

Increasing Use of “Negotiated” Instruments of European Competition Law Enforcement towards Foreign Companies

by

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Abstract

This paper considers the increasing use of “negotiated” instruments of European competition law (ECL) enforcement as illustrated by the example of the European Commission’s (EC) enforcement practice directed at firms of American and East Asian origin. The paper first defines the notion of “negotiated” instruments of ECL enforcement as a non-confrontational enforcement method that centres on

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the existence of a public-private dialogue and mutual will to solve the contested issue, which in turn facilitate mutual benefits in enforcement outcomes (e.g. faster market improvements *v.* no fines). Three key “negotiated” instruments of ECL enforcement are presented next: conditional merger clearances, commitments decisions, as well as leniency and the settlement procedure. The EC’s decision to introduce negotiated enforcement instruments into its toolkit has been largely embraced by the market. Their ever growing practical application suggests that public-private dialogue is becoming a rule, rather than an exception, in public enforcement of ECL. This thesis is illustrated by a selection of ECL cases involving US (e.g. Microsoft) and East Asian (e.g. Samsung, Sony) companies which chose to cooperate with the EC in order to generate tangible benefits for themselves, which are largely precluded in a more adversarial procedure.

Résumé

Cet article examine l’utilisation croissante de l’application des instruments européens «négociés» du droit de la concurrence (ECL) comme il est illustré par la pratique de l’application de la Commission européenne (CE) dirigée vers les entreprises d’origine américaine et asiatique (Asie de l’Est). L’article définit d’abord la notion d’instruments «négociés» de l’application de l’ECL comme une méthode d’application non conflictuelle qui se concentre sur l’existence d’un dialogue public-privé et la volonté commune de résoudre la question en litige, qui, en revanche, facilite les avantages mutuels dans les résultats de l’application (par exemple, des améliorations plus rapides du marché *v.* aucunes amendes). Trois instruments «négociés» de l’application de l’ECL principaux sont présentés ci-dessous: les autorisations conditionnelles de fusion, les décisions d’engagement, ainsi que la coopération et la procédure de règlement. La décision de la CE à introduire des instruments négociés de l’application dans sa boîte à outils (toolkit) a été largement acceptée par le marché. Leur application pratique en croissance constante suggère que le dialogue public-privé devient une règle, plutôt que d’une exemption, en application publique de l’ECL. Cette thèse est illustrée par une sélection de cas d’ECL concernant les entreprises en provenance des États-Unis (par exemple Microsoft) et de l’Asie de l’Est (par exemple Samsung, Sony) qui ont choisi de coopérer avec la Commission européenne afin de générer des bénéfices tangibles pour eux-mêmes, qui sont en grande partie exclue dans une procédure plus contradictoire.

Classifications and key words: European competition law, cooperation, negotiations, dialogue, conditional merger clearances, commitments decisions, leniency, settlement, US companies, East Asian companies, Japanese companies, South Korean companies

I. Introduction

Many important issues come to mind when considering current competition policy problems¹ in general, and European competition law² (hereafter: ECL) in particular. Among the most noticeable developments in the enforcement practice³ of the European Commission (hereafter: EC) is its large number of increasingly global cartel cases, which very often relate to East Asian companies, Japanese in particular (e.g. Mitsubishi, Hitachi)⁴. At the same time, many foreign companies, mostly American (e.g. Google) and East Asian (e.g. Samsung), have recently received key decisions based on Article 102 TFEU (e.g. Microsoft) and the EU Merger Regulation (e.g. Sony)⁵. It is also noticeable that the EC has handled many of these cases with “negotiated” instruments of ECL enforcement – conditional merger clearances, commitments decisions, as well as leniency and the settlement procedure.

Competition law is characterised by its extraterritorial applicability whereby the origin of the company/companies involved or the actual location of the practice are largely irrelevant when deciding whether a given set of competition rules must be complied with. The extraterritorial application doctrine has been widely discussed and disputed⁶ yet it is hard to argue now that if a company

¹ E.g. procedural fairness was the subject of the 9th Annual ASCOLA Conference held in Warsaw in June 2014.

² ECL is understood here as Articles 101 and 102 TFEU and the rules contained in the Merger Regulation as well as all of their implementing laws.

³ ECL is enforced by public authorities (EC and National Competition Authorities of EU Member States) as well as via private enforcement before national courts. Private enforcement remains outside the scope of this paper; for recent literature on this topic see, e.g., K. Huschelrath, H. Schweitzer, *Public and Private Enforcement of Competition Law in Europe: Legal and Economic Perspectives*, Springer 2014; B. Cortese (ed.), *EU Competition Law: Between Public and Private Enforcement*, Kluwer Int. 2013; A. Jurkowska-Gomulka, *Publiczne i prywatne egzekwowanie zakazow praktyk ograniczajacych konkurencje* [*Public and Private enforcement of antitrust prohibitions*], Warsaw 2013.

⁴ More than 1/3 of all cartel decisions issued by the EC in the last 15 years involved Japanese companies.

⁵ The thesis of this paper is presented on the example of a selection of cases involving companies of US and East Asian origin (primarily Japanese and South Korean). Focusing on ECL enforcement towards “foreign” companies reflects the growing internationalisation of the EC’s enforcement practice; focusing on companies from these two geographic regions reflects the fact that they amount to the majority of the EC’s “foreign” cases.

⁶ Starting with Case 48/69 *ICI v. Commission* [1972] ECR 619 and Case 6/72 *Continental Can v. Commission* [1973] ECR 215 on multilateral and unilateral restrictive practices respectively followed by key developments in Wood Pulp I, Cases 89/85 etc. *Ahlstrom v. Commission* [1988] ECR 5193 and CFI judgment T-102/96 *Gencor v. Commission* [1999] ECR II-753; for more on extraterritoriality see, e.g., P. Roth, V. Rose (eds), *Bellamy & Child: European Community Law*

wishes to partake in the Internal Market, then it must comply with the law governing it⁷. Firms active on the EU Internal Market have to comply with ECL in their everyday business activities if the applicable jurisdictional criteria are met⁸. This fact is both undisputed in legal and doctrinal terms as well as increasingly known to the companies themselves⁹. Importantly, increasing globalisation has made it essential for foreign companies to also realise that they might be breaking ECL even if they have little or even no activity on the Internal Market.

The extraterritorial applicability of ECL is crucial in today's global economy. Most global leaders in the economy-driving information sector are not European, such as the American giants Apple, Google, Intel or Microsoft, and yet their actions fundamentally shape the Internal Market. For that reason alone they must comply with ECL, and if they don't, they find themselves subject to public enforcement. Apple was among the addressees of a commitments decision in 2012 concerning retail prices of e-books¹⁰. Microsoft¹¹ has been subject to two major tying cases – one infringement decision in 2004 and one commitments decision in 2009. It also received a fine in 2013 for non-compliance with the 2009 decision. Confirmed by the General Court, Intel¹² received the largest individual ECL fine so far for the

of *Competition* 6th (ed.), Oxford 2013, p. 66 (1.110-1.114); R. Whish, D. Bailey, *Competition law* 7th edition, Oxford 2012, p. 495; L. Ritter, *European Competition law. A practitioner's Guide* 3rd edition, Kluwer Law International 2005, p. 71.

⁷ Aside from ECL, primarily state aid rules and free movement rules.

⁸ "Effect on trade between Member States" for Art.101/102 TFEU and "EU dimension" for concentrations.

⁹ Kameoka states that competition law awareness is relatively high in Japan but whether that would extend to ECL is unclear; see E. Kameoka, *Competition Law and Policy in Japan and the EU*, Edward Elgar Cheltenham 2014, p. 125.

¹⁰ EC decision of 12 December 2012 *E-Books* (COMP/39.847) 2013 OJ C 73/07 addressed to Apple and 4 publishers (Hachette, Harper Collins, Holtzbrinck/Macmillan, Simon & Schuster); Penguin (5th publisher involved) was subject to a separate commitments decision of 25 July 2013; note also that Apple has avoided an official ECL investigation in relation to iTunes service despite early complaints about its EU pricing policy.

¹¹ EC decision of 24 March 2004 *Microsoft* (COMP/C-3/37.792) (2007) OJ L 32/23 (hereafter: *Microsoft 2004*) and EC decision of 16 December 2009 *Microsoft (Tying)* (COMP/39.530) (2010) OJ C36/06 (hereafter: *Microsoft (Tying)*); see also EC decision of 06 March 2013 *addressed to Microsoft Corporation for failure to comply with a commitment made binding by a Commission decision pursuant to Article 9 of Council Regulation (EC) No 1/2003* (Case AT.39530 – *Microsoft (Tying)*) (2013) OJ C120/15 (hereafter: *Microsoft (Tying) FINE*), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39530/39530_3162_3.pdf.

