue of taking the remedy off the table—and thus reducing the risk of over-deterrence—in the cases that present the most difficulty in distinguishing between anticompetitive conduct that harms consumers and procompetitive conduct that benefits them [...].').

¹⁷ See Statement of the FTC in the matter of *Cardinal Health Inc.*, FTC File No. 101-0006 (17 April 2005), https://www.ftc.gov/system/files/documents/public_statements/637781/150420cardinalhealthcommstmt.pdf. For other recent disgorgement cases, see *FTC v AbbVie, Inc.*, No. 2:14-cv-05151-HB (E.D. Pa., filed 8 September 2014); Brief for FTC in Opposition to Cephalon's Motion to Dismiss for Lack of Subject Matter Jurisdiction, *FTC v Cephalon, Inc.*, No. 2:08-cv-2141 (E.D. Pa., filed 18 November 2013).

¹⁸ *Ibid.*, page 6.

The concept of the chapter is described in its introduction. A starting point is the fact that remedies tend to involve a certain degree of discretion on the part of the decision-maker; they may be molded according to particular circumstances, and thus remedy types are not necessarily prefabricated. This may open the door to risks associated with ‘discretionary remedialism’.¹⁹ Naturally, discretionary remedialism may find some justification on the basis of the principle of effective application of the law,²⁰ yet it is equally obvious that this discretion cannot be unbounded. Some of the limits to which it is subject arise from the imperatives of fundamental rights protection, from other general principles of (EU) law, and from the correlativity of private law disputes (that is, the correlativity between the rights and duties of litigants).²¹ In the present contribution Lianos discusses a further limit: the legitimacy of the authority deciding on the remedy, given that some types of remedial intervention would stretch beyond the boundary of legitimate public action. As intended in this chapter, legitimacy refers to legitimacy-building mechanisms which guarantee that an undertaking will consider the remedies imposed upon it to be politically acceptable even if, presumably, it would prefer to do without them. Those mechanisms of legitimacy may differ depending on which form of social ordering is in play. It is suggested that, if the exercise of authority is such that the public agency’s functions ‘trespass’ upon those of another type of social ordering, then in order to avoid serious legitimacy problems the agency should submit to the legitimacy-building tools that govern that other sphere. The type of social ordering to which the imposition of remedies (and thus remedial discretion) belongs is (structural) ‘adjudication’,²² as opposed

¹⁹ Such risks may be particularly acute in the context of Article 9 commitment procedures, where the Commission enjoys significant discretion in a number of respects. (National practice sometimes appears quite different, as NCAs may in some cases be subject to firmer constraints; Lianos provides examples including, as noted below in the main text, the interesting *Skyscanner* case in the UK.) See for example pages 132–134. Similar concerns have been expressed by many, although the Commission’s procedure has also been defended by observers arguing that criticisms have been overstated. Among the body of literature on the subject, see Claus-Dieter Ehlermann and Mel Marquis, eds, *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law*, Hart Publishing, 2010; and see also Damien Gerard’s contribution to this volume (summarized below).

²⁰ The term ‘principle of effectiveness’ may also evoke the notion of ‘optimal enforcement theory’. The latter theory, assuming for the sake of discussion that a consensus as to its meaning exists, may inform a normative understanding of the principle of effectiveness, and when the effectiveness principle is vindicated this may at the same time advance the interests embraced by that theory. But this would merely be an overlap since, by definition, they are distinct. The principle of effectiveness, in particular, is a multifaceted and potent legal concept. See, eg the remarks of Lianos at pages 108–112.

²¹ See page 117.

²² As noted below in the main text, Lianos later distinguishes ‘structural’ adjudication from the more classical ‘dispute resolution’ adjudication. (The words ‘limits of adjudication’ in the chapter title are a reference to this classical model.) The fact that the structural adjudication model in some ways resembles the managerial/administrative (regulatory) model leads Lianos to consider it suitable for resolving matters affecting a wide range of interests. See pages 123–124.

to contracting/bargaining, managerial/administrative discretion or legislation. Lianos mentions the example of managerial/administrative discretion, where an important legitimacy-building mechanism is the participation of affected interests in the remedial process. This type of discretion may often be seen in the sphere of economic regulation, and it is thus relevant here. The concern described above with regard to participation in the remedial process points to one of the chapter's recurring issues: whether and the extent to which it is necessary to enhance participatory rights and to broaden the circle of those involved in the remedial process to include a community of diverse affected interests. To illuminate the implications of this community of diverse interests, Lianos revisits the web-like 'polycentric' dimension of disputes, as elaborated in the 1970s by Lon Fuller and as developed and glossed by later scholars.

Polycentricity and the problems it raises for the standard process of adjudication—including the legitimacy problem where competition law remedies 'trespass' into areas traditionally inhabited by regulation—are discussed in section 3 of the chapter. It is observed in this context that competition law has features that accentuate the polycentric nature of disputes. For example, if a dominant firm and a rival engage in competition law litigation, other competitors as well as upstream suppliers and intermediate and final consumers may all be affected. Indeed, the outcome of the dispute may have repercussions in sectors and industries well beyond the relevant market. Lianos puts forward two sets of examples: (i) the Microsoft and Google cases, given their impact on innovation and competition in the global IT sector; and (ii) network industry cases, such as energy, telecoms or transport, which again tend to have far-reaching effects across sectors. At this point, Lianos explains that the adjudication model encompasses two sub-types. One of these, the 'dispute resolution' adjudication model, refers to a dispute that essentially concerns the arguments and evidence of the litigants themselves. But of more relevance for this discussion is the 'structural' adjudication model. The latter model allows for a broader spectrum of interests and affected persons, some of whom may be heard by the decision-maker—as in the case of *amicus* representations. And where the diversity of interests is prominent, it may in fact become increasingly difficult to distinguish this model from the regulatory model. In this light, Lianos describes the potential legitimacy problem as follows:

Put simply, the more EU competition law moves towards the regulatory/managerial model, and 'structural' adjudication comes close to that, the more it should integrate the legitimacy-building mechanisms of that model, with the enhanced participation of the entities subject to the remedies as well as of all those whose interests may be affected (ie consumers, competitors in related markets and interests vicariously represented by organizations and citizen's groups, [such as] environmental associations).²³

²³ Page 124.

Section 4 of the chapter extends the problems of discretion and of its limits from a legitimacy perspective to the use of the commitment procedure under Article 9 of Regulation 1/2003.²⁴ The background to this discussion is the occasional characterization of this procedure by commentators and by the ECJ itself as exemplifying a ‘consensual’ (or ‘contract law’) model. The position taken here is that the more proper classification is the structural adjudication model, which in some ways blurs with the regulatory (managerial/administrative) model, and which in normative terms requires a distinctive set of participation-oriented constraints. As Lianos contends in detail, the fact that the latter constraints are not embedded in the EU law on commitments (at least not to an adequate degree) may make Article 9 procedures almost irresistibly attractive in non-cartel cases from the Commission’s point of view. Whereas Article 7 procedures entail significant constraints,²⁵ in an Article 9 case the Commission may be in a position to ‘use its bargaining power in order to achieve remedies that would not only attempt to reverse the situation to the status quo ante but would also aim to establish a new, allegedly more competitive, equilibrium [...]’.²⁶ This desired equilibrium may also involve the pursuit of wide liberalization and regulatory objectives, and the theory of harm in such cases may not be evidently solid enough to sustain an Article 7 claim of infringement. Lianos adds to this by criticizing the supposed dichotomy between a public law paradigm under Article 7 and the above-mentioned ‘contract law’ paradigm under Article 9. Clearly rejecting the proposition that the Article 9 procedure is consensual, he refers to the ‘psychological pressure’ imposed by the shadow of Article 7, which ‘enables the Commission to extract disproportionate remedies’ under Article 9.²⁷ Since, for these reasons,

²⁴ For further extended analysis of the Article 9 commitments procedure, see the contribution by Damien Gerard (summarized below). Several features of the commitment procedure noted by Lianos and mentioned in the paragraph corresponding to this footnote are also discussed critically by Gerard, above all in section 2 of his chapter.

²⁵ See the contribution by Giorgio Monti (summarized below).

²⁶ Page 128. Concerning the subject of the Commission’s superior bargaining power as well as the potential for its abuse and the consequences for substantive outcomes—on which views are not universal—see also the remarks made below in reference to the chapter by Damien Gerard.

²⁷ Page 129. Such remedies must legally conform to the principle of proportionality—but it is the more diluted form of that principle as established in *Alrosa*. This is merely, as Lianos notes, a type of rationality test. However, the Commission deserves credit for holding itself to a standard somewhat higher than the one adopted by the ECJ. In the Commission’s Notice on best practices for the conduct of proceedings concerning Article 101 and 102 TFEU, [2011] OJ C308/6, para 115, the Commission states: ‘In light of the principle of proportionality, the Commission must verify that the commitments address the identified competition concerns and that the commitments offered do not *manifestly* go beyond what is necessary to address these concerns. When carrying out that assessment, the Commission will take into consideration the interests of third parties. However, it is not obliged to compare such voluntary commitments with measures it could impose under Article 7 of Regulation (EC) No 1/2003 and to regard as disproportionate any commitments which go beyond such measures.’ (emphasis added; citation omitted) The latter statement would be enforceable against the Commission in an action for annulment before the General Court on the basis of the principle of legitimate expectations.

Article 9 cases become a means of addressing issues—not necessarily confined to competition—which have wide implications for a variety of interests, they epitomize the notion of polycentric procedures. And again, they fit the model of structural adjudication.²⁸ Yet interested third parties, including complainants, do not have extensive participatory rights in Article 9 cases. For Lianos, this constitutes a major weakness that needs to be addressed through procedural reform. He punctuates his argument with a discussion of the stricter standard to which the then-OFT was held by the UK Competition Appeal Tribunal in the *Skyscanner* case.

Damien Gerard, ‘Negotiated Remedies in the Modernization Era: The Limits of Effectiveness’. A summary of this chapter may be prefaced by a word as to the meaning of the ambiguous term ‘effectiveness’, which appears in Gerard’s title. The intuitive meaning is arguably the successful vindication of the public interest in the enforcement of competition law, even if it is true that the *content* of the term ‘public interest’ in a given jurisdiction is typically contested. Gerard’s chapter, however, is based on an understanding of effectiveness rooted in the more subjective calculations of the competition law enforcer, which will have an interest in maximizing its own administrative resources when it can do so.²⁹ The subjective and dynamic interests of a public authority thus do not *ipso facto* equate to the interests of the public. A possible example relates to fines: subjectively, a competition enforcer might derive great utility from the successful imposition of a massive financial penalty; yet it is not clear, and for the sake of discussion let us say it is far from clear, that aggressive fining policies have succeeded as an instrument of effectiveness from a public interest perspective. Another example is provided by a source cited in Gerard’s chapter, according to which an agency might select a case not in order to fulfill its public mission to the fullest extent (the source assumes this mission to be securing benefits for consumers), but because the agency expects the case will be relatively easy to settle.³⁰ It is by no means unusual to regard the enforcer as a self-interested actor subject to legal and institutional constraints that limit (or fail to limit) bureaucratic drift,³¹ but it is perhaps helpful to emphasize the point because the use of terminology will be immediately understood, and because the manner in which ‘effectiveness’ is understood has implications for the way its relationship with legitimacy is conceptualized and evaluated.

²⁸ Page 131.

²⁹ In section 2.1.2 of the chapter, Gerard also refers to a separate concept, the ‘substantive effectiveness’ of antitrust principles.

³⁰ See page 143, footnote 20 (citing Ginsburg and Wright). Gerard proceeds, at page 145, to draw a distinction between effectiveness (again, from the perspective of the enforcer) and efficiency (welfare maximization). It appears from that discussion that the achievement of efficiency through enforcement constitutes, in Gerard’s view, the mission of the European Commission.

³¹ There is no shortage of literature on this, within and beyond the legal field.

