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Commitments decisions as the winning instrument of negotiated enforcement of the abuse prohibition in Europe, or are they?

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I. Introduction

1. The paper is based on the ongoing analysis of relevant procedural provisions, accumulated case law and literature in Europe, including Poland, covered by the **research project entitled "Negotiated Enforcement of Competition Law".** It focuses on **the change in the general policy trend of using negotiated enforcement tools in public enforcement** of competition law (mostly in Europe), directly reflected – among others – in the increasing use of commitments decisions to resolve abuse cases.

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2. A number of theses are proposed in the aforementioned research project in general, and in this paper in particular.

3. First, two alternative enforcement models applicable to the abuse prohibition are currently is use in Europe – the adversarial *vs.* the negotiated model based, respectively, on the choice to either close the case with an infringement decision (hereafter: ID) or a commitments decision (hereafter: CD). It is shown that use of the negotiated model has greatly increased.

4. Second, there is a need to unify the applicable terminology with respect to negotiated enforcement because although this trend has entered the mainstream of European competition law literature, a consensus on how best to call it has not yet been reached.

5. Third, abuse cases are affected most visibly by the shift from the adversarial to the negotiated model because their economic and global complexity including IPRs and technology related competition concerns as well as the lack of per-se abuses make the use of commitments decisions, as opposed to infringement decisions, most advantageous here.

6. Fourth, despite its many advantages, the increasing use of negotiated enforcement tools – the decreasing use of adversarial enforcement methods – also creates problems for the overall systemic values of competition law enforcement including legal certainty, proportionality and transparency. Many of these issues are currently at the heart of the on-going Google case.

7. The paper consists of three parts. After the **Introduction, part II** (Alternative enforcement models) covers the normative background in the EU and Poland. Two enforcement models are outlined: the classic adversarial and the negotiated model. The use of the term 'negotiated enforcement' is proposed in order to solve existing terminological differences. The advantages and disadvantages of the negotiated model are covered next followed by a comparison between CD and ID. A number of concerns are outlined in conclusion relating to varies systemic repercussions of the increasing use of negotiated enforcement in Europe.

8. **Part III** (Predominance of negotiated enforcement in abuse cases) shows the growing role of negotiated enforcement in abuse cases. Changes in the proportion of CD as opposed to ID are noted first both in the EU and Poland. Following is an analysis of the special characteristics of abuse cases dealt with by CD in the EU (complexity, reliance on IPRs, enforcement in regulated sectors) and the distinctively different experiences in Poland.

9. Part IV outlines the development of the Google investigation in light of the characteristics of the two special alternative enforcement models. The paper closes with **Conclusions** which put into question the recent enforcement practise.

II: Alternative models – *adversarial* vs. *negotiated* enforcement

1. Breaking competition law, including the abuse prohibition, creates competition concerns. It is the role of competition authorities to resolve them (private enforcement remains outside the scope of this paper). These are evaluated in the framework of competition proceedings which culminate in the issuance of a final decision (usually administrative in nature).

2. It is the nature of this decision, and especially the manner in which it is formulated (ie negotiated or adversarial), which remains – firstly – the focus of this paper. It is of essence here that there is, in fact, a choice to be made concerning what type of decision (ID *vs*. CD) will be used to solve a given abuse case, and what consequences that choice has for the overall competition law enforcement system in Europe. It is the formal introduction of such choice by Reg 1/2003, and the realisation that statistically the use of the new instrument has overtaken the use of the old, that point to the first theses of this paper – that there are two alternative enforcement models with respect to the abuse prohibition (adversarial & negotiated) and that the negotiated model is gaining in momentum.

1. Normative background

3. The manner of the enforcement of substantive competition rules is widely regulated on the regional and national level and there is no single unified competition law enforcement system, not even in Europe. The resulting differences derive primarily from applicable legislative solutions which determine the competences of enforcement agencies and their specific enforcement tools. Although legislators determine the key elements of applicable enforcement models, they tend to grant a wide scope of discretion to competition authorities when choosing their specific enforcement priorities and individual enforcement methods.

2. Both legislative solutions and enforcement practice can be analysed on the basis of **varies criteria –** the **two most relevant** to this research project concern:

1) character of the relationship between the enforcer and the those under investigation, considering in particular whether this relation is based on a clear supremacy of the enforcer or on a more balanced dialogue between the public and private side;

2) the extent and form of the impact of the undertakings on the result of the case, in other words, does the investigated company have an influence on its resolution.

3. These two criteria have **gradually changed** – not by way of a complete overhaul of earlier legislative solutions (EU [Reg 4064/89] & [Reg 17/72] and Poland [Competition Act of 2000]) but rather, **by** the **enrichment of established procedural rules by new instruments** that can be initialised (launched) at some stage of 'classic' proceedings.