¹² Intel's infringement decision covered two forms of abuse: conditional rebates and so-called naked restrictions, it was accompanied by a fine of 1060 mln EUR; EC decision of 13 May 2009 *Intel* (COMP/C-3/37.990) (2009) OJ C 227/13, upheld by the General Court (GC) on 12 June 2014 Case T-286/09 *Intel v Commission*, not yet reported.

widespread abuse of its dominant position, and the focus is now firmly on Google. Although the EC acknowledged that Google was not liable for the infringement committed by its subsidiary Motorola¹³, the EC is investigating a range of Google’s own practices. Most notably, the EC was expected to soon close its investigation into Google’s vertical search engines, but recent reports suggest that a final decision has been postponed¹⁴. Google is also known to be the subject on an investigation in relation to the Android operating system.

At the same time, many East Asian companies have found themselves surprised over the last 15 years at the onslaught of ECL investigations and the steep growth of ECL fines. The Korean giant Samsung has been subject to a record breaking 5 ECL decisions in 4 years, including 4 cartels cases and the April 2014 decision based on Article 102 TFEU¹⁵. In fact, Samsung’s recent commitments decision was among the most anticipated ECL cases of 2014¹⁶. Japanese companies alone received 9% of all European cartel fines (1.6 billion EUR) since 1999¹⁷. The European decisions in the infamous LCD cartel case covered a number of Taiwanese companies¹⁸. Considering that the wide-spread investigation into possible cartels concerning specific car parts is

¹³ EC decision of 24 April 2014 *Motorola – Enforcement of GPRS standard essential patents* (Case AT.39985), para 17 (hereafter: *Motorola 2014*), available at http://ec.europa.eu/competition/elojade/iseef/case_details.cfm?proc_code=1_39985; the Google/Motorola Mobility concentration was unconditionally cleared by the EC on 13 February 2012 making Google Motorola’s parent company for only 7 days before the infringement was ended, EC decision of 13 February 2012 *Google/Motorola Mobility* (COMP/M.6381), available at http://ec.europa.eu/competition/mergers/cases/decisions/m6381_20120213_20310_2277480_EN.pdf.

¹⁴ J. Almunia, “EC competition policy and sectoral challenges”, speech Fordham 12 September 2014, p. 5, available at http://europa.eu/rapid/press-release_SPEECH-14-592_en.htm; see also <http://www.theguardian.com/technology/2014/sep/08/european-commission-reopens-google-antitrust-investigation-after-political-storm-over-proposed-settlement>.

¹⁵ 4 cartels: *DRAMS* (2010), *LCD* (2010), *TV and computer monitor tubes* (2012), *Smart Chip* (2014) as well as the recent commitments decision concerning *Mobile Essential Patents* (2014).

¹⁶ EC decision of 29 April 2014 *Samsung – Enforcement of UMTS Standard Essential Patents* (AT.39939) (hereafter: *Samsung 2014*), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf. The *Samsung 2014* decision was greatly anticipated alongside, among other things, the aforementioned *Motorola 2014* case and the ultimately still unresolved investigation into Google’s vertical search engines.

¹⁷ A. Italianer, “European competition policy and Japan”, speech Tokyo 22 November 2013, p. 11, available at http://ec.europa.eu/competition/speeches/text/sp2013_10_en.pdf.

¹⁸ EC decision of 08 December 2010 *LCD – Liquid Crystal Displays (LCD)* (COMP/39.309), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39309/39309_3643_4.pdf; EC decision of 05 December 2012 *TV and computer monitor tubes* (COMP/39.437) OJ 2013/C 303/06.

ongoing, more East-Asian cases are likely to follow¹⁹. Incidentally, some of the resulting cases might relate to small markets with little overall turnover²⁰, meaning that those involved might not even realise that they are breaching ECL at all, or of the extent of the possible financial repercussions.

While the recent proliferation of major “foreign” ECL cases is clearly visible, it is essential to stress that a large number of these exclusively, mostly or partially non-EU cases have been dealt with by the EC with the use of “negotiated” instruments of ECL enforcement. In light of this, the purpose of this paper is to offer an overview of an example of cases that show a particularly strong tendency to engage in public-private dialogue in order to resolve the identified competition problem. The paper will focus on cases involving companies originating from the US and from the East Asian region, mostly Japan and South Korea, as they constitute some of Europe’s most important trading partners. The paper shows that the EC has taken a conscious decision to introduce an element of “negotiations” (public-private dialogue, cooperation) into ECL enforcement. Its resulting enforcement practice shows that instruments with “negotiated” characteristics are an increasingly used, if not the preferred method of ECL enforcement by the EC. This development is in part at least caused by the fact that “negotiated” enforcement has been largely embraced by global market players.

Outlined first are the legislative origins of “negotiated” ECL enforcement (II.1.). Conditional merger clearances will be considered next as the oldest “negotiated” enforcement tool in existence as well as the source of “remedies” (II.2.). Assessed next are commitments decisions (II.3.) considering their relationship to individual exemptions and infringement decisions. Leniency will be covered last (II.4) stressing that its partially “negotiated” character can be completed by the settlement procedure²¹.

¹⁹ Cars are clearly among the most important components of Japanese exports; see T. Takigawa, “Japan” [in:] M. Williams (ed.), *The Political Economy of Competition Law in Asia*, Edward Elgar Cheltenham 2013, p. 15.

²⁰ A. Italianer, “European competition policy...”, op. cit.; see also E. Kameoka, *Competition Law...*, op. cit, pp. 51–53.

²¹ The scope of this paper is limited to those aspects of conditional merger clearances, commitments decisions and EU leniency/settlement which are directly relevant to their shared “negotiated” characteristics; the thesis has been formulated in light of the changing enforcement practice of the EC as illustrated by a selection of EC decisions issued to US, Japanese and Korean firms.

II. The use of “negotiated” instruments of ECL enforcement towards foreign firms

1. “Negotiated” enforcement instruments

Foreign companies are most visibly affected by ECL in the context of its public enforcement by the EC. Although the latter is no longer the only authority entitled to enforce ECL²², it remains the central figure in the European Competition Network and as such, developments that originate in its enforcement practice form a road-sign likely to be followed by National Competition Authorities (hereafter: NCAs) of EU Member States also.

The enforcement of ECL has originally been predominantly reactive and repressive. Discovery and evidencing were difficult and time consuming resulting in a limited number of cases. Moreover, seeing as competition law is firmly based in economics, which is not an exact science, proving a violation within an administrative procedure of an adversarial character was always under the threat of juridical review. As a result, many long-standing, wide-spread cartels were only recently uncovered, stopped and penalised²³, mostly thanks to the voluntary input of market players. The original enforcement approach changed in the 1990s as the proficiency in competition law matters grew in market players. It is this increasing legal awareness that became essential for the successful application of conditional merger clearances and individual exemptions (from what is now Article 101 TFEU). It was the use of these very enforcement mechanisms that gradually paved the way to the current, largely pro-active state of ECL enforcement²⁴ that often resembles a negotiation between multiple (not quite equal) parties with different interests that must be balanced against each other. Indeed, what conditional merger clearances and individual exemption decisions had in common was that they did not have an adversary character but developed as “negotiated” enforcement instruments. They were based on:

- a. the existence of a dialogue between the enforcer and scrutinised companies;

²² Art. 101/102 TFEU are enforced also by National Competition Authorities (NCAs) of EU Member States.

²³ Mostly thanks to leniency e.g. the Animal Feed Phosphates cartel lasted for 35 years, the International Removal Services, Marine Hoses and Pre-Stressing Steel cartels lasted for up to 20 years each.

²⁴ For a detailed analysis of the growing pro-activeness in ECL enforcement by the EC before 2004 see E.D. Sage, “Community Competition law and Multimedia”, DPhil Thesis, Oxford University Faculty of Law 2005, available at <http://www.ewelinasage.co.uk/publications>.

- b. mutual will to solve the identified competition problems;
- c. mutual gain from using a non-confrontational enforcement method.

The above three characteristics were “transferred”, and further strengthened, into the new ECL enforcement order that coincided with the mass EU enlargement of 2004²⁵. Conditional merger clearances were not only preserved, their use remains a preferred method of ECL enforcement with respect to problematic concentrations. While the use of individual exemptions ceased after 2004²⁶, their negotiation-based elements were transferred into the new enforcement instrument of “commitments decisions”, which applies not only to cases based on Article 101 but also those based on Article 102 TFEU. Although less pronounced, similar considerations form the basis of two other enforcement instruments introduced in the EU over the last 15 years – the leniency programme and the settlement procedure²⁷.