That being said, aside from the ‘limits of effectiveness’, the title also refers to ‘negotiated remedies’, by which Gerard means remedies in the form of commitments made binding, whether at EU or national level. This remedial tool is of a piece with leniency and cartel settlements, which in turn exemplify procedural modernization, one of the three sisters of the ‘legal and cultural revolution’, along with institutional and substantive modernization. The focus on commitments in this chapter is thus shared in common with the chapter by Lianos (see above). While Gerard ostensibly may seem to take a different view inasmuch as he stresses a paradigm of negotiation while Lianos rejects the consensual/contractual nature of commitments, both authors agree that: the implied threat of an infringement procedure makes the ‘voluntary’ nature of commitments suspect or illusory;³² and that the abundant use of commitments in non-cartel cases implies the expansive and to a large extent unchecked discretion of the European Commission.

Gerard’s chapter is rich in detail and argumentation; this short tour will unavoidably be incomplete. As an initial matter, readers interested in the incentives driving both the authority and the undertakings concerned to engage in ‘negotiated solutions’ will want to pay particular attention to section 1.1.2, where numerous factors affecting those incentives are highlighted. To select just one example, a linkage with substantive modernization is discussed since, on the side of the enforcer, the additional costs and complexity of an infringement procedure that arise from the turn to an ‘effects-based’ approach can be substantial. In this sense, the advantages created by procedural modernization allow it ironically to cannibalize the potential gains (ie, potentially more efficient outcomes) that substantive modernization was intended to capture. In section 1.2, Gerard expresses concern with regard to the fact that commitment procedures focus on designing remedies rather than on establishing an infringement. In that setting, the theory of harm emerges from the mutual discussion of possible remedies and from the possible influence of third parties who are ‘rarely motivated by purely benevolent interests’.³³ To that extent, the theory of harm may be biased, and—as already discussed—the applicable principle of proportionality under the relevant case law is a loose one that

³² As far as Gerard is concerned see, in particular, pages 157–158. Monti takes a different view and suggests that the leverage the Commission wields based on the constant possibility that it might withdraw from the commitment procedure under Article 9 and revert to the standard Article 7 infringement procedure is more apparent than real. As Monti notes, the Commission’s Notice on best practices (above n 27) indicates the Commission’s willingness to re-submit commitments if the market test is negative, thus keeping its Article 7 powder dry pending further efforts to resolve the case under Article 9. See Giorgio Monti, ‘*Alrosa and Commitment Decisions in Perspective*’, in Barry Hawk, ed., *International Antitrust Law and Policy: Fordham Competition Law 2014*, Juris Publishing, 2015, chapter 17.

³³ Page 156.

might not provide a sufficient safeguard against procedures and outcomes gone astray.³⁴

The critique of this process leads to a call, in section 2, for a redoubled effort from the Commission to pursue ‘optimal’ outcomes and to address the existing ‘legitimacy gap’. The fundamental idea behind section 2, which is the heart of the chapter, is that the tension between procedural and substantive modernization as manifest in the commitments context can be reconciled by restoring (i) the principle of proportionality and especially (ii) the protection of fundamental rights, to their proper strength. Doing so, it is argued, would likewise restore the balance between effectiveness (maximization of administrative resources) and efficiency (maximization of welfare). With regard to proportionality and fundamental rights, Gerard suggests that due process may serve as a proxy for proportionality in terms of ensuring optimal outcomes, and that this would be a way to deal with the uncomfortable case law in this area. The discussion in section 2 covers a lot of ground. For example, it describes the shift to increasingly ‘regulatory’ (as opposed to corrective) remedies, and it underlines the problematic decline of solid, predictable new case law and the rise of a very influential but potentially error-inducing body of commitment decisions—not to mention the near-disappearance of judicial control by the EU Courts, which has further perverse consequences. As Gerard maintains, ‘commitment decisions tend to stretch the boundaries of antitrust legal standards with the paradoxical effect of affecting the overall predictability of the scope of Articles 101 and 102 TFEU’.³⁵ In this way, the Commission pursues the (subjective) effectiveness of enforcement as defined above, but in reality the factors skewing its enforcement toward suboptimal commitment decisions have the effect of undermining the stability and ‘substantive effectiveness’ of antitrust principles.³⁶

With a view toward closing the legitimacy gap arising from this troubling state of affairs, Gerard in section 2.2 enters into a detailed discussion of the need for greater respect for proportionality and due process (right to be heard, access to file, effective judicial protection). As he explains, and apart from their other virtues, due process helps to ensure that the Commission will identify the relevant issues and tailor its analysis while proportionality ensures that the substance of the adversarial process is translated into the appropriate outcome. Yet both principles are relaxed or truncated in the context of commitment procedures.³⁷ In this part of the essay Gerard discusses, and registers

³⁴ See above n 27 (the latter footnote recalling, however, that the Commission holds itself to an intermediate standard of proportionality falling somewhere between the *Alrosa* rationality test and the traditional standard that applies under Article 7).

³⁵ Page 165.

³⁶ *Ibid.* See also page 167.

³⁷ Again, Monti has expressed doubts as to the criticisms lodged by Gerard and others regarding proportionality and due process (and hence the seemingly lopsided bargaining power of the Commission and the risk of suboptimal remedies), and has described them

his disappointment with, the ECJ's *Alrosa* judgment, for example because in his view it leaves ample scope for suboptimal remedies and lowers the bar as far as due process is concerned. On the other hand, it is acknowledged that the Commission has not run amok with its long leash but rather has cleaved to an intermediate proportionality principle (ie, a 'manifestly disproportionate' test) by virtue of its own scruples, typically (though not always) by limiting the duration of commitments made binding. Yet Gerard questions whether time limits have been too onerous in light of the pace and cycles of the industry concerned; and ultimately, he doubts that this self-discipline (even if the Commission's soft law statements create legitimate expectations) will be satisfactory as a sustainable safeguard. Given the state of the case law, it seems that in order to counterbalance a relatively weak proportionality standard, a more robust application of due process requirements is needed (section 2.2.2).³⁸

In Gerard's view, the weaknesses of the commitment procedure call for a series of corrective measures. First of all, two systematic and enforceable obligations should be imposed on the Commission to ameliorate the 'due process deficit': (i) firms that propose commitments should be provided with full non-confidential versions of the observations of third parties who respond to the market test; and (ii) they should furthermore be provided with a reasoned decision if the Commission opts to reject market-tested commitments. Second, in order to restore the voluntary character of commitments, Gerard advocates immunity from fines for firms admitted to commitment proceedings if the commitment process fails and the Commission ultimately finds an infringement.³⁹ Removing the sword from above the head of the undertaking concerned would in his view 'radically contribute to closing the legitimacy gap ... because it would force the Commission to "weigh carefully" the optimal character of negotiated solutions and would create a more balanced

as overstated—in particular given the enforceable soft law statements the Commission has made as regards the manner in which it conducts the commitment procedure. See Monti, '*Alrosa* and Commitment Decisions', above n 32.

³⁸ With regard to the principle of proportionality, Gerard accepts that it may be justified to apply a more relaxed standard in commitment cases; but not necessarily to the extent that the case law suggests. And his willingness to accept a looser proportionality standard is conditioned on the reforms he proposes as far as due process is concerned (see the main text below). He thus states, at page 172, that if such reforms are properly implemented, it is 'not *per se* unacceptable for the Commission to benefit from reasonable flexibility in the application of the proportionality principle in commitment cases'.

³⁹ This proposal was endorsed by Jenny in Frédéric Jenny, 'Worst Decision of the European Court of Justice: The *Alrosa* Judgment in Context and the Future of Commitment Decisions', in Barry Hawk, ed, *International Antitrust Law and Policy: Fordham Competition Law 2014*, Juris Publishing, 2015, chapter 16. Also published as 38 *Fordham International Law Journal* 701 (2015).

framework for the negotiation of (the final set of) commitments'.⁴⁰ Finally, Gerard calls for the further strengthening of judicial review by the EU Courts of the Commission's infringement decisions so that full appellate jurisdiction is effectively exercised at least where the Commission has imposed a fine or periodic penalty payment. (In this he joins several others among the Workshop participants.) Beyond the other merits of robust review, this would help to re-establish a genuine choice for firms between offering to settle by way of commitments and, by contrast, fighting to the end.⁴¹ To the above-described proposals one could add other conceivable reforms as well, even if some of them might be unrealistic for the time being. Considering that in the next few years we are liable to witness a significant revision of Regulation 1/2003, an interesting opportunity for improvements may present itself. Will it be missed, is the question.

Giorgio Monti, 'Behavioural Remedies for Antitrust Infringements—Opportunities and Limitations'. As the title suggests, Monti's essay concerns behavioral remedies imposed by the European Commission in the specific scenario where an infringement has been found under Article 7 of Regulation 1/2003.⁴² The aim of the discussion is to put more focus on the role of behavioral remedies in this setting, their scope, the (judge-enforced) principles that the Commission follows in designing them, and their practical and procedural dimensions. With regard to their role, Monti points out that they are to be understood as restoring the possibility of competition by giving the undertaking concerned the guidance needed to secure compliance—guidance

⁴⁰ Page 181 (citation omitted). The need for a specific bar is however questioned by Monti: '[A] party who is fined after an unsuccessful, good faith attempt to make commitments may have a basis for a successful appeal against the fine. The issue remains to be explored and it may well be that in the future the Court will take the view that accepting to go down the commitment path creates a legitimate expectation that there will not be a fine'. Monti, above n 32.

⁴¹ Monti (above n 32) suggests that the oft-stated proposition that judicial review of Commission infringement decisions has been weak is overstated. He explains that such claims are largely based on the Commission's 'winning streak' in Article 102 cases, and that the Commission's success may be attributed above all to the expansive substantive scope of the prohibition. This latter observation is undoubtedly true, although one might still find it significant that the substantially greater financial impact of an infringement decision that emerged in the last dozen years did not of itself seem to prompt a more exacting review of Commission findings to temper the consequences of the prohibition.

⁴² Commitments in the context of the Article 9 procedure are discussed incidentally, that is, by reference to their systemic relationship to remedies imposed under Article 7, and by wondering whether some of the constraints governing remedies under each of the two different procedures (the term 'remedies' is used here in a non-technical sense since there is no finding of infringement in the Article 9 context) might provide inspiration—in terms of discipline in the case of Article 9, or in terms of transparency in the case of Article 7. For his recent and more direct commentary on Article 9 commitments as an enforcement tool, see Monti, 'Alrosa and Commitment Decisions', above n 32 (casting doubt on many of the criticisms that have been leveled against the commitment procedure). The subject of commitment decisions is also discussed in other contributions to this volume, specifically in the chapters of Ioannis Lianos and Damien Gerard (see above).

ensuring that the undertaking does not re-offend.⁴³ This role is distinct from, and may to some extent be complementary to, a role of pure deterrence, general or specific. It is also distinct from a different vision of remedies which goes farther and gives the enforcer the latitude to address anticompetitive effects caused by the impugned conduct (other than the effects that would persist but for the cessation of the infringement), and to shape the dynamics of a market in pursuit of a welfare-optimizing outcome.⁴⁴ Due in part to these distinctions, Monti observes that the Commission's use of Article 7 remedies do not fit within either the 'crime/tort' model or the 'administrative' model of enforcement, using the terminology adopted by Crane in his work. Since there is no handy name available, Monti simply describes these remedies as being of a hybrid nature.