2. Conditional merger clearances

The introduction in 1989 of the 1st European Merger Regulation (hereafter: MR) marked a fundamental change in the enforcement patterns of competition law in Europe. Unlike the provisions in the founding Treaty, the enforcement of which is largely conditional on the existence of an illegal practice, the MR was designed to be enforced pre-emptively with no reference to “illegality”²⁸. The EC (with its sole jurisdiction to enforce the MR) can thus not treat those subject to a merger investigation as alleged offenders. It can be argued therefore that the economic rights of the parties are equally

²⁵ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereafter: Regulation 1/2003) (2003) OJ L 1/1.

²⁶ Note, according to Whish & Bailey: “It is no longer correct to say that agreements are given individual exemptions: they either do, or do not, satisfy Article 101(3)”, R. Whish, D. Bailey, *Competition law...*, op. cit., p. 152.

²⁷ Incidentally, Lee lists the Korean consent order system (resembles commitments decisions), its leniency and advance rulings (resemble individual exemptions) as three different enforcement instruments under the heading “Facilitation of engagement of corporations”. Their use reflects a change in policy whereby efficient/effective investigation is only possible with the cooperation of market players; J. Lee, “Korea” [in:] M. Williams (ed.), *The Political...*, op. cit., pp. 76–80.

²⁸ Note that while Takigawa speaks of legality/unlawfulness of mergers in Japan that in itself does not negate the fact that he also clearly stresses the role of informal consultations in the pre-notification stage; see T. Takigawa “Japan...”, op. cit., p. 39; note, informal pre-notification consultations will no longer apply after the recent AMA amendment, see S. Hayashi, “A Study on the 2013 Amendment to the Antimonopoly Act of Japan – Procedural Fairness under the Japanese Antimonopoly Act” (2014) 7(10) *YARS*.

important, and worth protecting, as the rights of others, including the market overall, consumers or other market participants. This, in itself, suggests that the EC must in each case balance all affected rights, for which there proved to be no better way than to engage in a wide-spread dialogue with all those affected by the operation.

2.1. “Negotiated” character of conditional clearances

In truth, the vast majority of EU merger notifications are easily cleared, they do not need to be subject to much of a public-private discussion as they do not pose any competition concerns²⁹. However, negotiations are at the heart of the assessment of problematic operations, especially in the context of merger remedies, that is, specific conditions and/or obligations offered by the parties in order to gain clearance of a merger³⁰. When the competition authority identifies potential threats to competition generated by a forthcoming merger, it would enter into a dialogue with the parties based on the mutual will of both sides to solve the identified problems. While the enforcer should be driven by the thought that mergers are essential to the economy and that the rights of the parties should not be restricted any more than absolutely necessary, the merging parties seek clearance of their operation and for that they are willing to “negotiate” and give concessions. Those negotiations involve, most importantly, the formulation of merger remedies meant to address (counteract) the identified competition concerns without negating the primary aim of the concentration.

In light of this, the remaining question is whether clearing the operation would be mutually beneficial to the EC and to the parties, in other words, would it be in the public as well as in the private interest of the parties. To answer this question it is essential to note that remedies are also often offered in cases ultimately ending in a merger prohibition (or notification withdrawal). An open dialogue and mutual will to solve the identified problems might very well also exist in such cases, but the “negotiated” character of merger prohibitions is ultimately negated by the failure of the operation because a ban does not “benefit” the unsuccessful private parties. For this reason,

²⁹ In truth, only less than 5% of notified concentrations go to Phase II, and remedies are ultimately submitted in about 40% of those cases

³⁰ It is worth noting that before the 2011 reform, the chance of offering remedies in Phase I could be discussed already before the notification making it easier for firms to comply with the 20 days limit which used to be placed on offering remedies in Phase I; see A.G. Toth (ed.), *The Oxford Encyclopedia of European Community Law*, OUP Oxford 2008, p. 520; E. Kameoka, *Competition Law and Policy...*, op. cit., p. 104.

only conditional clearances based on Article 8(2) MR can be considered a “negotiated” enforcement instrument under the MR³¹.

Unsurprisingly, merger prohibitions are avoided in the ECL enforcement practice as they constitute the most severe invasion into the economic freedom of undertakings – a ban on their forthcoming operation. With very few ECL prohibitions up to date, it is fair to say that conditional clearances are the clearly “preferred” enforcement method for problematic concentrations under the MR³², seeing as they reflect the fact that both sides can “negotiate” a satisfactory solution (where the merger would be allowed to proceed under conditions acceptable to both the public and private side).

2.2. Merger remedies

The key role played by public-private dialogue in the design of conditional clearances is thus easily identifiable. A vivid example of extensive negotiations over structural remedies involving foreign firms³³ can be found in the *Panasonic/Sanyo*³⁴ merger of 2010 which proved particularly interesting as alternative objects of divestiture were ultimately approved as equally capable of resolving the identified competition problem³⁵. The “negotiated” character of conditional clearances lends itself very well to deal with the specifics of given circumstance and so, for instance, the *Cisco/Tandberg*³⁶ merger was cleared not subject to “physical” divestments, but to the transfer of intellectual property rights (the “TIP” protocol). While the most recent *Kuraray/GLSV*³⁷ case provides a clear example of partial divestment, Toshiba’s commitment

³¹ This paper looks exclusively at the “negotiated” aspects of conditional clearances; for a comprehensive analysis of this legal instrument see T. Skoczny, *Zgody szczególne w prawie kontroli koncentracji* [*Special clearances in merger control law*], Warsaw 2013, p. 262 *et seq.*; generally see, e.g., I. Kokkoris, H. Shelanski, *EU Merger Control: A Legal and Economic Analysis*, OUP Oxford 2014; on the notion of remedies see e.g. L. Ortiz Blanco (ed.), *EU Competition Procedure*, OUP, Oxford 2013, p. 770 *et seq.*

³² See T. Skoczny, *Special clearances...*, *op. cit.*, pp. 39–40.

³³ Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 OJ C267/1 para 33; see also R. Whish, D. Bailey, *Competition law...*, *op. cit.*, p. 884 *et seq.*

³⁴ EC decisions of 29 September 2009 *Panasonic/Sanyo* (COMP/M.5421) (2009) OJ C322/13; see R. Devai, T.P. Maass, D. Magos, R. Thomas, “Merger Case M.5421 Panasonic/Sanyo – Batteries included or ‘lost in translation?’” (2010) (1) *Competition Policy Newsletter* 60–63.

³⁵ *Panasonic/Sanyo*, para 223.

³⁶ EC decision of 29 March 2010 *Cisco/Tandberg* (Case COMP/M.5669), available at http://ec.europa.eu/competition/mergers/cases/decisions/M5669_20100329_20212_253140_EN.pdf.

³⁷ EC decision of 29 April 2014 *Kuraray/ GLSV Business* (Case COMP/M.7115), available at http://ec.europa.eu/competition/mergers/cases/decisions/m7115_20140429_20212_3758673_EN.pdf.

to amend its contractual arrangements with other shareholders in one of the *Global Nuclear Fuels* joint ventures³⁸ is a good example of behavioural remedies imposed in the framework of ECL enforcement to foreign companies.

One of the cases to mention here is the infamous *AOL/Time Warner*³⁹ merger which is known for the key importance of “negotiations” in the design process of remedies imposed by the EC in order to prevent potential foreclosure of music downloading. Negotiations were fundamental here for the formulation of the clearance which was ultimately made conditional upon AOL cutting its structural and lessening its contractual links with Bertelsmann (a 3rd party) in order to force a separation of the content rights held by AOL/TW and Bertelsmann preventing, in turn, excessive concentration of music rights. AOL/TW was also obliged not to engage in proprietary formatting of Bertelsmann’s music post-merger – a fundamentally behavioural remedy meant to keep the music downloading market open. However, the impact of the public-private negotiations conducted in this case went further, as the parties were made aware that they would also have to give up Time Warner’s parallel acquisition of EMI. In a move that avoided a merger prohibition, and thus saved considerable resources on both sides, the notification of the *Time Warner/EMI* merger was thus withdrawn in light of the EC’s objection to excessive market concentration.

The *AOL/TW* merger marks the first “digital music” case in Europe. It shows the fears of the EC that excessive concentration on the side of global music companies could foreclose the emerging downloading market. Keeping the music market competitive (5 major labels on the content level) was thus seen as an effective remedy against market power spill-over into the downloading market. What followed were the greatly contested clearance of the *Sony/BMG* joint venture⁴⁰ and the very detailed conditional clearance of

³⁸ EC decision of 19 September 2006 *Toshiba/Westinghouse* (Case COMP/M.4153) (2007) OJ C10/1.