With regard to the principles to which the Commission must adhere in designing a remedy under Article 7, they tend to follow from the above conceptualization. The first is that such a remedy must have a direct link to the infringement; Article 7 may not be used to pursue broader agendas. The second (which, as applied, may impose constraints similar to those implied by the first) is that the remedy must comply with the rights of defense. That is to say, the infringement decision must make clear how the remedy addresses the infringement; it may not address, for example, competition concerns that the decision leaves unidentified. The third principle is that of proportionality: the remedy must not exceed what is necessary to restore the opportunity for competition in the market. The fourth and final principle is equal treatment, which would be relevant, in particular, where access or supply remedies are to be designed. If the remedy consists of permission to cross a unique bridge, for example, that permission may have to be given on a non-discriminatory basis. This principle may in some cases require a partial derogation from the others but, as Monti explains, it mainly concerns competitive conditions downstream. Overall, the foregoing principles appear to constrain the Commission's remedial powers—which may perhaps come as some relief when considered in the context of the concerns raised in other chapters of this book. On the other hand, Monti also points out that these constraints may

⁴³ In section 2 of the chapter Monti breaks down this conception into three related functions: an effective remedy under Article 7 will achieve the termination of the offending practice, prevent its recurrence and restore the opportunity for competition in the market. The significance of the terms '*opportunity* for competition' and, similarly, '*possibility* for competition' (as opposed to restoring competition) is that illegal conduct may well have caused various effects that are unlikely to be cancelled merely by ensuring that it ceases and does not reappear. Monti gives the examples of the financial strength, market position and rate of innovation of parties to a cartel, or advantages that may have been gained from exclusionary conduct by a dominant firm. In the latter case, the remedy is aimed at restoring the excluded rival, so far as possible, to its *ex ante* position.

⁴⁴ This particular observation regarding the way remedies under Article 7 are understood may be contrasted with the normative preference for a welfare-optimizing approach to remedies that is evident in the next chapter by Frank Maier-Rigaud (see below).

be significant factors in the preference for the looser discipline of Article 9 procedures where broader, market-shaping remedies are desired.⁴⁵

Finally and briefly, Monti discusses several practical considerations and considers the benefits and costs of introducing improvements to the applicable procedures. These include, among other issues, the occasional need for a defendant to cooperate with the Commission even as it continues to fight its corner and deny any wrongdoing, or the use of certain techniques to facilitate monitoring and compliance with imposed remedies. In the context of his observations on practical considerations, he addresses a misunderstanding, on the basis of a certain narrow reading of the CFI's case law, as concerns the Commission's authority to impose affirmative obligations such as entering into contractual supply obligations under Article 101. Monti shows that a remedy of this kind is possible so long as the relevant principles, including in particular the principle of proportionality, are respected. While it could be objected that harmed parties may pursue such remedies through private law means and that the imposition of those remedies by the Commission is thus disproportionate, Monti suggests that significant advantages might potentially be gained if the affirmative remedies as well as any necessary compensation orders were rolled into the public law procedure. In other words, the public authority would protect relevant private interests in parallel with its defense of the common interest of the EU.

Frank Maier-Rigaud, 'Behavioural versus Structural Remedies in EU Competition Law'. If one were to consider competition law remedies from behind a veil of ignorance, perhaps no type of remedy would appear to have inherent superiority over others. Instead of assuming a hierarchy the innocent observer might conclude that the best approach for an economic infraction would be to impose whatever remedy or mix of remedies is meet for the case. However, it would seem that most lawyers tend to regard remedies through two inter-related and socially constructed lenses which create an aversion to structural remedies in the non-merger context. The first lens derives from the Lockean and classical liberal tradition that attaches high value to property rights, which are to be protected, as a general rule, from public intervention—irrespective of whether the intervention provides for compensation or outright confiscation, though the latter is certainly beyond the pale. The much longer tradition of coercive taxation by the state as well as other principles of sovereign power have always made private property rights relative rather than absolute, but nevertheless such rights are generally strong and dearly cherished. The second lens derives from being socialized as lawyers. A non-lawyer, at least if she is also innocent of the liberal tradition,

⁴⁵ On this latter point, see page 196. A variety of factors favoring resort to the commitment procedure are also discussed in section 4 of the chapter by Lianos (see above), for example at pages 130–131.

might be more inclined to accept the social function of property rights;⁴⁶ but for many lawyers, rights are, again, to be vigorously defended. The hierarchy that appears so natural through these lenses has been reinforced through the long and chequered past of structural remedies in the antitrust experience of the United States.⁴⁷ In the EU context, it also appears to be reinforced by the wording of Article 7(1) and Recital 12 of Regulation 1/2003.

Maier-Rigaud, an economist, challenges this point of view that assumes structural remedies to be remedies of last resort. Unsurprisingly, his analysis, which finds odd quirks in the EU approach (also taking account of the practice under Article 9 of the said Regulation), is framed by the assumption that EU competition policy should be determined primarily on the basis of economic effects. From that vantage point he endeavors to ‘rehabilitate’ structural remedies; but beyond establishing the desirability of using them in appropriate cases, he also argues that the legal path to the use of structural remedies is not as laden with obstacles as may be assumed. His first order of business is to arrive at a definition of a structural remedy, and he proposes that it should be understood as a measure that changes the structure of a firm by way of a transfer of tangible or intangible property rights, following which transfer the prior and present owners of those rights have no ongoing relationship.⁴⁸ Such a remedy removes the incentive or the means to revert to the anticompetitive conduct in question, and therefore requires no *ex post* monitoring. In contrast to the regulatory, market-constraining nature of behavioral remedies,⁴⁹ the affirmative case for structural remedies stems from the fact that they are ‘within the logic of the market system and allow an efficient adaptation to changing market conditions. ... [To an observer] they cannot be distinguished from the usual workings of a market system in which mergers and divestitures are a characteristic feature of normal market developments. In that sense they take full advantage of market allocation dynamics ...’⁵⁰

⁴⁶ The social function of property, a concept originally propagated by the Bordeaux scholar Léon Duguit (1859–1928), is mainly associated, through expansive and politicized interpretation, with Latin American constitutionalism. See, eg Thomas Boccon-Gibod, ‘Duguit, et après? Droit, propriété et rapports sociaux’, 28 *Revue Internationale de Droit Economique* 285 (2014); MC Mirow, ‘Origins of the Social Function of Property in Chile’, 80 *Fordham Law Review* 1183 (2011).

⁴⁷ The literature is voluminous. To cite only two authorities, see William Kovacic, ‘Designing Antitrust Remedies for Dominant Firm Misconduct’, 31 *Connecticut Law Review* 1285 (1999); Richard Epstein, ‘Monopolization Follies: The Dangers of Structural Remedies under Section 2 of the Sherman Act’, 76 *Antitrust Law Journal* 205 (2009) (the title being, as Epstein admits, ‘a tad unkind’).

⁴⁸ See pages 209–210.

⁴⁹ As Maier-Rigaud states, ‘it is surprising to see how widespread behavioural remedies are in a competition law context as they are fundamentally at odds with the idea that a decentralised competitive process ... alone allows the efficient allocation of resources and the highest welfare’. Page 212, footnote 16.

⁵⁰ Page 211. For observations regarding the advantages of behavioral remedies (in particular given the limitations of a system such as that of the EU in which fines are a central pillar), while recognizing their disadvantages, see the chapter by Giorgio Monti, for example at pages 186–187.

Moreover and ironically, a structural remedy may be ‘advantageous’ for a firm deprived of its assets in the sense that it can get on with its business unencumbered by ongoing regulatory commitments.

Section 3 of the chapter is devoted to a textual analysis of Article 7(1) of Regulation 1/2003, the aim of which is to derive an ‘economically sound interpretation’ of that provision which is also consistent with the original intent behind it. The starting point is the notion that an infringement can only be brought effectively to an end if no significant incentive to re-offend remains—and in this regard it is not assumed that the threat of future fines in case of infringement obviates any concern about incentives.⁵¹ Maier-Rigaud examines the particular elements of Article 7(1), including proportionality, necessity and ‘equal effectiveness’, and then arranges them into a graphically depicted filtering process. His discussion of the successive filters leads him to the conclusion that Regulation 1/2003 does not establish any preference for behavioral over structural remedies. ‘On the contrary’, he says, ‘the structural or behavioural nature of a remedy is immaterial as long as such remedies are not equally effective’.⁵² He concludes that the meaning of the key proviso would be clearer if the wording were adapted to the effect that behavioral remedies may be imposed only if there is no more effective structural remedy or where any equally effective structural remedy is equally or more burdensome than the behavioral remedy for the undertaking concerned.

C. *Agencies as amici curiae*

Stephen Calkins, ‘The Antitrust Conversation (Continued)’. The ‘conversation’ in this context is one between the judiciary and amici curiae, a category which typically includes civil society but which in some contexts might also include actors such as sovereign states or supranational institutions. One immediate observation that may be made here is that there is no guarantee that amici curiae represent the public interest, any more than it is guaranteed that the interests of the litigants themselves will coincide with the public interest. Nevertheless, and on the optimistic side, where a court permits a range of amici to participate, this may open up the process of deliberation to a broader spectrum of legal and policy views which may enhance the quality of the marketplace of ideas within the boundaries of the litigation. To a certain extent, a conscientious court can also efficiently screen amici to reduce the risks of being diverted by rent-seekers and time-wasters. Inevitably, a cost-benefit analysis is made as to whether an amicus brings marginal value to the dispute.

⁵¹ See pages 216–217, footnote 29.

⁵² Page 220.

1 Introduction

The bulk of this chapter concerns US practice, and above all the practice of the US Supreme Court. Calkins provides a rather thorough overview of amicus interventions in the most prominent US antitrust disputes, but also of other types of cases (chiefly those raising constitutional issues) decided in the last dozen years. Do these interventions sway the Justices? While one cannot speak with certainty in terms of causation,⁵³ Calkins shows that amicus briefs may be of distinct value to a court. First, he points out that amicus briefs are routinely used by the Court and its clerks to sift through the tiny percentage of cases in respect of which petition for certiorari will be granted. Furthermore, once a case is selected for litigation, amicus briefs on the merits may influence the Court if, for example, it uncovers a latent issue of significance; or if it demonstrates the wider implications of a judgment beyond the interests of the parties, possibly by highlighting a risk of unintended consequences and a corresponding need to restrict (for example) the scope of a judgment's *ratio decidendi*. Calkins also explains the role amicus briefs have played as litigation played out in specific Supreme Court cases; and he emphasizes the privileged status enjoyed by briefs received from the US Solicitor General (both at the certiorari stage and on the merits), which reflect the position of the incumbent executive branch of the federal government.⁵⁴ Having discussed a variety of aspects of the US practice, Calkins proceeds in section 4 of the chapter to add a summary of practice elsewhere. In general, the role of amici curiae outside the US has been substantially more limited. In certain European settings, for example, including in litigation before the EU Courts, the vehicle for presenting arguments to judges is formal intervention as an interested third party. In the EU, leaving aside the privileged positions of the Member States and the EU Institutions, the possibility of intervening formally is restrictive.⁵⁵ (Of course, if an organization or individual wishes to make its own public statements and present them to the public as observations relevant for the EU Courts, nothing prevents it or him from doing so, but this is merely informal practice.⁵⁶) One is therefore left to wonder whether, given the relatively

⁵³ For example, as a general matter, the fact that an amicus brief is cited in a judgment is hardly a sound basis, at least absent additional corroborative indicia, for hard and fast conclusions as to whether the brief has been decisive.

⁵⁴ The Solicitor General is by no means a member of the Supreme Court (and may thus be distinguished from an Advocate General in the EU context) but is the third-highest ranking official of the US Department of Justice. As a frequent repeat player, representing the US government in numerous cases each year, he is essentially in a continual dialogue with the Court on issues affecting the government. For further information, see the SG's web site, <http://www.justice.gov/osg/about-office-1>.

⁵⁵ As Calkins points out, intervention before the Court of Justice is governed fundamentally by Article 40 of the Statute of the Court of Justice, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/staut_cons_en.pdf.

⁵⁶ For an example from Amnesty International in the context of human rights litigation (minimum standards for classification and status of third-country nationals as refugees under Council Directive 2004/83/EC), see Observations by Amnesty International and

cumbersome nature of intervention, the Court of Justice and other courts would benefit from a reform giving them the (non-mandatory) flexibility to open the door to amicus submissions. It may be true that the Advocate General already provides the Court with a well-considered and unbiased point of view, and that is certainly a valuable service; but he can scarcely be regarded as a substitute, as a general matter, for amici curiae.