³⁹ The *AOL/TW* merger is a good example of extensive structural and behavioural remedies being imposed in order to counteract the perceived threat to competition posed by the operation whereby AOL was obliged to, for instance, loosen its contractual links with Bertelsmann (not a party to the operation); the parties were also banned from formatting their music in a proprietary manner to prevent “mass adoption of digital download delivery standards”, see point 55 of the EC decision of 28 April 2000 *AOL/Time Warner* (COMP/M.1845), available at http://ec.europa.eu/competition/mergers/cases/decisions/m1845_en.pdf. Note, a *Time Warner/EMI* merger had also been notified but had to be abandoned in order for the *AOL/TW* concentration to be cleared see *Time Warner/EMI* (Case COMP/M.1852) (2000) OJ 180/06.

⁴⁰ EC decision of 19 July 2004 in *Sony/BMG* joint venture (COMP/M.3333), available at http://ec.europa.eu/competition/mergers/cases/decisions/m3333_20040719_590_en.pdf. The joint venture was first approved by the EC in 2004 but then appealed by IMPALA and ultimately annulled by the CFI on 13 July 2006 (T-464/04) ECR 2006 II-2289 which found manifest errors on the side of the EC. The case was later subject to an exceptionally detailed

*Universal/BMG Music Publishing*⁴¹. The latter is noteworthy primarily because of the extensive use of questionnaires sent to a multitude of 3rd parties in order to seek their input⁴².

The consolidation process culminated with the 2012 conditional clearances of Sony's acquisition of EMI's publishing business⁴³ and Universal's acquisition of EMI's recording business⁴⁴. Permitting the combination of 2 out of 4 remaining majors would surely result in unilateral negative effects on competition (increase market concentration). Yet the possibility of public-private dialogue allowed the EC and the companies involved to identify at least some of the problems faced by the music industry overall, and EMI in particular. Clearing the operation was thus "necessary" but excessive foreclosure had to be avoided. In order to do so, both of the conditional clearances are characterised by very detailed divestment lists⁴⁵. Not without relevance was also the special social importance of music, which shaped the obligation to sell the identified assets to a "professional" music entity, rather than an external body which did not have the expertise to properly utilise and protect the assets (such as an investment fund for instance)⁴⁶. Both decisions also contained a variety of behavioural remedies that responded to 3rd party concerns such as the prohibition to re-sign EMI's divested artists or its obligation to licence its recording to "Now this is what I call music" for 10 years after the merger. "Negotiated" instruments of ECL enforcement have thus proven instrumental in supervising the evolution of the global music market while still allowing a decrease in the number of major labels

economic re-assessment by the EC focusing on coordinated effects but the joint venture was once again cleared on 03 October 2007; available at http://ec.europa.eu/competition/mergers/cases/decisions/m3333_20071003_590_en.pdf.

⁴¹ EC decision of 22 May 2007 *Universal/BMG Music Publishing* (COMP/M.4404), available at http://ec.europa.eu/competition/mergers/cases/decisions/m4404_20070522_20600_en.pdf.

⁴² Separate questionnaires were sent to authors, competitors (other majors), competitors (independents), customers, collecting societies etc. The EC market tested the 1st and 2nd remedy package and only approved the 3rd (final) offer; *Universal/BMG* paras 394,406, 411.

⁴³ EC decision of 19 April 2012 *Sony/Mubadala Development/EMI Music Publishing* (COMP/M.6459), available at http://ec.europa.eu/competition/mergers/cases/decisions/m6459_20120419_20212_2499936_EN.pdf.

⁴⁴ EC decision of 21 September 2012 *Universal/EMI* (COMP/M.6458), available at http://ec.europa.eu/competition/mergers/cases/decisions/m6458_20120921_20600_3188150_EN.pdf.

⁴⁵ Listing individual Artists such as Andrea Bocelli or Ozzy Osbourne; see *Sony/EMI* pp. 96–117, David Guetta or Pink Floyd; see *Universal/EMI* p. 398.

⁴⁶ The Purchaser must have "...proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors"; see *Sony/EMI* para 90.

from 5 to 3⁴⁷ in a little over a decade, on terms acceptable to both sides and addressing at least some of the concerns of 3rd parties.

In conclusion it is worth noting two other aspects of the “negotiated” nature of conditional clearances, which also largely applies to commitments decisions and leniency and the settlement procedure. The aforementioned public private dialogue is not limited to the enforcement agency and the merging companies. Equally important is the detailed input sought from interested 3rd parties within the market test procedure⁴⁸. In fact, not only are other stakeholders consulted on their views concerning the likely effects of the concentration itself, they are also extensively consulted on the appropriateness of the proposed remedies. Moreover, many large mergers have such wide-spread consequences that international cooperation between enforcement agencies is crucial to the success of the pre-emptive control process. The Panasonic/Sanyo merger proved just that, where the EC cooperated with a number of foreign competition agencies including the US and Japanese authorities⁴⁹, in particular as far as the coordination of effective remedies was concerned. Indeed, wide-spread international cooperation is also being increasingly employed with East Asian authorities⁵⁰. Commissioner Almunia estimated recently that the EC cooperates with external enforcement agencies in “30% of unilateral conduct cases, about half of its major merger investigations, and 60% of cartel decisions”⁵¹.

⁴⁷ Three major global music labels: [French] Universal (including EMI music recording business; part of the Vivendi group), [Japanese] Sony (comprising Bertelsmann and EMI music publishing business) and [American] Warner.

⁴⁸ Point 35 Preamble MR.

⁴⁹ Based on the framework provided by the Agreement Concerning Cooperation on Anti-competitive Activities was signed in 2003 between the EU and Japan.

⁵⁰ EC decision of 26 November 2013 *Life Technologies/Thermo Fisher* (COMP/M.6944), available at http://ec.europa.eu/competition/mergers/cases/decisions/m6944_20131126_20212_3661859_EN.pdf which was assessed by most key competition law jurisdictions including South Korea and Japan. Similarly for Libor, Euribor and car parts cartels.

⁵¹ J. Almunia, “Keeping the global playing field level”, speech Marrakech 23 April 2014, available at http://europa.eu/rapid/press-release_SPEECH-14-332_en.htm; see also P. Lowe “International Cooperation between competition agencies: Achievements and challenges”, speech Seoul 05 September 2006, who spoke of the goals to be achieved – which are now largely being implemented, available at http://ec.europa.eu/competition/speeches/text/sp2005_021_en.pdf.

3. Commitments decisions

3.1. Origin and characteristics of commitments decisions

While conditional merger clearances were not greatly affected by the ECL reform of 2004⁵², the new framework brought with it the elimination of the EU individual exemption procedure and the formal introduction of commitments decisions (based on Article 9 Regulation 1/2003)⁵³. The key feature of this new enforcement instrument⁵⁴ is that the EC imposes with its decision binding commitments on the scrutinised undertaking without however establishing that the addressee had actually committed an ECL violation and without imposing a fine.

By contrast, infringement decisions based now on Article 7 Regulation 1/2003 definitely establish that a violation occurred (a fact which can be overturned in judicial review) and contain a cease & desist order if the infringement continues. Infringement decisions usually also impose a fine (albeit they do not have to as shown by the 2014 Motorola decision) and may contain conduct remedies (behavioural conditions/obligations meant to protect competition). What the two instruments do have in common is that they intend to put an end to a specific ECL infringement. However, while the role of commitments decisions is primarily to facilitate accurate pro-competitive changes, infringement decisions have a mostly penal/deterrent and precedence setting function. In fulfilling its role, commitments decisions are, without a doubt, the key negotiated instrument of ECL enforcement right

⁵² On relevant procedural changes affecting conditional clearances/remedies see L. Ortiz Blanco (ed.), *EU Competition...*, op. cit. pp. 770–772.

⁵³ For an early take on the introduction of commitments decisions see J. Temple-Lang, “Commitment Decisions and Settlement With Antitrust Authorities and Private Parties Under European Antitrust Law” [in:] *International Antitrust Law & Policy: Fordham Corporate Law 2005* where the word “settlement” is used in a similar manner to what is here referred to as negotiations (in light of the fact that a separate “settlement” procedure now exists in the EU). For a general overview of commitments decisions see, e.g., L. Ortiz Blanco (ed.), *EU Competition...*, op. cit. and C. Kerse, N. Khan, *EU Antitrust Procedure*, Sweet & Maxwell 2012.

⁵⁴ Before the introduction of commitments decisions, the EC is known to have dealt with many of its antitrust concerns in an informal manner – the popularity of this greatly pragmatic approach, with all its advantages and disadvantages, largely explains the introduction of formal commitments decisions. Interestingly, the use of informal case resolutions continued even after 2004 as illustrated by Apple which made “voluntary adjustments” to its iTunes pricing policy; see “Antitrust: European Commission welcomes Apple’s announcement to equalise prices for music downloads from iTunes in Europe” Press Release 09 January 2008 http://europa.eu/rapid/press-release_IP-08-22_en.htm. Generally on “voluntary adjustments” see L. Ortiz Blanco (ed.), *EU Competition...*, op. cit., p. 571.

now – in the words of the EC itself – they “allow for the quicker resolution of competition concerns on a more cooperative basis”⁵⁵.