At the level of the courts of the Member States, while US-style amicus submissions by private parties are not yet rapidly gaining traction, Calkins recalls that the European Commission is, and certain NCAs are, developing an interesting and fairly active role as ‘amici’ in private litigation by virtue of Article 15 of Regulation 1/2003.⁵⁷ As far as the Commission and NCAs are concerned he rightly expects this trend to continue as private litigation in Europe continues to grow. But he also predicts that global trends toward larger-scale, institutionalized litigation will eventually lead to greater amicus involvement by private parties. On the basis of the US record, he would welcome such a development: ‘Just as one hopes that Europe can learn from the US’s experience and achieve the best of private enforcement, one hopes it can learn from the US’s experience with amici.’⁵⁸

D. Dealing with public measures that restrict competition

José Luis Buendía Sierra, ‘Enforcement of Article 106(1) TFEU by the European Commission and the EU Courts’. In this chapter, Buendía Sierra reviews a number of issues in connection with the enforcement of Article 106(1), which, as EU lawyers know, is typically applied in tandem with Article 102, the prohibition of abuse of dominance. One significant part of the chapter⁵⁹ is Buendía’s endorsement of the judgment of the Court of Justice in *Greek Lignite*,⁶⁰ one of a small number of Article 106(1) cases that

the International Commission of Jurists on the case *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (C-199/12, C-200/12 and C-201/12) following the Opinion of Advocate General Sharpston of 11 July 2013, <https://www.amnesty.org/en/documents/POL33/003/2013/en/>.

⁵⁷ For useful information concerning the Commission’s ‘amicus’ practice, see http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html.

⁵⁸ Page 259.

⁵⁹ The chapter addresses several issues not discussed here, including for example the Commission’s case practice, or the ECJ’s application of the threshold matter of whether the entity holding exclusive or special rights is an undertaking, or again the ECJ’s application (or non-application) of Article 106(1) in conjunction with Article 49 TFEU and with Article 56 TFEU.

⁶⁰ Case C-553/12 P *Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)*, EU:C:2014:2083 (setting aside the earlier judgment of the General Court and remanding the case to that court).

the Court has had the occasion to decide in the last decade.⁶¹ The paucity of cases may be related in part, though not entirely, to what Buendía suggests is an untoward passivity on the part of the European Commission, which could presumably seek out more cases if it had the appetite for it. As it transpires, however, the Commission—acting with extraordinary and anomalous discretion in this context—seldom invites Article 106(1) to the ‘family table’.⁶² As he has done elsewhere,⁶³ Buendía on the one hand questions the propriety of this judge-approved discretion and on the other criticizes the Commission for failing to use it to bring more cases.⁶⁴

With regard to *Greek Lignite*, a case that did arise from a Commission investigation, Buendía regards the ECJ’s judgment as consistent with the understanding, correct in his view, that if the Commission can establish that a state measure leads to effects equivalent to an abuse—for example because it effectively extends a dominant position from one market to another—the Commission (and by implication a plaintiff) is not required to show any actual or potential abuse to which the privileged undertaking has been led or could be led by the state measure.⁶⁵ The contested measure in such a case creates ‘inequality of opportunity’: the privileged undertaking is favored, while other undertakings are placed at a disadvantage. In essence, this egalitarian position divorces the responsibility of the Member State from the scope of

⁶¹ Other than *Greek Lignite*, the most significant Article 106 case during that recent time frame is probably Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] ECR I-4863. For cases where the joint application of Article 106(1) and Article 102 TFEU was of some (at least potential) relevance but either did not constitute the core issue or was left undetermined for lack of admissibility, see also Case C-437/09 *AG2R Prévoyance v Beadout Père et Fils SARL* [2011] ECR I-973, paras 68–72; Case C-250/06 *United Pan-Europe Communications Belgium SA and Others v Belgium* [2007] ECR I-11135, paras 18–23; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti Srl v Giuseppe Calafiori* [2006] ECR I-2941, paras 21–26; Case C-295/05 *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado* [2007] ECR I-299, paras 39–45.

⁶² Page 280. In this regard the objection is that, in the Article 106(3) context, it is practically impossible for a party complaining about a state measure to challenge the Commission’s decision not to act on the complaint.

⁶³ See José Luis Buendía Sierra, ‘Exclusive or Special Rights under Article 106 TFEU: An Overview of EU and National Case Law’, *eCompetitions*, article N° 44436, 20 March 2012.

⁶⁴ On the other hand, if one harks back to around 1991, when Article 106(1) TFEU (then Article 90 EEC) began to emerge as an important competition law provision, the formative cases and the later cases in which the Court developed the application of that provision materialized as part of the preliminary ruling procedure (or in Buendía’s terms, indirect enforcement), and hence as part of national litigation. Preliminary references in this context have become relatively more scarce, possibly for want of relevant disputes (a surprising lull, given that Member States have certainly not abstained from adopting or maintaining measures with implications for competition) and perhaps in part because cases that should be referred are not. Further, as Buendía points out, some cases dealing with Article 106(3) directives are at bottom also Article 106(1) cases given that such directives are meant to vindicate the policy expressed in the latter provision.

⁶⁵ Similarly, see the Opinion of Advocate General Wathelet in Case C-553/12 *Commission v DEI*, EU:C:2013:807, paras 55–65.

the prohibition contained in the relevant competition rule, Article 102.⁶⁶ And, as Buendía explains, the judgment of the ECJ is not merely a vindication of its old case law; it features an innovative and rather expansive move. The Court followed the effects doctrine

to its logical consequence. Indeed, the judgment states that *any state measure* producing anticompetitive consequences would infringe Articles 106 and 102 TFEU. Contrary to previous judgments, this statement is not confined to the ‘extension of a dominant position’ from one market to another caused by an exclusive or special right. It also applies to the original grant of a stand-alone exclusive or special right to a company.⁶⁷

In Buendía’s view, the consummation of the effects doctrine makes sense because it results in a harmonization of the application of Article 106(1) and the application of the Treaty’s free movement rules—where the scope of the prohibitions tends to be broad and where the burden thus often rests with the Member State to justify its actions.⁶⁸

For my own part I have been more skeptical of the ECJ’s judgment in this case,⁶⁹ but such criticism is now academic. The Court has taken a firm stand, and as Buendía notes, Article 106 is pregnant with ‘enormous possibilities’ and ‘far-reaching content’.⁷⁰ What fruit and how much of it the provision will bear are to be seen.

Daniel Crane, ‘Hard Look Review of Anticompetitive State Action’. Crane’s chapter extends the subject of public restraints of competition by introducing a semi-abstract and normative evaluation of different possible models of judicial antidotes to abusive regulation. The first two models—the ‘representation reinforcement’ model (ie a particular form of political accountability model, drawn from democratic theory and mapped onto the *Parker-Midcal* experience in the US) and the ‘substantive review’ model (ie the EU model)—are found to be flawed, and accordingly they are rejected.⁷¹ Crane instead advocates a third model, the hard look review model, which is based on the

⁶⁶ There is thus an asymmetry here compared to the ECJ’s jurisprudence relating to Article 4(3) TEU and Article 101 TFEU. See in particular Case C-2/91 *Wolf Meng* [1993] ECR I-5751 and Case C-245/91 *Ohra Schadeverzekeringen NV* [1993] ECR I-5851.

⁶⁷ Page 288.

⁶⁸ Buendía has long argued that the old *Corbeau* case—although it was ostensibly an Article 106(2) case, and though the Court did not enter into an analysis under Article 106(1)—essentially signaled a convergence between the competition rules in this context and the free movement rules.

⁶⁹ See Mel Marquis, ‘The State of State Action in EU Competition Law and a National Competition Strategy for China’, in Niels Philipsen, Stefan Weishaar and Guangdong Xu, eds., *Market Integration: The EU Experience and Implications for Regulatory Reform in China*, Springer Verlag, 2015, chapter 2.

⁷⁰ Pages 288–289.

⁷¹ The two basic models are discussed in further detail in Daniel Crane, ‘Judicial Review of Anticompetitive State Action: Two Models in Comparative Perspective’, 1 *Journal of Antitrust Enforcement* 418 (2013).

practice of US administrative courts imposing a certain procedural discipline on regulatory agencies under their control. The principal features of hard look review are described in section 2 of the chapter. They include first of all the requirement that an agency build a public record in its decision-making process, on the basis of which it must prepare an adequately reasoned, internally consistent decision. In explaining its decision the agency must explain why obvious alternative solutions were passed over and must show how ‘significant’ public comments were taken into account. However, the nature of the scrutiny remains procedural and not substantive—the court does not itself balance interests, and it does not substitute judgment (for example, by insisting on the least restrictive alternative). The core objective of this approach is to ensure that the decision-making process is publicly minded, and that it is not driven by private interests to the detriment of the common good.

Underlying Crane’s analysis are his assumptions that the representation reinforcement model and the substantive review model are deficient. One could perhaps raise objections with regard to the assumed weaknesses of the substantive review model in certain institutional contexts. In particular, the analogy between the era of ‘Lochnerism’ and substantive due process in the early 20th Century in the United States, on the one hand, and the relatively rigorous scrutiny by the ECJ of anticompetitive legislation in the EU context on the other hand, may be deceiving. The legitimacy deficit, as it were, that tainted the judicial activism of the *Lochner* era⁷² was closely linked to the fact that substantive due process was developed according to a certain ideological interpretation of the US Constitution by the US courts.⁷³ By inferential reasoning, it was held in a number of cases that regulations imposing, inter alia, health and safety standards in various sectors were contrary to the constitutional clauses prohibiting the government from depriving

⁷² *Lochner v New York*, 198 U.S. 45 (1905). The case is reviewed in, among others, Daniel Crane, ‘Lochnerian Antitrust’, 1 *New York University Journal of Law and Liberty* 496, 498–501 (2005).

⁷³ While the word ‘ideological’ can appear to be pejorative, it may be useful to recall that most courts of significant jurisdiction, duty-bound as they are to decide consequential disputes, are seldom capable of escaping entirely from their conscious and unconscious ideological inclinations. To a certain extent, something of a ‘third man’ argument may apply here: if a judge (assuming she is not a perfect Hercules) seeks, for the sake of scruple, to distance herself from her own conscious ideology-driven views, a certain ideology—albeit a different one—may creep back into the process of deciding how to achieve ‘objectivity’ and overcome the biases of which she is aware. Despite the reference to US courts in the age of *Lochner* espousing a certain ideology, one may find ideology permeating the choices of the courts that later repudiated *Lochner*, not to mention, undoubtedly, those of innumerable other courts. It is fine for Justice Holmes to say that ‘a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*’, and that it is ‘made for people of fundamentally differing views’, but an ideological perspective may be unearthed here too without much difficulty. The validity of the statement itself may also perhaps be questioned, depending on how narrowly or broadly it is construed, but that discussion may be omitted here.

persons of their liberty and property without due process of law. The hermeneutic approach of the Supreme Court in that context relied on something akin (speaking anachronistically) to penumbras and emanations—there is certainly no explicit constitutional rule forbidding the federal or state governments from adopting anticompetitive measures, and even the long history of the ‘dormant’ Commerce Clause was based on an extrapolative reading of the Constitution.⁷⁴ One may therefore plausibly argue that the *Lochner* saga bears little resemblance to the judicial control of anticompetitive state measures in Europe, in particular because Article 106 TFEU is quite explicit that Member States must avoid adopting or maintaining (unjustified) anticompetitive measures where a public or privileged undertaking is concerned, and because Article 107 TFEU explicitly prohibits (unjustified) state aid.⁷⁵ In the contexts of these Articles, it is submitted, there is no countermajoritarian difficulty with judicial intervention or, as the case may be, with intervention in the first instance by the European Commission, as the relevant specific competences have been built into primary law.⁷⁶ Admittedly and perhaps ironically, the ECJ’s *Van Eycke*⁷⁷ line of case law rests on inferential reasoning,⁷⁸ but the subsequent limitations resulting from cases such as *Ohra* and *Meng*⁷⁹ may be interpreted as a move of judicial conscience. Ultimately, the judicially

⁷⁴ Specifically, the relevant clause is Article I, Section 8, which in pertinent part provides that: ‘The Congress shall have the Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes’. It is of course recognized that local protectionism was an important catalyst behind the Philadelphia Convention in 1787. See, eg Julian Eule, ‘Laying the Dormant Commerce Clause to Rest’, 91 *Yale Law Journal* 425, 429–435 (1982).