Commitments decisions have their roots in other ECL enforcement instruments. An Article 9 Regulation 1/2003 procedure starts similarly to an infringement case (based on Article 7) in that the authority comes to the preliminary conclusion that a violation of ECL might have occurred. At this point, a commitments procedure resembles the past approach to individual exemptions⁵⁶ where the public and private side negotiate a workable solution to the identified problems. Experiences accumulated with conditional merger clearances are also relevant. Although most commitments turn out to be behavioural in nature, but Article 9 “decisions have allowed for more structural remedies to be adopted in anti-trust cases. As a result, there is a form of convergence between remedies in anti-trust cases and remedies in merger cases”⁵⁷.

The use of Article 9 Regulation 1/2003 in cases analogous to those that used to be assessed under the individual exemption procedure (Article 101(3) TFEU) does not raise concerns. In fact, the new instrument seems to have outright taken over the characteristics and pro-active role fulfilled earlier by Article 101(3) procedures. This realisation is best shown by the close similarity between the *UEFA Champions League* case of 2003⁵⁸ (individual exemption) and the *Bundesliga* case of 2005⁵⁹ (notified under the old procedure but ultimately closed as the 1st ever decision based on Article 9 Regulation 1/2003)⁶⁰. Both of these decisions ultimately enable a football association’s joint selling of media rights scheme under a set of specific conditions and obligations. Yet the scope of the applicability of Article 9 is far wider than that of individual exemption procedures, and its applicability to more severe

⁵⁵ COM(2014) 453 Communication from the Commission to the European Parliament and the Council Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives para 21(hereafter: Communication on Regulation 1/2003).

⁵⁶ Still, while Whish/Bailey admit that there is certain resemblance between commitments decisions and individual exemption decisions, they nevertheless state they are conceptually different because while the former close cases without any definite findings, the latter did established the inapplicability of Article 101(1) because of the fulfilment of Article 101(3) criteria; see R. Whish, D. Bailey, *Competition Law...*, op. cit., p. 168.

⁵⁷ Staff Document on Regulation 1/2003 para 188.

⁵⁸ EC decision of 23 July 2003 *Joint selling of the commercial rights of the UEFA Champions League* (COMP/C.2-37.398), OJ L 291, 08/11/2003, pp. 25–55.

⁵⁹ EC decision of 19 January 2005 *Joint selling of the media rights to the German Bundesliga* (COMP/C-2/37.214), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/37214/37214_90_1.pdf.

⁶⁰ Followed also by EC decision of 23 March 2006 *Join selling of the football right to the FA Premier League* (COMP/C-2/38.173), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38173/38173_134_9.pdf.

multilateral restraints is not as clear. This issue is well illustrated by the mixed-origin *BA/AA/Iberia* case⁶¹ for instance. The EC's decision not to end the horizontal joint venture, despite its extensive market consequences, and to accept commitments instead was strongly opposed by Virgin⁶².

The new framework extended the possibility of a public-private dialogue in ECL enforcement to potential abuse cases as well. The American beverage giant Coca-Cola became the first recipient of a commitments decision based on Article 102 TFEU in June 2005 concerning its distribution system⁶³. Since Article 102 TFEU enforcement was until 2004 largely reactive and repressive, allowing for public-private negotiations in unilateral cases proved very successful indeed. Three times as many commitments decisions (most recently Samsung⁶⁴) have been issued over the last decade than infringement decisions⁶⁵ (most recently towards Motorola⁶⁶) in Article 102 TFEU cases. That in itself suggests the growing conviction of the advantages offered by the commitments procedure (even if an infringement procedure offers the benefit of judicial review and thus being cleared). As Competition Commissioner Almunia said: "most companies implicated in anti-competitive practices go for the solution that can best protect their interests and reputation"⁶⁷ – and that now often proves to be a commitments procedure.

This observation is illustrated by the two European Microsoft cases – the *Microsoft 2004* infringement decision (among other things, Media Player tying) and the *Microsoft (Tying)* commitments decision from 2009 (Internet Explorer tying)⁶⁸. Although both relate to tying, the attitude and role played in the investigation and decision-making process by Microsoft are fundamentally different. The first case was a firm example of adversarial ECL enforcement

⁶¹ EC decision of 14 July 2010 *BA/AA/IB* (COMP/39.596), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39596/39596_4342_9.pdf.

⁶² Virgin complained about the revenue sharing joint venture see http://ec.europa.eu/competition/antitrust/cases/dec_docs/39596/39596_4997_5.pdf

⁶³ EC decision of 22 June 2005 *Coca-Cola* (COMP/A.39.116/B2), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39116/39116_258_4.pdf; incidentally, the case was based on jointly dominance of Coca-Cola and 3 of its bottlers – joint dominance being a particularly difficult issue to prove making the use of a commitments procedure far easier for the Commission than an infringement case, see paras 23-25.

⁶⁴ Available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf.

⁶⁵ 2004 *PO/Clearstream*; 2005 *Prokent/Tomra*; 2007 *Telefonica*; 2009 *Intel*; 2011 *Telekomunikacja Polska*; 2014 *OPCOM/Romanian Power Exchange*; 2014 *Motorola 2014*.

⁶⁶ Available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39985.

⁶⁷ J. Almunia, "Remedies, commitments and settlements in antitrust", speech Brussels 08 March 2013, p. 3, available at http://europa.eu/rapid/press-release_SPEECH-13-210_en.htm.

⁶⁸ *Microsoft 2004*, *Microsoft (Tying)* and *Microsoft (Tying) FINE*.

– Microsoft was treated as a major offender. The company image suffered greatly, it received a huge fine, and became the first ever subject to conduct remedies under ECL. By contrast, suspected once again of tying in 2008, Microsoft’s attitude could not have been more cooperative. It did not negate its practices but immediately offered to design effective commitments which largely considered the input of 3rd parties. The EC decided therefore to approve them in 2009 in light of Microsoft’s cooperative attitude and the fact that an effective remedy was found. The entire procedure took an amazing two years with little, if any, harm to the company image. The fact that the second case ended with an Article 9 decision shows both Microsoft’s and the EC’s will to resolve the identified issue in a more constructive manner.

Incidentally, Microsoft was fined in 2013 for its failure to comply with the 2009 commitments which it not only voluntarily offered, but in fact designed. Microsoft’s failure to accurately communicate the importance of the implementation of the commitment has ultimately cost the company 561 mln EUR – a fine that it had originally managed to avoid thanks to the benefits of the commitments procedure. This case unfortunately suggests that for the success of “negotiated” enforcement, it might not be sufficient for the public and private side to cooperate, internal dialogue and strengthening of the competition culture inside the corporate structures might also be necessary. If complying with self-designed remedies proved so difficult for a company as large and experienced as Microsoft, how much more difficult could it prove to be for an East Asian company, for instance, struggling with severe language barriers?

It is worth stressing next that although the legal scope of the Article 9 Regulation 1/2003 procedure is very wide, because it can be applied in both Article 101 and 102 TFEU cases, its practical scope is more limited. According to Regulation 1/2003 itself, the procedure was designed for cases that did not warrant a fine⁶⁹ – certainly therefore it was never meant for major violations such as cartels. What about other serious cases however? Microsoft, for instance, received in 2004 a large fine for its abuses, which included tying, so the illegal act clearly warranted a fine. Yet an analogous practice was addressed by a commitments decision in 2009 posing the question, what has changed? It could be argued that the use of Article 9 procedures has since proven the preferred method of ECL enforcement – if the company duly cooperates with the investigation and promptly offers appropriate commitments, the EC is likely to accept them. Indeed, rather than mentioning the necessity of fines, it is now said that “a pre-requisite for engaging in the commitment path is that effective, clear and precise remedies are identified, and effectively offered, by the parties”⁷⁰.

⁶⁹ Recital 13, Regulation 1/2003.

⁷⁰ Staff Document on Regulation 1/2003 para 187.

3.2. Advantages of commitments decisions in Article 102 TFEU cases

So why have commitments decisions proven so successful, outnumbering infringement decisions in all types of cases but cartels? Their advantages are diverse for both the public (EC as the main enforcer) and private side. First of all, they are fundamentally “negotiated” in nature allowing both sides to compensate for their respective information deficiencies. They allow the enforcers to uncover how the market works and allow companies to find out how best to align their practices with ECL requirements. Indeed, commitments decisions can only be formulated in negotiations – refusal to cooperate by the alleged offender, which might firmly oppose the accusations hoping to prove its point before the EC or later in juridical review – automatically precludes the use of Article 9. Considering the three elements mentioned above, the existence of an open dialogue is thus essential (although might not be sufficient) to the success of this procedure. Equally important is the mutual will to solve the identified competition problems, albeit the commitment level of the companies can differ considerably depending on the circumstances.

It is clear that the commitments procedure can be mutually beneficial, for instance, as shown by the *Microsoft (Tying)* investigation, if it considerably shortens the time needed to close a case. The recently closed *Samsung* case also took a mere two years. However, the need to design and market-test remedies (as well as possibly re-design and repeatedly market-test) means that time savings are by no means ensured in an Article 9 Regulation 1/2003 procedure⁷¹. On the other hand, public interest might be well served because judicial challenges are less likely, a fact which not only saves resources but also ensures faster implementation of the remedial measures. However, commitments decisions have a serious drawback – they neither definitely “clear” a given practice, nor do they formally prove an infringement. Therefore, they provide little, if any, legal certainty for anyone involved or interested in the case. As a result, they might not preclude private enforcement, but they certainly make it far more difficult⁷².

The commitments procedure was designed as a more flexible enforcement tool than infringement decisions⁷³, which retained their adversary and penal

⁷¹ For example, the *Microsoft (Tying)* decision came less than two years since the opening of the proceedings; by contrast, the current Google case opened in 2010 and said to be ready to close in 2014, yet with new changing market circumstances the decision has now been indefinitely postponed.

⁷² Article 9 decisions do not facilitate follow-on actions; also, they are usually less detailed than an infringement case and thus offer less information about the practices for private claimants to build their case on.

⁷³ Incidentally, the Commission recently stressed that infringement decisions are still its most important enforcement tool presumably because of their use in cartels cases; Communication

character. Still, without a truly negotiated enforcement tool for abuse cases, even the use of infringement decisions had to evolve. That realisation is shown by the *Microsoft 2004* decision where the use of positive (prescriptive rather than prohibitive) conduct remedies was meant to respond to competition concerns which could not be elevated by a simple cease and desist order⁷⁴. Among the key advantages of commitments decisions is therefore that the alleged offender can design tailor-made remedies that can address the identified competition problems far more accurately than if they were “imposed” upon it as conduct remedies. If a company designs the remedy itself, it is more likely to consider all business and legal aspects of the case, which will in turn greatly improve its understanding of ECL principles and help identify potential problem areas in its business practices. The company can benefit from being able to consider its own convenience and future plans, issues unlikely to be taken into account by the authorities when designing conduct remedies.

Statistics clearly show that the importance of commitments decisions is growing. Until December 2013, the EC issued a total of 78 Article 7 decisions, 60 of which concerned cartels. This leaves only 18 non-cartel infringement decisions based on Articles 101 and/or 102 TFEU in nearly 10 years – as opposed to 33 commitments decisions issued in the same time⁷⁵. Infringement decisions are currently issued for lack of effective remedies⁷⁶, to penalise and deter a particularly grave infringement⁷⁷ or to create a precedent⁷⁸. It is interesting to note that some industry sectors seem more likely to benefit from commitments decisions (energy, media and automobile industries) while others were so far only ever subject to infringement decisions (pharmaceuticals and telecoms).

⁷⁴ Commission imposed positive, behavioural conduct remedies on Microsoft in its *Microsoft 2004* decision. Incidentally, despite the availability of Article 9, the Commission issued an infringement decision with conduct remedies in EC decision of 19 December 2007 *MasterCard* (COMP/34.579), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/34579/34579_1889_2.pdf and EC decision of 16 July 2008 *CISAC* (COMP/38.698), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38698/38698_4567_1.pdf; on the respective advantages and disadvantages of Article 7 and Article 9 decisions see A. Italianer, “To commit or not to commit, that is the question”, speech Brussels 11 December 2013, available at http://ec.europa.eu/competition/speeches/text/sp2013_11_en.pdf.

⁷⁵ Commission Staff Document on Regulation 1/2003 para 184-186.

⁷⁶ E.g. TP case where the only “remedy” to the identified problem was to stop the actual violation, EC decision of 22 June 2011 *Telekomunikacja Polska* (COMP/39.525), available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39525.

⁷⁷ E.g. pay to delay in pharmaceuticals see, e.g., Press Release: Antitrust: Commission fines Lundbeck and other pharma companies for delaying market entry of generic medicines (IP/13/563 OF19/06/2013) available at http://europa.eu/rapid/press-release_IP-13-563_en.htm?locale=FR.

⁷⁸ E.g. *Motorola 2014*.

3.3. Newest developments: *Motorola 2014* and *Samsung 2014*

Noted in conclusion must be two EC decisions issued simultaneously on 29 April 2014, Motorola's infringement decision and Samsung's commitments decision, that deal with a novel aspect of ECL's interaction with national IPRs laws – the use of injunctions on the basis of standard essential patents (hereafter: SEPs). It is fair to say that the EC used these two cases together to end Europe's mobile phone "patents wars".

The two cases have a lot in common in economic and legal terms and thus their assessments were similar with respect to market definition, dominance and abuse issues⁷⁹. What set them apart was that Motorola's conduct was considered largely historical in nature⁸⁰ as it ceased after the merger with Google. Since the issue was considered a serious, but not immediate, threat to competition, Motorola's conduct was dealt with by a detailed infringement decision meant to act as a clear precedent for the entire industry to follow. Indeed, the decision is said to provide "a 'safe harbour' for standard implementers who are willing to take a licence on FRAND terms"⁸¹. By contrast, and despite the fact that Samsung has long since withdrawn the contested injunction applications, the EC seemed to fear that the Korean giant could re-engage in the contested practices at any time. Hence, it sought to eliminate the concerns it had specifically towards Samsung as quickly and efficiently as possible – by way of tailor-made commitments. Because of the more "immediate" danger posed by Samsung, the decision implements "the 'safe harbour' concept established in the Motorola decision in practical terms"⁸².

The Samsung case is the most recent example of the use of "negotiated" instruments of ECL enforcement towards foreign firms acting directly inside the Internal Market, and within the boundaries provided by the legal regimes

on Regulation 1/2003 para 19; Commission Staff Working Document: Ten Years of Antitrust Enforcement under Regulation 1/2003 *Accompanying the document* Communication from the Commission to the European Parliament and Council Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives{COM(2014) 453} {SWD(2014) 231 (hereafter: Staff Document on Regulation 1/2003) para 184.

⁷⁹ They clarified, in essence, that while ECL does not consider the use of injunctions as an abuse in itself, it can become one in exceptional circumstances including the existence of standard setting and the investigated company's commitment to licence its SEPs on FRAND terms.

⁸⁰ *Motorola 2014*, para 17.

⁸¹ FRAND means fair, reasonable, and non-discriminatory terms; EC Press Release, "Antitrust decisions on standard essential patents (SEPs) – Motorola Mobility and Samsung Electronics – Frequently asked questions", p. 2, available at http://europa.eu/rapid/press-release_MEMO-14-322_en.htm.

⁸² *Ibid.*

of EU Member States. Interestingly also, the EC decision specifically states that Samsung disagreed with the accusations⁸³, and yet it still chose to use a negotiated enforcement instrument despite the fact that it could have insisted on pursuing an adversarial procedure and contest the EC decision before the courts. The Samsung case illustrates therefore that negotiated instruments are becoming the preferred method of ECL enforcement not just for the EC but also for companies.

Incidentally, and despite the fact that fines are almost always imposed in Article 7 decisions, Motorola escaped without a penalty due to the novel nature of the contested legal problem. It is an issue which lies at the intersection of ECL enforcement and IPRs laws, which remain firmly in the ambit of individual Member States and have thus generated divergent approaches from national judiciaries. The Motorola decision shows therefore the flexibility, or even an evolution of Article 7 cases as well – it addresses the need to create a clear legal precedent without pursuing its traditionally penal objectives. One has to wonder therefore, can “negotiations” become part of infringement procedures also if the latter are not bound by the need to punish the offender, but are mostly driven by the need to provide legal clarity in the ever more complex global economy? Are we seeing another step towards an even more “negotiated” enforcement of ECL?

4. Leniency and the settlement procedure

4.1. “Negotiated” aspects of leniency and settlement

Europe’s first leniency was introduced in 1996, replaced in 2002 and most recently renewed in 2006⁸⁴. With numerous applications per year⁸⁵, the procedure has proven immensely successful; most cartel investigations

⁸³ “Samsung disagrees with the Commission’s assessment set out in the Statement of Objections. It nevertheless has offered commitments under Article 9(1) of Regulation (EC) No 1/2003 to meet the concerns expressed to it by the Commission”. *Samsung 2014*, para 6.