⁷⁵ The twice-appearing word ‘unjustified’ in this sentence punctuates the general point being made about the competence and hence the legitimate authority conferred by the Treaty upon the Court of Justice to review public restraints of competition—and in so doing to arbitrate if necessary between potentially conflicting policy interests, and potentially (certainly not automatically) to displace legislative or regulatory choices. This feature of supranational governance implies a judicial role which causes discomfort for many both within and outside Europe. See, for example, Crane’s discussion at pages 317–319 (which, *inter alia*: draws a distinction between competition as a value of somewhat lesser significance and other interests of ‘moral principle’ such as gender classifications and limitations on free speech; and maintains that judges are ill-suited ‘to engage in a sort of open-ended cost-benefit analysis that would sometimes result in the judges substituting their view of what interests are important for those in the executive or legislative branches’).

⁷⁶ While the prohibition contained in Article 106 is clearly enshrined in the Treaty, the direct effect of Article 106 (with the possible exception of the second sentence of Article 106(2), since the direct effect of that sentence has not yet been established with certainty) is a separate issue. The ability of claimants in national proceedings to invoke Article 106 has been confirmed by the hermeneutical practice of the ECJ, and indeed the very foundations for the direct effect of sufficiently clear and precise Treaty provisions were a product of the judicially driven constitutionalization process of the 1960s. To that extent, the debate about the ECJ’s judicial activism, documented in many classic commentaries especially since the 1980s (and originally often linked to what was in those days the diminishing control of the Council and the rise of supranational governance), has never really subsided.

⁷⁷ Case 267/86 *Pascal Van Eycke v ASPA NV* [1988] ECR 4769.

⁷⁸ The ironic aspect is that while the Treaty is explicitly concerned with public measures in scenarios involving public and privileged undertakings, there is no such explicit apprehension with regard to cartels.

⁷⁹ Both cases are cited above n 66.

determined expansive nature of the duty of sincere cooperation (Article 4(3) TEU), which serves inter alia as a gap-filler, may still invite charges of judicial activism, but these days the main battlegrounds in relation to public restraints (as exemplified by the above discussion of the chapter by Buendía Sierra) are Article 106 and the state aid regime. Having said all of that, it must be recalled that Crane's discussion is semi-abstract; he recognizes that the hard look approach may not fit all institutional environments.⁸⁰ Likewise, the above objection relating to Europe's 'constitutional' decision to regulate public restraints as a matter of explicit primary law is jurisdiction-specific and would be irrelevant, for better or worse, in many actual and future contexts.

PART 2: *Legitimate Enforcement of Competition Law*

Renato Nazzini, 'Parallel Proceedings in EU Competition Law: Rethinking *Ne Bis In Idem* as a Limiting Principle'. The problems of concurrent and consecutive competition enforcement actions have been latent in Europe since the 1960s,⁸¹ but they have intensified since the adoption of Regulation 1/2003 and the related maturation of Europe's multi-level enforcement network.⁸² The fact that Article 50 of the EU Charter of Fundamental Rights (*ne bis in idem*) is binding primary EU law merely punctuates the matter.⁸³ Accordingly, the relationship between effective and legitimate enforcement is here once again front and center, and it is not surprising to find that Nazzini believes that the two objectives are inadequately balanced. Discretionary prosecutorial restraint, he says, does not sufficiently protect against the risk of multiple proceedings and decisions against the same undertakings for the same conduct. If the *ne bis in idem* principle were (*de lege ferenda*) construed properly, however, it would effectively limit (*ex post*) the 'vexatious and inefficient exercise of concurrent jurisdiction in competition matters within the Union'.⁸⁴

⁸⁰ See page 325.

⁸¹ See Case 14-68 *Walt Wilhelm and others v Bundeskartellamt* [1969] ECR I.

⁸² See, eg Giorgio Monti, 'Managing Decentralized Antitrust Enforcement: *Toshiba*', 51 *Common Market Law Review* 261 (2014).

⁸³ Besides the protection that follows from the general principles of EU law and indirectly from the ECHR (Protocol 7, Article 4), as Nazzini points out, the *ne bis in idem* principle is expressed in various other legal instruments such as Chapter 3 of the Convention implementing the Schengen Agreement and Article 3(2) of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant.

⁸⁴ Page 358. In some measure the risk of multiple proceedings is compounded by the ECJ's holding in *Tele2 Polska* that NCAs are precluded under Regulation 1/2003 from finding positively that an undertaking has not committed an infraction under the EU competition rules. The argument that the holding in that case justifies a more flexible interpretation of *ne bis in idem* was rejected by the General Court in Case T-402/13 *Orange v Commission*, EU:T:2014:991. The latter judgment was not appealed.

The Court of Justice should thus substantially modify the approach it has taken to *ne bis in idem* in connection with competition law proceedings in the EU's system of parallel competences, and should tighten up the applicable limiting principles in that regard.⁸⁵ To suggest how this could be done, Nazzini lays out a six-part survey of the role of *ne bis in idem* in a variety of contexts, mainly as it pertains to preclusion or non-preclusion of multiple proceedings within the EU.⁸⁶ A number of points emerge from this survey. For example, Nazzini shows that the ECJ's restrictive reading of *ne bis in idem* in the context of parallel or multiple competition law proceedings has in fact resulted in a fragmentation of the Court's own case law, when compared to the jurisprudence in the European Arrest Warrant and the Schengen contexts.⁸⁷ In the latter contexts, the Court does not impose the high hurdle of demonstrating that a second prosecution is driven by the same 'legal interest'; identity of the relevant conduct is the core issue. More fundamentally than the fragmentation issue, it may well be that the bar has been placed so high that the *ne bis in idem* principle no longer effectively serves its function of securing repose and protecting fundamental rights. Nazzini suggests that *ne bis* under Article 50 of the EU Charter and as a general principle of EU law should be interpreted in such a way that two infringements constitute the same 'offense' when they arise from the same facts or facts inextricably linked in terms of space, time and subject matter.

Drawing inspiration from Advocate General Sharpston and from the ECJ's case law in the Schengen Agreement context, Nazzini also offers a practical criterion by which the *ne bis in idem* principle might be applied. According to this criterion,

a distinction should be made between decisions to close a case that are based on a preliminary and summary investigation, which should not bar further proceedings [in the ECN context], and decisions to close a case that follow a significant consideration of the merits of the case and are adopted in a procedure where the defendant has had a full opportunity to exercise his rights of defence, which should bar further proceedings whatever the formal classification of the final decision.⁸⁸

⁸⁵ The arguments are also presented in Renato Nazzini, 'Fundamental rights beyond legal positivism: rethinking the *ne bis in idem* principle in EU competition law', 2 *Journal of Antitrust Enforcement* 270 (2014).

⁸⁶ Nazzini also addresses the scenario where a non-EU authority has already condemned (or 'acquitted') an undertaking, and where a competition authority within the EU investigates the same undertaking in relation to the same facts. However, in this global context—taking account of public international law—there is no precise equivalent to the *ne bis in idem* principle, and EU law does not recognize *ne bis* protection in such scenarios. Nazzini accepts and endorses the state of EU law on this point.

⁸⁷ For further discussion of the *ne bis* principle in these contexts, see John Vervaele, 'Schengen and Charter-related *ne bis in idem* protection in the Area of Freedom, Security and Justice: *M and Zoran Spasic*', 52 *Common Market Law Review* 1339 (2015).

⁸⁸ Page 360 (citing the Opinion of Advocate General Sharpston in Case C-467/04 *Giuseppe Francesco Gasparini* [2006] ECR I-9199, para 96 (suggesting preclusion where

In Nazzini's view, this two-part test (assessment of the merits; full exercise of the rights of defense) should also be applied for the purpose of determining whether a commitment decision under Article 9 of Regulation 1/2003 precludes later proceedings on *ne bis in idem* grounds. Under this approach, and in cases where the test is met, fundamental rights would effectively override the scheme of the Regulation and its recitals, which assume that Article 9 has no such preclusive effects. The test would also have implications for scenarios where the EU Courts invalidate an infringement decision of the Commission on purely procedural grounds, which opens the possibility for the Commission to reopen its proceedings, correct the defects and readopt a decision. Here Nazzini suggests an intermediate position whereby a second round of proceedings could ensue if necessary to secure effective enforcement, and if the procedural errors were either not attributable to the competition authority or excusable, which is to say they must not have been caused by the authority's gross negligence or bad faith. Applying a nuanced version of *ne bis* in this way would seem likely to encourage an authority to be more meticulous the first time around. That might also conceivably (and all else being equal) lengthen the average duration of proceedings but, if so, the tradeoff may be worthwhile.

Nazzini's conclusions on these points and others are summarized conveniently in section 4 of his chapter.

Wolfgang Kirchhoff, 'Reflections on Parallel Enforcement, Fundamental Rights and the Rule of Law in the Competition Law Context'. As noted earlier,⁸⁹ Germany is something of a poster child as regards the need for harmonized rules on sanctions. Perhaps the most prominent issue in that context is the partially divergent position on parental liability. In this chapter, Judge Kirchhoff does not discuss parental liability as such but he discusses the related issue of the extent to which the liability of an undertaking to pay fines survives or is extinguished when the undertaking is transformed or restructured in the sense of German company law. Other issues relevant to the relationship between effective enforcement and fundamental rights protection are also discussed, such as the principle of *nullum crimen, nulla poena sine praevia lege poenali* and the variant of that principle contained in Article 7(1) ECHR.

With regard to successor liability following a transformation of an undertaking, Kirchhoff refers to the restrictive jurisprudence of the German Federal Court of Justice (Bundesgerichtshof), and in particular its interpretation of Section 30 of the German Act on Regulatory Offences.⁹⁰ According to that

the first proceedings involved 'significant consideration' of the merits); and citing Case C-469/03 *Filomeno Mario Maraglia* [2005] ECR I-2009, paras 30 and 34 and Case C-150/05 *Jeon Leon Van Straaten v Netherlands* [2006] ECR I-9327, paras 56–60).

⁸⁹ See above the summary of the chapter by Konrad Ost.

⁹⁰ Section 30 governs regulatory fines imposed on legal persons and associations. For an English-language version of the Act, see http://www.gesetze-im-internet.de/englisch_owig/englisch_owig.html#p0143.

jurisprudence, where a company that has been fined by the Bundeskartellamt merges with another company, or where the company's assets are sold, the ability of the Bundeskartellamt to pursue the successor in interest becomes very limited. Successor liability was accepted only where the old and the new assets were identical or nearly so from a commercial perspective.⁹¹ A broader approach was considered contrary, in the Federal Court's view, to the *nulla poena* principle as expressed in Article 103(2) of the German Basic Law. It was believed that this rather wide gap in the German law on successor liability is for the legislator, not the Federal Court, to close. The legislator did later address the issue, but as Kirchhoff points out, the solution was merely partial and may not suffice to forestall determined efforts to circumvent the collection of significant fines. In national litigation in Germany the argument has been raised that Article 5 of Regulation 1/2003 may imply a directly applicable rule of successor liability that would be independent of the Act on Regulatory Offenses. However, the Appellate Court of Düsseldorf rejected this proposition on a variety of grounds including, unsurprisingly here again, the principle of *nulla poena*. In my view, a plain-language reading of Article 5 seems to support the conclusion that the provision does not have the purpose or effect of extending the Commission's sanctioning powers to the NCAs. Nevertheless, since national laws may not deprive the EU competition rules of their effectiveness, a preliminary reference to the ECJ would have been welcome even assuming under Article 267 TFEU it was not obligatory since the Court of Appeal is a lower court. On appeal, it appears that the Federal Court of Justice would in principle be required to make such a reference, provided the *acte clair* doctrine does not apply.⁹² Judge Kirchhoff doubts that Article 5 and its proper interpretation should be classified as '*acte clair*', though he circumspectly refrains from taking a position on the merits of the case.