⁸⁴ Commission Notice on Immunity from fines and reduction of fines in cartel cases OJ C 298, 08 December 2006, pp. 17–22; replacing 2002 Commission notice on immunity from fines and reduction of fines in cartel cases OJ C 45, 19 February 2002, pp. 3–5; replacing 1996 Commission Notice on the non-imposition or reduction of fines in cartel cases OJ C 207, 18 July 1996 pp. 4–6; This paper focuses on the “negotiated” aspect of leniency and settlement; generally on leniency see, e.g. T. Calvani, T.H. Calvani, “Cartel sanctions and deterrence”, (2011) 56(2) *Antitrust Bulletin*; N.H. Miller, “Strategic Leniency and cartel enforcement”, (2009) 99 *American Economic review*.

⁸⁵ Average 4 per month; J. Almunia, “Fighting against cartels: A priority for the present and for the future”, speech Brussels 03 April 2014, p. 3, available at http://europa.eu/rapid/press-release_SPEECH-14-281_en.htm.

now start with a leniency application⁸⁶. The negotiated nature of leniency as a valid ECL enforcement instrument is perhaps not as intuitively recognisable as that of conditional merger clearances or commitments decisions, but it exists nevertheless. The basic assumption behind leniency is that immunity from fines and sizable fine reductions are offered to whistle-blowers – cartel participants that inform the authorities of the existence of a cartel and provide evidence of its practices. Despite their cooperation, leniency applicants receive an infringement decision with all its other effects such as damage to the corporate image and the possibility of follow on private claims.

The leniency procedure is firmly based on a public-private dialogue – it is the essence of leniency for companies to approach the authorities and try to “negotiate” the best solution possible in the circumstances. Commissioner Almunia noted in 2011 that the policy change whereby the elements for the calculation of the fine will be indicated already in the Statement of Objections, “will open a channel for dialogue with the parties and will give them a better idea, at an early stage, of the size of the fine that may be imposed on them”⁸⁷.

It is also clear that leniency offers major mutual gains for both the public and the private side. Discovery is greatly improved for enforcers and advantages in procuring evidence of collusive wrong-doings are huge, considering that much of it is hand-delivered by the leniency applicants. The gain for the parties is mostly re-active, monetary damage control – eliminating, or at least reducing, the fine they must pay for their wrongdoing. Whistle-blowing can, however, also be as much about escaping fines, as it is about staying ahead of competitors or even getting them into trouble. A cartel member might therefore approach the authorities when the cartel reaches the end of its usefulness⁸⁸ and/or if a “new” business strategy would benefit from the misfortune of other cartels members.

Nevertheless, the “negotiated” character of leniency is only partial because, unlike in mergers or commitments cases, leniency applicants usually do not have a supreme future goal worth negotiating over (such as the approval of a merger or escaping an infringement decision). For this reason, their will to solve the identified competition problem (cartel) is either non-existent, or at least far less pronounced than in the two above-mentioned enforcement instruments. In most cases, enforcers can expect that the level of cooperation of leniency applicants will only be sufficient to achieve their immediate objective – immunity from fines or a fine reduction associated with the scrutinised cartel.

⁸⁶ A. Italianer, “European competition policy...”, op. cit., p. 9.

⁸⁷ J. Almunia “Cartels: the priority in competition enforcement”, speech Berlin 14/04/11, p. 3, available at http://europa.eu/rapid/press-release_SPEECH-11-268_en.htm?locale=en.

⁸⁸ E.g. EC decision of 13 April 2011 *Consumer detergents* (COMP/39579), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39579/39579_2633_5.pdf.

It will generally amount to no more than that which is necessary, seeing as being too open with the authorities might very well result in the discovery of other ECL infringements which the applicant might not want disclosed.

Additional incentives were created by the introduction of settlement in 2008⁸⁹. Its primary purpose is to shorten and simplify the administrative procedure to the benefit of both the public and the private side. To do so, parties must admit to the violation and assume responsibility for it. In return, they receive a 10% fine reduction for parties willing to settle the dispute, even if they have already received a fine reduction thanks to leniency. Furthermore, the resulting infringement decision is not only reached more quickly than a normal cartel case⁹⁰, the decision itself is also less detailed, limiting the basis for follow on claims. Judicial review is also far less likely as the addressees have admitted their involvement in the infringement and agreed to the terms of the decision⁹¹. The use of settlement visibly strengthens therefore the negotiated character of leniency as it provides the parties with the opportunity to further limit the adversarial aspects of cartel investigations.

The settlement procedure is proving successful – the EC is hoping to use it in about half of its cartel cases⁹². Yet although the recent *Steel Abrasive* cartel represents the 13th settlement decision since 2010, 4 of them were hybrid cases where some cartel members decided to settle while others did not. Considering that the majority of cartels are not being settled at all, this shows that there will always be some companies which do not wish to “negotiate” or, even more

⁸⁹ Commission Regulation (EC) No. 622/2008 of 30/06/08 amending Regulation (EC) No. 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ L 171, 01 July 2008, pp. 3–5; Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases, OJ C 167, 02 July 2008, pp. 1–6; generally on settlement see, e.g. R. Gamble, “‘Speaking (formally) with the enemy’ – cartel settlements evolve” (2011) 32(9) *ECLR*; U. Soltesz, Von Kockritz, “EU cartel settlement in practice – the future of EU cartel law enforcement?” (2011) 32(5) *ECLR*; M. Motta, “Settlement in cartel cases” [in:] C.D. Ehlerman, M. Marquis (eds) *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law*, Oxford 2009; K. Mehta, M.L.T. Centella, “Settlement procedure in EU cartel cases” (2008) available at http://professorgeradin.blogs.com/professor_geradins_weblog/files/settlements_paper_mehta_and_tierno.

⁹⁰ Just over 3 years rather than usual just over 5 years see A. Italianer, “European competition policy...”, op. cit., p. 15; note that the 3rd settlement in the *Consumer Detergent* case was reached in only a year and a half!

⁹¹ Societe Generale has challenged its settlement decision in the *Euribor* cartel (EC decision of 04 December 2013, Case 39914) with respect to the method of calculating its fine; available at <http://www.bloomberg.com/news/2014-02-19/socgen-appeals-eu-calculation-of-613-5-million-euribor-fine.html>.

⁹² J. Almunia, “Remedies, commitments...”, op. cit., p. 6; J. Almunia, “Fighting against...”, op. cit., p. 3.

likely, to admit to having committed a competition law violation. Interestingly, the most recent *Smart Card Chip* cartel shows that open settlement discussions can also falter if companies fail to cooperate to the expected standard.

4.2. East-Asian cartels

The introduction of leniency in Europe has generated an almost instant effect on the discovery rates of cartels including those involving East Asian companies, Japanese in particular. In 1999, the EC fined four Japanese firms for the first time for their involvement in the *Seamless Steel Tubes* cartel⁹³. Most likely due to its early origin, this is the only East Asian case to date where none of the companies applied for leniency. Yet the advantages offered by the programme were soon recognised. In the *Graphite Electrode* cartel⁹⁴ of 2001, Showa Denko was the first to approach the EC and received the largest fine reduction awarded until then (70%). The infamous *Vitamins* cartel⁹⁵ brought with it Europe's first immunity (Aventis) as well as fine reductions for the three scrutinised Japanese companies, including Takeda. It only took another year and four more related cases⁹⁶ for the very same Takeda to use its experiences and gain immunity for its role in the uncovering of the *Food Flavour Enhancers* cartel, which crucially also involved two South Korean companies. Once again, the usefulness of leniency was quickly recognised by Korea's Daesang (50% fine reduction).

The *Gas Insulated Switchgear* cartel⁹⁷ of 2007 proved of key importance in this context. East Asian companies infringed ECL primarily through market sharing cartels whereby they stayed out of the Internal Market in return for European companies staying out of Asia. The GIS decision was the first to impose a fine on East Asian companies even though they had nearly no EEA turnover in the cartelised products⁹⁸. The GIS case is thus crucial because it clarifies, as confirmed by the General Court⁹⁹, that ECL cartel fines can be imposed despite the lack of an actual presence on the Internal Market (if the

⁹³ EC decision of 08 December 1999 *Seamless Steel Tubes* (IV/E-1/35.860-B), OJ 2003 L 140, p. 1.

⁹⁴ EC decision of 18 July 2001 *Graphite Electrode* (COMP/E-1/36.490) (2002) OJ L 100/1.

⁹⁵ EC decision of 21 November 2001 *Vitamins* (COMP/37512) (2003) OJ L6/1.

⁹⁶ *Carbonless Paper; Sodium Gluconate; Animal Feed; Speciality Graphites*.

⁹⁷ EC decision of 24 January 2007 *Gas Insulated Switchgear* (COMP/F/38.899) (2008) OJ C5/7.