The discordance between EU law and national law and the corresponding tension between fundamental principles lead Kirchhoff to an incidental but

⁹¹ This is quite a contrast compared to the Commission's powers under Article 23 of Regulation 1/2003. As the Grand Chamber of the ECJ has held (in a case where Italian law self-consciously aligned itself on the parallel provisions of Regulation 1/2003), 'the legal forms of the entity that committed the infringement and the entity that succeeded it are irrelevant. Imposing a penalty for the infringement on the successor can therefore not be excluded simply because, as in the main proceedings, the successor has a different legal status and is operated differently from the entity that it succeeded.' Case C-280/06 *Autorità Garante della Concorrenza e del Mercato v Ente tabacchi italiani—ETI SpA and Others* [2007] ECR I-10893, para 43.

⁹² Ost affirms flatly in his chapter (page 48) that 'the ECJ will have to deal with that question'. For the classic jurisprudence on the *acte clair* doctrine (ie, that a national court need not refer where there are objective grounds of obviousness), see Case 283/81 *CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415, paras 16–20. A key criterion for the application of *acte clair* is that, '[b]efore it comes to the conclusion that [a referral is unnecessary], the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice'.

significant observation regarding the harmonization of enforcement powers and procedures in Europe. As he says:

In the past, compelling political reasons may well have prevented the European legislator from stipulating uniform powers of investigation and penalties for NCAs equal to those of the Commission. But in an internal market which requires a level playing field for undertakings, serious differences in investigation powers and sanctions between the Commission and NCAs as well as among NCAs are unacceptable in the long run and contradictory to the principles of a system of parallel enforcement of EU competition law.⁹³

Kirchhoff adds that the need for harmonization is further accentuated by the need for the ECN to function properly, given that an authority hobbled by national law limitations cannot be regarded as ‘well placed’ from a Union-wide point of view to handle cases. This perspective evokes, once again, the neofunctionalist nature of the modernization enterprise.

Two other cases highlighted by Kirchhoff may be mentioned here briefly. First, there is *Outokumpu’s* complaint before the German Federal Constitutional Court essentially challenging the lawfulness of the EU fining system and of its application, notwithstanding an earlier judgment by the ECJ to the contrary. In regard to this case Kirchhoff recalls the classic jurisprudence of the Constitutional Court, which normally (in theory) abstains from interfering on condition that the EU institutions ensure the protection of fundamental rights to a standard equivalent to that guaranteed by the German Basic Law. Conceivably, an indirect challenge might be brought before the ECtHR, although the issue of whether the Member States may be held collectively and vicariously responsible for the acts of the Court of Justice remains rather unclear—one would think that attributability poses problems in this regard.⁹⁴ The other case to which Kirchhoff refers is relevant by analogy to the basic

⁹³ Page 388.

⁹⁴ The residual responsibility of the Member States for the acts of the Union (again, if attributability can be established) seems to be accepted in principle by the ECtHR. See Case 24833/94, *Matthews v United Kingdom*, 18 February 1999, para 32 (‘The Court observes that acts of the [European Community] as such cannot be challenged before the Court because the [Community] is not a Contracting Party. The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be “secured”. *Member States’ responsibility therefore continues even after such a transfer.*’ (emphasis added)). See also the aborted Case 56672/00, *DSR Senator Lines GmbH*, 10 March 2004 (where an application against all of the then-15 Member States of the Community—on the ground that the applicant’s obligation to pay a fine of 273 million euros imposed by the Commission before the appellate process played out infringed Article 6 ECHR—was found to be moot and inadmissible by the ECtHR given the annulment of the fine on other grounds by the Court of First Instance); Case 51717/99, *Guérin Automobiles EURL v The Member States of the European Community*, 4 July 2000 (where a judgment of the ECJ was indirectly challenged; application inadmissible not because it indirectly contested an act of the ECJ but because the claim lodged concerning a right of information with regard to judicial remedies fell outside the scope of Articles 6 and 13 ECHR).

principle of self-assessment that is inherent to the EU's post-modernization universe. Are the requirements of competition law so indefinite and approximate as to be unconstitutionally vague? More precisely, does the system of self-assessment respect the requirements of accessibility and foreseeability under Article 7 of the ECHR?⁹⁵ As Kirchhoff points out, the Swiss Federal Court considers that Swiss competition law contains indefinite legal concepts such as the 'abuse of a market-dominating position' prohibited by Article 7 of the Kartellgesetz. It emerges from an *a contrario* reading of the case law that the Swiss court would regard such a concept as impermissible were it not for the possibility to notify the Swiss Competition Authority in advance before implementing a practice that might raise competition concerns,⁹⁶ a procedure that provides a measure of *ex ante* certainty and thus 'compensates' for the indefinite nature of Article 7. Kirchhoff (correctly) considers, however, that it would be difficult to attack the very foundations of the post-modernization edifice in the EU context, and that the more conceivable scenario that could arise would be a challenge to the particular application of sanctioning powers in circumstances where there is insufficient experience and positive law and guidance—that is to say, the sanctioning of 'grey area' practices where the boundaries of legitimate conduct are unclear and cannot be discerned despite reasonable efforts to comply. With regard to past practice, as far as certain individual cases are concerned, opinions have differed.

William Kovacic, 'Creating a Respected Brand: How Competition Agencies Signal Quality'. This chapter begins with the simple observation that '[a]n agency with a strong brand stands a greater chance of being effective than one with a weak brand',⁹⁷ the term 'brand' being a metaphor for reputation and perceived organizational identity. Brands, Kovacic says, can perform two positive functions for an enforcement agency: they can provide information about what the agency does; and they can signal institutional quality. The foundations for a good brand in this context include: strong substantive programs and judicious selection of which programs to operate; sound procedures; solid proficiency and capacities; and a 'healthy' organizational culture, the latter implying qualities such as integrity, courage and serious commitment

⁹⁵ In EU law, one cannot say that the system of self-assessment is *inherently* contrary to the principle of legal certainty (such a position would seem quite radical), but that principle does constrain, for example, the methods employed to determine whether an undertaking's conduct is anticompetitive. See Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, para 202 ('[assessing the legality of the defendant undertaking's pricing solely on the basis of its own costs and prices is consistent with legal certainty insofar as it] allows that undertaking, in the light of its special responsibility under Article 82 EC, to assess the lawfulness of its own conduct').

⁹⁶ See Article 49a of the Kartellgesetz. If the notification is made a minimum of five months in advance and if the competition authority does not open an investigation, immunity from fines for the practice in question can be obtained.

⁹⁷ Page 393.

to continuous, long-term improvement. If the agency is successful in signaling quality on the basis of those foundations, its brand becomes a significant capital asset that can help the agency achieve its goals. By virtue of its strong brand the agency enjoys to some extent a ‘halo’ effect with respect to a variety of interlocutors and stakeholders such as judges, legislators and any relevant supervisory committees or paymasters, other public regulators, and civil society—not to mention the broader domestic public and international audiences. The foregoing considerations suggest a virtuous circle: by establishing effective enforcement and effective organizational activities, the agency earns a strong brand which allows it to further strengthen its effectiveness. Moreover, the process of branding and the definition and evolution of a brand must certainly be key to the agency’s self-understanding, self-expectations and identity, all of which are of great significance.

Section 3 of Kovacic’s chapter provides a detailed set of factors that contribute to the definition of a brand and to the level of brand quality. Many of these could be described as superior agency practices and (long-term) good governance techniques. These will not be enumerated in full here; suffice it to note a few brief points that emerge. One is that Kovacic understandably cautions against entrusting an enforcer with a mission that is too variegated. Where the agency is put in that position, the process of priority setting may be confused; and *messaging*, both externally and internally, may be too diluted. In those circumstances, brand quality and hence effectiveness may be jeopardized. Of course, the risks of mission fragmentation and paralysis tend to increase as the agency’s assigned tasks grow increasingly incompatible (leading, in the worst case, to ‘schizophrenia’), and where the diverse demands placed on the agency stretch the limits of its capacity.

Another point raised, and a consistent message in Kovacic’s voluminous body of work, concerns the sometimes deceptive link between an agency’s quantitative output—more infringement decisions and prohibitions (provided they generally withstand appeals), more investigations, ever-higher fines—and its quality, effectiveness and true impact on the economy. The ‘more is better’ assumption exerts a strong influence on brand image, and one therefore would think this implies a tradeoff. On the one hand, an agency’s efforts to be visibly active can represent an opportunity cost: the agency might refrain from more meaningful investments in projects such as advocacy programs, market studies, self-evaluations and ‘policy R&D’, and as Kovacic has often said, there is often too much focus on activity levels as a performance indicator. On the other hand, as already noted, the enhancements of brand strength provide the agency with advantage. Taking a pragmatic perspective, Kovacic points out that there may be circumstances—eg where there is new leadership at the agency (which might be linked to a change in the incumbent political party) or where the agency itself is new—where the authority is enabled, by pursuing a visibly active agenda with flashy output, to accumulate ‘capital’ to be spent later, for example in the form of a (pro-competitive but perhaps contra-populist)

decision not to prosecute. Notwithstanding this acknowledgement, however, Kovacic comes back to the fallacy of easy measurables: ‘To say that an agency is bringing lots of cases, or collecting substantial fines, does not establish that its program is improving economic performance—the genuine test of effectiveness’.⁹⁸ He goes on to discuss how the tendency to overvalue cases and fines while neglecting the deeper question of effectiveness is reinforced by the confluent professional interests of various stakeholders who benefit from high levels of agency intervention.

The final selected point to be mentioned here concerns quality control mechanisms, both at the level of the agency and its investigatory and decision-making processes, and at the level of courts reviewing the agency’s decisions—assuming that judicial review is a reality.⁹⁹ The challenge of quality control (including the challenge of an agency’s confirmation bias), in terms of the rigorous testing of inculpatory evidence and the appearance of procedurally fair decision-making, is particularly acute where a number of institutional duties—deciding when to prosecute, carrying out the prosecution, determining liability and deciding the sanction—are combined within a single body. In those circumstances, the adequacy of checks and balances is of vital importance. Judicial review is one obvious form of ensuring quality control, and one may expect optimistically that if the agency is held to a rigorous standard on appeal, then it will internalize that standard in its future activities. As an example of this positive dynamic, Kovacic recalls the prominent 2002 annulments of Commission merger decisions by the Court of First Instance. On the other hand, if a court, for statutory or other reasons, fails to ensure that the relevant evidence is robust or that due process is respected, quality control may be missing at both levels. All of this is crucial for institutional design when regimes are being introduced or reformed. It can also have important implications for the perceived quality of the brand of the agency, not to mention that of the relevant judicial system.

PART 3: *Effectiveness and Legitimacy in International Enforcement Cooperation*

Alberto Heimler, ‘Effectiveness of Enforcement Cooperation in Developing Countries: What Role Can Existing Institutions Play?’ In sections 2 and 3 of his chapter, Heimler reviews the star-crossed romance between trade and

⁹⁸ Page 404.

⁹⁹ This is not the case in all jurisdictions, as illustrated notably by the Chinese enforcement system.

competition within the framework of the WTO, and the not coincidental rise of the ICN as a relatively successful locus of international cooperation in competition matters.¹⁰⁰ Section 3 begins with some of the ICN's history but Heimler shows some of the difficulties the ICN has faced in its evolution. His main criticism, among others, is that the ICN fails to function as a motor of convergence which could support and provide useful guideposts for the agencies of developing countries. For all the apparent but ambiguous success of some of its Recommended Practices (particularly in relation to merger notification and review procedures), Heimler notes a 'progressive abandonment' of the recommendation approach, and a turn toward a mere 'encyclopedic' reporting of the variety of practices prevailing worldwide as regards given fields of enforcement and practice. At the end of section 3, Heimler suggests a set of initiatives which in his view would get the ICN back on track with its proper role as he sees it.

But the core of Heimler's chapter, presented especially in sections 4 and 5, concerns the tribulations developing countries have experienced in their attempts to establish and maintain effective competition enforcement regimes. The starting point in this regard is that, while competition laws as such now encircle the globe, the factors necessary to breathe life into them—money, adequate human capital, enforcement capacity and so on—are all too often lacking. There were many reasons to be optimistic about the potential capacity of regional cooperation, including the conclusion of competition chapters in regional trade agreements and in some cases the establishment of supranational authorities, to fill some of the enforcement gaps. But as Heimler underlines, most of the attempts to achieve a functioning system of regional competition enforcement have met with little success or none at all. To substantiate this, Heimler provides a useful summary survey of the main experiences with regional cooperation efforts,¹⁰¹ and he points out a number of flaws in their design, governance and implementation. Depending on the region, these flaws include, to name only a few: the absence of adequate cross-border merger control provisions; jurisdictional uncertainty, eg due to overlapping memberships; insufficient independence from national interests; or a lack of flexible case allocation mechanisms (which Heimler refers to, in a non-technical sense, as a principle of 'subsidiarity'). More generally and crucially, the political will necessary to establish and maintain (and fund) an effective system of law and of enforcement is highly variable across numerous jurisdictions

¹⁰⁰ For recent discussion of the links between these stories, see Mel Marquis, 'Idea Merchants and Paradigm Peddlers in Global Antitrust', 28 *Pacific McGeorge Global Business and Development Law Journal* 155 (2015).

¹⁰¹ Specifically, Heimler discusses Mercosur, the Southern African Customs Union, the Andean Community, COMESA, CARICOM, and WAEMU. Special attention is given in section 5 of the chapter to the Southern African Development Community.

worldwide. In section 6, Heimler holds out the relatively deep and innovative ‘ANZCERTA’ arrangements between Australia and New Zealand in relation to competition cases as an example of how developing countries could cooperate effectively without the need for elaborate, costly and ultimately ineffective supranational authorities and frameworks.

In light of this chapter and other similar findings one might say that, despite all of the strides made over the last 20 years, the global competition project—insofar as enforcement in most developing countries is concerned—has faltered. And it is up to the competition community to imagine more creative ways to address the substantial asymmetries among agencies in their credibility as enforcers. Experience suggests that regional cooperation agreements cannot by themselves stimulate the necessary mix of capacity, incentives and political will to advance and achieve effective competition enforcement in developing countries. For Heimler, the more promising strategy is a combination of deeper bilateral agreements for case practice issues and, at the level of established international organizations, renewed efforts to achieve closer procedural and substantive convergence.

Antonio Capobianco, John Davies and Sean Ennis, ‘The Need for International Cooperation in Merger Enforcement’. The need for cooperation arises from the Cambrian proliferation of merger regimes around the world, from extraterritorial claims of jurisdiction and from the rarity of one-stop shop mechanisms. In those circumstances, the risk of divergent outcomes is substantial.¹⁰² Of course, one may maintain that a criss-crossing web of regimes is better than none, but the question is how to secure the gains of the worldwide quilt of merger laws while minimizing costs and risks. In this chapter the authors begin by breaking down the reasons why two or more jurisdictions might reach different regulatory results when reviewing essentially the same merger, bearing in mind that differences among merger decisions may be completely justified by different circumstances. Notably, these reasons include: differences in legal tests, or in attitudes toward efficiency or in underlying goals; varying conditions of competition; differences in evidence; and the happenstance of different authorities making different judgment calls. This range of challenges implies that convergence on substantive standards provides little assurance of convergent outcomes.

¹⁰² This theme is discussed in expanded form, not only relation to mergers but to cartels as well, in OECD Background Paper, Challenges of International Co-operation in Competition Law Enforcement (2014), <http://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf>. The Background Paper is also available from the SSRN site: see Antonio Capobianco, John Davies and Sean Ennis, ‘Implication of Globalisation for Competition Policy: The Need for International Co-operation in Merger and Cartel Enforcement’ (20 June 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2450137. For further discussion, with more specific focus on experiences in non-OECD countries, see UNCTAD Secretariat, International Cooperation in Merger Cases as a Tool for Effective Enforcement of Competition Law (27 April 2015), http://unctad.org/meetings/en/SessionalDocuments/tdrbpcnf8d4_en.pdf.

The authors also discuss some of the costs of disagreement among authorities, which include negative externalities imposed on other jurisdictions in scenarios where either the jurisdiction with the strictest approach *de facto* blocks a deal with global effect despite the desirability of the merger in other jurisdictions, or where for example structural remedies affecting undertakings' upstream operations have similar spillover effects. There is good cause for concern since the multiplication of veto players has led to ever greater scope for externalities and irrationality in the global regulatory (non-)framework. At least in theory, the odds that a global merger will be prohibited increase, and the most interventionist veto player may become, so to speak, a hostage taker. Beyond the direct costs occasioned by this fragmentation, one can also speculate that market operators may be deterred from undertaking desirable global transactions, or that they may structure a transaction in sub-optimal ways to mitigate risk. There was a time when perhaps an optimistic perspective prevailed, in particular because *GE/Honeywell* led to redoubled efforts between the EU and the US to avoid conflicts. But particularly given the emergence of China's MOFCOM as a potent merger regulator and given its tendency to tread its own path—sometimes prohibiting deals on puzzling grounds—the global situation as regards large international mergers appears to have regressed. At the same time, there do not currently seem to be either *de jure* or *de facto* mechanisms in place that can adequately address the problems described. As the authors point out, there is a glaring and unfortunate gap in governance. Following the completion of this chapter by Capobianco, Davies and Ennis, the OECD Council adopted its Recommendation on International Co-operation on Competition Investigations and Proceedings,¹⁰³ but—notwithstanding its generally salutary approach—good cooperation practices among OECD countries cannot fundamentally address that gap.

PART 4: *Issues for Courts and Perspectives on the Judicial Role*

Gerald Barling, 'The UK Competition Regime: Developments and Further Proposals for Change'. As the title suggests, Barling's chapter was prepared midstream prior to the implementation of a number of profound reforms to the UK competition law system. The essay discusses private and public enforcement in the UK, and the position of the Competition Appeal Tribunal (CAT) in the midst of these fundamental changes. Putting the reforms in context, he underlines first of all the flawed and illogical arrangements

¹⁰³ <http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf>.

established when the Competition Act 1998 was amended by the Enterprise Act 2002, specifically in relation to the CAT's inability in a private damages suit to decide whether a practice constituted an antitrust infringement. This limitation in turn stunted the growth of private enforcement in the UK.

Barling in his essay welcomed the Consumer Rights Bill (now the Consumer Rights Act—see below) for introducing many new features including stand-alone claims for damages before the CAT, powers of injunctive relief (essential, for example, in stand-alone cases of alleged abuse of dominance) and for the provisions on both opt-in and opt-out collective actions (whereas, previously, only opt-in actions were possible—with anemic results). With specific regard to the collective action provisions, Barling found them in general to be a positive step forward. He was surely justified in saying that '[t]here is simply no point in giving citizens rights if there are no effective remedies and procedures enabling those rights to be enforced'.¹⁰⁴ (As an aside, I would transpose this view beyond the UK: if a Member State simply adopts an opt-in collective action procedure without adding some controlled possibilities for an opt-out procedure, it is akin to taking no action whatsoever.¹⁰⁵) Having welcomed the new regime in principle, Barling reacted to the envisaged provisions, pointing out for example that reasonable judges may fiercely disagree about whether, for certification purposes, multiple claims are the same, similar or related. With regard to the BIS consultation on streamlining appeals in regulatory and competition law cases,¹⁰⁶ Barling notes his opposition to any weakening of the CAT's standard of review (ie, by substituting a legality standard for the current merits review standard); he further observes fallacies with respect to the possibility floated by the Government of limiting the use of new evidence in appeals against the CMA's decisions.¹⁰⁷ In a coda to his

¹⁰⁴ Page 530.

¹⁰⁵ To be more explicit, this is a criticism I respectfully lodge with the European Commission and the opt-in constituencies that dissuaded the Commission from treading the bolder path. However, with regard to the Commission's position, Barling's assessment is more charitable. 'Understandably', he says, the Commission 'does not ask all [the Member] States, with very differing levels of sophistication in their justice systems, to attempt to introduce opt-out procedures'. Page 536. This may be a fair observation, but it does not follow that the best course is to recommend that all the Member States should presumptively, absent a justification, adopt an opt-in procedure. To address the concern regarding variable levels of capacity, the Commission could at the very least have left that choice to each Member State rather than establishing a hierarchy favoring opt-in schemes.

¹⁰⁶ BIS, Streamlining Regulatory and Competition Appeals: Consultation on Options for Reform <https://www.judiciary.gov.uk/publications/qbd-response-bis-consultation-streamlining-regulatory-competition-appeals/> (19 June 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf.

¹⁰⁷ See now the Government's Response to the Consultation on Revising the CAT Rules of Procedure (September 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/460442/BIS-15-357-competition-appeal-tribunal-rules-of-procedure-government-response.pdf, pp 15–18. CAT Rule 9(4)(h) now requires the appellant's notice of appeal to identify any new substantive evidence that was not before the CMA or the rel-

chapter, Barling issues a robust warning against attempts by the government, without proper justification and possibly with a view to indulging corporate interests, to clip the wings of the courts—specifically, his. As he remarks pointedly: ‘It is crucially important that courts, particularly small specialist ones, whose judicial personnel are few in number and well-known to their users, should not have to expect that giving a judgment to this or that effect might well lead to intense lobbying for jurisdictional and procedural changes, with the aim of lessening the scrutiny to which certain decisions would be subject in the future.’¹⁰⁸

Following the completion of Barling’s chapter, the UK did in fact adopt the Consumer Rights Act 2015 (‘CRA’),¹⁰⁹ thereby amending the Competition Act 1998 (as modified by the Enterprise Act 2002). The relevant provisions, contained in Schedule 8,¹¹⁰ as further supplemented by Part 5 of the CAT Rules 2015,¹¹¹ are generally in line with the features of the Bill discussed by Barling. A number of details could be added, but suffice to note here that non-UK claimants are not automatically included in an opt-out action and must opt *in* to such an action if they wish to participate. After some early controversy, law firms can at least potentially be approved as a representative for the purpose of obtaining a collective proceedings order, provided of course that there is no conflict of interest between the firm and the class of claimants; and provided, more generally, that the CAT deems such representation to be just and reasonable. As Barling noted, the CRA also provides for collective settlement orders as a means of early resolution.

For completeness one may also call attention to the voluntary redress system introduced by the CRA.¹¹² The relevant rules provide that the CMA may approve a redress scheme, possibly on a conditional basis, during an investigation or upon its completion. The CRA required the CMA to publish guidance to be approved by the Secretary of State, and to that effect the CMA consulted

evant regulator. A similar counterpart rule applies to the CMA or regulator. Rule 15(3)(c) requires the CMA or regulator to explain in detail any objections to the admission of the appellant’s new evidence.

¹⁰⁸ Page 540.

¹⁰⁹ http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga_20150015_en.pdf.

¹¹⁰ <http://www.legislation.gov.uk/ukpga/2015/15/schedule/8/enacted/data.pdf>.

¹¹¹ Like the CRA 2015, the new CAT Rules, which amend the 2003 version, became effective on 1 October 2015. The CAT Rules are available at <http://www.catribunal.org.uk/240/Rules-and-Guidance.html>. See also the CAT’s revised Guide to Proceedings (2015), www.catribunal.org.uk/files/Guide_to_proceedings_2015.pdf. For discussion of the private enforcement aspects of the CRA and the CAT Rules, see, eg Barry Rodger, ‘The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the UK: A Class Act?’, 3 *Journal of Antitrust Enforcement* 258 (2015); Roger Gamble, ‘Not a class act (yet): Europe moves softly towards collective redress’, 37 *European Competition Law Review* 14, 21–22 (2016).