⁹⁸ Another 4 Japanese companies were fined (with some reductions) in the *Sorbates* cartel of 2003.

⁹⁹ GC judgment of 12 July 2011 *Toshiba v. Commission* T-113/07 ECR 2011 II-3989.

latter is caused by a market sharing cartel). The *Videotape Producers*¹⁰⁰ cartel is worth noting as it shows that the EC can, and will act in an adversarial manner in certain circumstances for instance to send a strong message to foreign companies concerning their duty to comply with ECL. Here, Sony's fine was increased by 30% for, among other things, obstructing an EC inspection.

The *DRAM*¹⁰¹ (Dynamic Random Access Memory) cartel of 2010 stands out from the many cartels that followed¹⁰² as ECL's first settlement – a procedure which proved very popular with East Asian companies¹⁰³. The *DRAM* decision also marks the beginning of a set of high-tech cases which brought with them the notable expansion of the subjects of ECL cartel cases to include not just Japanese but also Korean and Taiwanese companies. Following the Japanese example, other East Asian companies soon became aware of the benefits offered by EU leniency. In the *LCD* (Liquid Crystal Display) cartel¹⁰⁴, leniency was used by both the Korean (Samsung received immunity; LG received a 50% fine reduction) and two of the Taiwanese companies including Chunghwa. With this new experience, Chunghwa successfully applied for immunity in the 2012 *CRT* (TV and computer monitor tubes) cartel¹⁰⁵, leaving Samsung behind, albeit the giant still managed to receive a sizable 40% reduction. By contrast, with no leniency at all, LG Electronics received in this case one of the EU's largest individual cartel fines so far (nearly 700 mln EUR)¹⁰⁶.

Aside from electronic goods, East Asia is also well known for its car manufacturing business. After opening a major investigation in this field, the

¹⁰⁰ EC decision of 20 November 2007 *Professional Videotape* (COMP/38.432) para 219-227, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38432/38432_526_5.pdf.

¹⁰¹ Although both Korean companies received fine reductions under the leniency programme, as did some of the Japanese participants, ultimately it was the US-base Micron that managed to receive immunity followed by the second largest fine reduction granted to the German Infineon. Although it was again Lufthansa that got immunity in the Air Cargo cartel, Japan Air managed to get the second biggest reduction of 25%, EC decision of 09 November 2010 *AIRFREIGHT* (AT.39258), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39258/39258_6547_3.pdf.

¹⁰² 2007 *Flat Glass*; 2007 *Chloroprene rubber*, 2008 *Synthetic rubber*; 2009 *Marine Hoses*; 2009 *Power Transformers*.

¹⁰³ Panasonic got 40% off for its participation in the *Refrigerator Compressors* cartel settlement of 2011, EC decision of 07 December 2011 *Refrigerator Compressors* (COMP 39.600), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39600/39600_2147_3.pdf.

¹⁰⁴ EC decision of 08 December 2010 *LCD – Liquid Crystal Displays (LCD)* (COMP/39.309), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39309/39309_3643_4.pdf.

¹⁰⁵ EC decision of 05 December 2012 *TV and computer monitor tubes* (COMP/39.437) OJ 2013/C 303/07.

¹⁰⁶ Incidentally, *CRT* is the only case so far with no successful leniency application from any of the Japanese participants, which included Panasonic and Toshiba, both of which have had experiences with EU leniency before.

EC has issued three car-parts decisions already¹⁰⁷, unsurprisingly two of which focus on East Asia – the 2013 *Wire Harness* cartel and the 2014 *Car and Truck Bearing* cartel¹⁰⁸. Japanese companies used leniency in both cases, gaining immunity from fines (e.g. Sumitomo) and fine reductions. Moreover, both cases were settled showing that Japanese companies are visibly aware of the benefits offered by the new procedure. Incidentally, Sumitomo was among the two Asian companies that managed to get a fine reduction in the 2014 *High Voltage Power Cables* cartel¹⁰⁹ (with 6 EU, 3 Japanese and 2 Korean companies) suggesting once again that past experiences with leniency facilitate its successful use in the future¹¹⁰.

With cartels becoming more international, but also cartel discovery improving notably world-wide, it is not completely surprising to see such extensive enforcement of ECL against East Asian companies. In truth, Japan alone is the EU's seventh largest export destination and the EU is Japan's third¹¹¹. But the noticeably large proportion of EU cartel cases with a Japanese focus might actually reflect the fact that cartels were encouraged in Japan after the war to boost the national economy. That could have made Japanese companies culturally accustomed to their existence and use. It was thus not until EU leniency generated the first European cartel cases that Japanese companies became aware of the limitation placed upon them by ECL in light of its extra-territorial applicability. It then took several more years for them to fully acknowledge ECL's fight against global market sharing. East Asian companies were however very quick to recognise the advantages offered by the "negotiated" features of EU leniency, and more recently, settlement, and soon became proficient in using these enforcement tools to their advantage. It is worth noting in conclusion that the above statistics also suggest that a company that has cooperated with the authority with respect to one of its

¹⁰⁷ The *Flexible Foam* cartel had no Asian participants; EC decision of 29 January 2014 *Polyurethane foam* (AT.39801), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39801/39801_2457_8.pdf.

¹⁰⁸ EC decision of 10 July 2013 *Automotive Wire Harnesses* (AT.39748), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39748/39748_3865_3.pdf; EC decision of 19 March 2014 *Bearings* (COMP/39922), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39922/39922_2067_2.pdf.

¹⁰⁹ Analogue to the GIS cartel and Fining Guidelines point 18, the Commission imposed fines despite the Asian parties' absence from the Internal Market by attributing to them sales according to respective share of sales in the nearly global market.

¹¹⁰ The most recent *Smart Card Chips* cartel decision was another example of a successful use of leniency by East Asian companies seeing as Hitachi and Mitsubishi's joint venture received immunity. Samsung has once again received a fine reduction (30%). It is, however, also an example of an unsuccessful settlement – the procedure was discontinued in 2012, see EC decision of 03 September 2014 *Smart Card Chips* (COMP/39574) not yet reported.

¹¹¹ A. Italianer, "European competition policy...", op. cit.

infringements is likely to approach the EC again, and be more successful next time. This realisation suggests that “negotiated” enforcement instruments might have an additional key advantage for the public side – they exercise a positive impact on global ECL compliance by helping companies identify their infringements as well as giving them a clear incentive to cease them. This might apply especially well to smaller foreign firms which might still not know of the restrictions placed upon their activities by ECL.

III. Conclusions

The enforcement of European Competition Law by the European Commission towards foreign firms seems to largely centre on the element of public-private “negotiations”. The EC engages in extensive talks with those that “might have infringed” ECL and those that wish to implement a problematic concentration (via commitments decisions & conditional merger clearances) with the view to allow them to continue their business activities but in a pro-competitive manner. Dialogue is particularly important when companies design, and often repeatedly re-design, remedies and commitments, which can also be shaped by 3rd party input. The EC encourages companies to tell on their co-conspirators, giving them the chance to escape or reduce their fines if they duly cooperate in a cartel investigation (leniency). Fine reductions are simultaneously offered to those that clearly admit to an infringement and are willing to settle (settlement).

Rather than infringement decisions or merger prohibitions, the EC seems to favour “negotiated” enforcement instruments which can offer faster, more accurate solutions to identified competition problems, which greatly improve discovery of ECL infringements world-wide, and which save administrative resources. Yet the success of “negotiated” ECL enforcement instruments could only have occurred thanks to the positive response it received from global market players. Businesses, clearly including foreign companies, be it American giants or East Asian high tech firms, have recognised the benefits of non-adversarial enforcement methods: lesser or even no fines, shorter and thus cheaper proceedings, less damage to the company image, less disclosure of company information, and avoiding a declaration that an infringement occurred, which can facilitate private damages claims.

In truth, however, “negotiated” enforcements have significant drawbacks also¹¹². These include the lack of penalty and corporate stigma for likely

¹¹² For a theoretical analysis of the concept of “negotiated” enforcement of competition rules, including in particular a comparison between the classic and the negotiated enforcement

offenders and arguably less of a deterrent effect for other market players. They provide also less legal security – while they clearly contribute to the clarification of overall market conditions, they fail to specify how, and according to which criteria, the EC would have assessed the given conduct. As such, commitments decisions do not contribute to the development of legal “precedents” and lower the transparency of the EC’s enforcement practice on the whole. Nevertheless, the long list of advantages of public private dialogue for both the enforcer (here, the EC) and the investigated entities makes it unsurprising that the “negotiated” approach has become such a major part of the EC’s enforcement practice, also, or maybe in particular, towards foreign firms.

approach, see T. Skoczny, “Negotiated enforcement of competition law – theoretical concept”, forthcoming in *YARS* 2015.