¹¹² See pages 10–13 of Schedule 8 (link provided above n 110). Following the CRA amendments, the relevant provisions are Sections 49C to 49E of the Competition Act 1998.

on a draft text¹¹³ and in the summer of 2015 adopted the final document.¹¹⁴ Under this approval system, the CMA will assess the effectiveness of the scheme by considering the value of the (monetary or non-monetary) compensation and the governance of its disbursement to victims of the anticompetitive behavior in question. A company whose redress scheme is certified by the CMA can earn forgiveness of up to 20 per cent of the fine the CMA otherwise would have imposed.¹¹⁵ Once approved, the CMA may enforce its terms, including by way of court actions.¹¹⁶ It emerges from the final guidance that the CMA may even approve a redress scheme following an infringement decision of the European Commission. An obvious risk in relation to redress schemes is that a company might seek to lowball victims with paltry offers, but in theory the CMA will be vigilant in its screening responsibilities. Another potential point of concern might be the use of the system to preempt collective damages actions, in particular opt-out actions. The possibility that some victims will go uncompensated is always present but—to the extent that such a scheme has a genuine incentive effect, and to the extent it stimulates serious offers and at least partially restores victims to their *ex ante* position—the interplay of the two systems might prove salutary.

Coming back finally to the overhauled system of collective proceedings in the UK under the CRA 2015, much of the detailed functioning of this system will depend not on what the provisions of the CRA or the CAT Rules say, but on how particular issues are managed as the cases and appellate judgments accumulate over time.

James Venit, ‘What Is To Be Done?’. The title of this chapter can be either crystal clear or cryptic, depending on the eye of the beholder; readers familiar with the long-running criticisms of the EU enforcement architecture will immediately understand. Venit has often underlined the deficiencies of the EU system, and he recapitulates the core complaint here. As he says, ‘the credibility of the EU competition enforcement regime is itself on trial. ... [T]he combination of an inquisitorial (as opposed to adversarial) administrative system which confers substantial enforcement powers on the European Commission with a system of limited judicial review is too one-sided and calls into question the legitimacy of the EU regime of antitrust enforcement.’¹¹⁷

¹¹³ See CMA, Draft Guidance on the CMA’s Approval of Voluntary Redress Schemes (2 March 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408326/Consultation_-_draft_guidance_-_voluntary_redress_schemes.pdf.

¹¹⁴ CMA, Guidance on the Approval of Voluntary Redress Schemes for Infringements of Competition Law (14 August 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/453925/Voluntary_redress_schemes_guidance.pdf.

¹¹⁵ See the final guidance document, above n 114, para 3.30.

¹¹⁶ See revised Section 49E of the Competition Act 1998.

¹¹⁷ Page 543.

According to this critical perspective, the flaws tainting the Commission's administrative investigations and the seeming half-measures of the EU Courts (notwithstanding some improvements) to address a weak system of judicial review—which stop short of a comprehensive commitment to close scrutiny of Commission decisions—are troubling not just on fundamental rights grounds but also because they may skew substantive outcomes.

Most of the chapter discusses the EU's system of judicial review, and expounds the view that Article 263 TFEU, which is the textual basis for 'control of legality',¹¹⁸ does not present any obstacle to robust and extensive review.¹¹⁹ But Venit draws attention to the awkwardness of the fine distinctions that have developed in the concept of judicial review (outside the 'unlimited jurisdiction' context where fines are scrutinized) as the EU Courts understand it. As he argues:

In theory, the distinction between the Court's rigorous assessment of the correctness, completeness and reliability of the facts and the appropriateness of the conclusions drawn from them, on the one hand, and the requirement that it not substitute its assessment for that of the Commission, on the other hand, is coherent in its articulation and can be neatly encapsulated in the notion that the Court can only annul where the Commission has committed a manifest error of assessment by drawing implausible or unwarranted conclusions from the facts. However, we are on a very slippery slope, and it is far from self-evident how, in practice, the Court can easily draw the line between thoroughly reviewing whether the facts are sufficient to support the conclusions the Commission has drawn from them while at the same time respecting the obligation not to substitute its judgment for that of the Commission. Respecting this distinction is likely to present serious problems in practice.¹²⁰

The chapter discusses relevant jurisprudence, including from the merger context, and develops Venit's case for more rigorous judicial review—which can be achieved, he says, without resort to Treaty amendment. He also adds,

¹¹⁸ While one may acknowledge the commonly accepted and historically grounded notion that the jurisdiction of the Court under Article 263 TFEU is a derivation of French administrative law principles (see eg Jürgen Schwarze, 'Judicial Review of European Administrative Procedure', 68 *Law and Contemporary Problems* 85, 86 (2004)), and while Article 263 illuminates the types of acts that are reviewable, it is worth recalling that the provision makes no explicit reference to any particular standard of scrutiny such as manifest error of assessment, nor to any injunction against a substitution of the Court's appraisal for that of the administrative authority.

¹¹⁹ Indeed, it is clear that the EU concept of legality control must be construed in a manner consistent with the principle of full jurisdiction as elaborated by the ECJ in its *Chalkor* and *KME* judgments of December 2011 and subsequent case law. This jurisprudence seems to require a mixed (and in my view unsatisfactory) approach: a general standard of correctness applies to the Commission's fact-finding and appraisals of the facts as well as the legal conclusions drawn; but the Commission still enjoys a margin of discretion with respect to questions of technical or economic complexity. This mixed approach is given a name by Ian Forrester, who calls it 'legality plus' or 'merits minus'. See page 576.

¹²⁰ Pages 549–550.

without going into detail, a number of other more incidental suggestions for the EU system that would help to address issues of legitimacy, including, among others, a substantial strengthening of the Hearing Officer (to the point where the current tendency to seek help from the EU's Ombudsman is rendered unnecessary) and the establishment of a system of 'complete file access' based on protective orders that would 'eliminate the scandalously wasteful process of redaction, ensure fair file access and remove one of the procedural bases on which Commission decisions can be delayed and ultimately annulled'.¹²¹

Ian Forrester, 'Quis custodiet ipsos custodes? Assessing the Judicial Role in a Lawful System of Competition Enforcement'. Who are the *Guardians* in this context? The idea could perhaps apply at two levels. A first guardian is the European Commission, indeed it is common to refer to the Commission as the 'Guardian' of the Treaties.¹²² More specifically to our purposes, it is also the primary guardian of the EU's competitive market order. At the next level, another guardian is the EU judicature. Who shall guard *this* guardian? One would have to think that this answer is not a 'who' but the Rule of Law itself, a concept which necessarily incorporates the core fundamental protections recognized in the Treaties, in the Charter and the ECHR, and in the general principles of EU law. Perhaps Forrester intended that his title be associated mainly with the question of who shall guard the Commission, but it seems more likely that he meant to raise the question with regard to each of these guardians. The concerns expressed in his essay apply to both.

It is a chapter of significant breadth; this summary will only scratch the surface. One of the premises of the essay, a theme touched on several times in this book and which Forrester has discussed at length in his other works, is that the Commission is a distinguished, righteous and proficient institution but it is marked by the fatal and structural flaw of improperly circumscribed powers and procedures.¹²³ Is the flaw cured by proper guardianship at the level of the EU Courts? Much of the essay is devoted to laying out the reasons why it is not. A pertinent irony that is highlighted is that, whereas the power of public authority in the context of competition law enforcement by the Commission is insufficiently or at least inconsistently checked, the Court of Justice in other contexts—above all where sensitive questions of the relationship

¹²¹ Page 555.

¹²² One may also recall the textual basis for the Commission's great responsibility, Article 17(1) TEU, of which the first three sentences provide that '[t]he Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union.'

¹²³ For a summary of the criticism against the Commission's administrative procedures, see Forrester's oral remarks at pages 498–499. See also pages 577–578.

between supranational and national law are concerned—has heroically established itself as a *Marbury*-style constitutional and progressive court. One is also struck by the palpably different roles assumed by the Court according to whether the case before it is an action for annulment of a Commission decision or a request for a preliminary ruling. There are unmistakable differences in these procedures, but whether the Court should feel so constrained when performing its appellate function may be doubted.

In short, the judicial Guardian has not shown itself capable of constraining the enforcer to an appropriate extent, and with sufficient predictability. Forrester thus logically appeals to the Rule of Law. That is to say, he attempts to show that judicial scrutiny should be strengthened so that the enforcer's decisions are reviewed consistently with proper rigor—including as regards issues of fact, which clearly can be and often are determinative in competition cases. Some progress has been made in that regard, he concedes: the Court of Justice has made efforts to tighten up judicial review.¹²⁴ This is a step in the right direction, he allows, but it is insufficient.¹²⁵ One can agree with Forrester in particular with regard to the perplexing persistence of the 'complex economic/technical assessments' doctrine. Its justification remains fuzzy. One also hopes that the principles governing judicial review in this context will develop to the point when the articulation of standards is more closely matched with the intensity of scrutiny that is actually applied. Ultimately these issues lead back, as Forrester observes, to the question of legitimacy. In his words, '[t]he availability of rigorous, consistent and effective judicial

¹²⁴ The position of the Court of Justice with regard judicial review by the General Court is summarized in, for example, Case C-382/12 P *MasterCard and Others v Commission*, ECLI:EU:C:2014:2201, paras 155–156:

155. As regards the extent of judicial review, it is apparent from EU case-law that where the General Court is seised, in accordance with Article 263 TFEU, of an action for annulment of a decision applying Article 81(1) EC, the General Court must as a general rule undertake, on the basis of the evidence adduced by the applicant in support of the pleas in law put forward, a full review of the question whether or not the conditions for the application of that provision are met (see, to that effect, judgments in *Remia and Others v Commission*, EU:C:1985:327, paragraph 34; *Chalkor v Commission*, C-386/10 P, EU:C:2011:815, paragraphs 54 and 62; and *Otis and Others*, C-199/11, EU:C:2012:684, paragraph 59). The General Court must also establish of its own motion that the Commission has stated reasons for its decision (see, to that effect, judgments in *Chalkor v Commission*, EU:C:2011:815, paragraph 61 and the case-law cited, and *Otis and Others*, EU:C:2012:684, paragraph 60).

156. In carrying out such a review, the General Court cannot use the Commission's margin of discretion, by virtue of the role assigned to it in competition policy by the EU and FEU Treaties, as a basis for dispensing with the conduct of an in-depth review of the law and of the facts (see, to that effect, judgments in *Chalkor v Commission*, EU:C:2011:815, paragraph 62, and *Otis and Others*, EU:C:2012:684, paragraph 61).

¹²⁵ Among other passages, see pages 582–583.

review is not something “desirable” and “worthy”, but an indispensable element in the acceptability of the whole system’.¹²⁶

Mario Siragusa, ‘Interaction between Public and Private Enforcement of Competition Law’. Siragusa here provides his reflections on certain issues regarding the subject in the title. Not limited to a discussion of courts or perspectives on the role of judges, Siragusa refers specifically to: the indispensability of effective judicial review in light of Article 9 of the EU Damages Directive (the so-called ‘binding effect’ of decisions); the disclosure of evidence; interim measures at EU and national level; the remedial powers (including structural remedies) of NCAs; limitation periods and joint and several liability; and quantification of harm. The chapter is brief and can be summarized selectively in a few lines here. One observation to highlight is Siragusa’s concern that the Directive’s rules on disclosure, although generally to be welcomed to the extent that it opens up broader possibilities in some Member States, may be unduly restrictive in its formulation that evidence sought should be described as precisely and as narrowly as possible in the reasoned justification presented to the judge. Also notable is the discussion of the possibility of NCAs imposing not only behavioral remedies but also structural remedies, where appropriate. Siragusa contends that such power, while not granted explicitly by Article 5 of Regulation 1/2003, is nevertheless implicit and that its contours are shaped, or logically should be shaped, by those of the Commission’s analogous power under Article 7.

With regard to private enforcement, the Damages Directive certainly has its weaknesses.¹²⁷ If there is cause for optimism it is because it is a first generation instrument, and as such it is a milestone, however modest and ambivalent it may be.

¹²⁶ Page 586.

¹²⁷ Among several other critical commentaries, see Mel Marquis and Giorgio Monti, eds, *Shaping Private Antitrust Enforcement in Europe*, forthcoming, Hart Publishing.