4. **This paper covers the enforcement of the abuse prohibition only** (Article 102 TFEU in the EU; Article 9 of the Polish Competition Act of 2007). The legal basis for the classic, adversarial enforcement model can be found in Articles 7 & 23 of Reg 1/2003 in the EU, and in Article 10 & 106 of the Competition Act of 2007 in Poland. The classic enforcement model is based on a vertical confrontation between the enforcer and the accused. Authorities must prove the abuse, parties are not interested in cooperating and thus do not influence the content of the resulting declaratory decision. Although *ad hoc* settlements were used before 2004, they were not common and lacked a normative basis.

5. The character of the relationship between the EC and undertakings formally changed on 1 May 2004 with Reg 1/2003 giving the EC the express power to issue CD on the basis of **Article 9 Reg 1/2003**. [Sage; Skoczny 3] Resembling American *consent decrees* [Schweitzer 1; other papers in the European Competition Law Annual 2008, Ehlerman, Marquis], the new institution provided the EC with a clear normative basis for issuing decisions directly in cooperation with undertakings, as well as replacing individual exemptions [Colomo; Sage]. According to Article 9(1) Reg 1/2003, if the EC intends to issue an infringement decision, but the company offer commitments to solve (meet) the competition problems identified in the preliminary assessment (PA), the EC can make these commitments biding upon the undertakings and find that there are no longer grounds for action by the EC (it is not obliged to conclusively prove the existence of an infringement). According to Recital 13 Reg 1/2003, CD are not appropriate in cases where the EC intends to impose a fine. Despite the increasingly frequent use of such decisions, lack of soft law guidelines on the use of CD in the EU must be seen as a serious failure on its part [Wagener-Von Papp]. It would be particularly important for the EC to clarify what commitments it is going to consider sufficient [Italianer] considering it recently stated that 'the use of commitment decisions depends on whether the parties offer effective, clear and precise commitments.' [Communication: Ten Years]

7. Commitments decisions were introduced in **Poland** in 2004; after subsequent amendments, their current legal basis can be found in Article 12 of the Competition Act of 2007. In line with EU rules, commitments decision can be issued in Poland if the NCA finds that it is likely that a breach of Article 6 or 9 of the Competition Act or Article 101 or 102 has taken place/is taking place – it means 'can be rendered plausible' ('*uprawdopodobnione'*) but not proved – the undertakings concerned "commit to take or discontinue certain actions aiming at preventing those infringements or eliminating their effects". The NCA can then impose upon them the obligation to fulfil such commitments (Article 12(1) Competition Act of 2007). Unlike the EC, the Polish NCA issued in 2012 its own Guidelines on the use of commitments

decisions [*Wyjaśnienia w sprawie wydawania decyzji zobowiązującej*]. Unfortunately, the Guidelines are not sufficiently precise in stating when a commitment will 'eliminate the infringement or its effects'; the commitment must however be formulated in a 'clear and precise manner, making it possible to assess whether it will facilitate the fulfillment of the objective of a CD'. [Kulesza; Piszcz 1] The NCA clarified also therein that it will not use CD to deal with any form of cartels (price, contingent, market sharing and tender fixing).

8. It is worth noting that CD are not the only, albeit key, **enforcement instrument used in negotiated competition law enforcement**. [Skoczny 3; Modzelewska de Raad; Sage] Mentioned here, but remaining outside the scope of this conference paper, must also be **conditional merger clearances** [Article 6(2) & Article 8 (2) Reg 139/2004; Article 19 of the Polish Competition Act of 2007]. Doctrinal views are more divided on the 'negotiated' nature of the **cartel settlement procedure** [Article 10a Reg 773/2004] [Cook 2; Bach; Schweitzer 2] & Polish *voluntary submission to a fine procedure* [Article 89a of the Competition Act of 2007] and especially **Leniency** [2006 Fining Guidelines; Articles 11a-113k of the Polish Competition Act of 2007 + 2009 Guidelines]. [Bolecki; Piszcz 2 & 3; Sage; Wagner Von-Papp]

9. Importantly, **all these instruments** (CD, conditional merger clearances, EU cartel settlements and Leniency) **'fit' into classic (standard) competition proceedings** which are, at first, opened *ex officio* and conducted in the form of a dispute between the authority (having competition concerns) and the investigated undertakings (which cannot influence the 'verdict' of the authority). At some point in that proceeding, the originally adversarial character of that relationship can change into one far closer to a public-private dialogue which can give the undertakings the change to participate in the formulation of the final decision.

2. Doctrinal approach

10. The increasing use of public-private dialogue within the framework of public enforcement of competition law is a well-documented fact of great practical importance. As such, it has been subject to much doctrinal debate mostly in the **USA** [Kovacic; Wood; Ascione, Motta; Georgiev; Ginsburg, Wright; Goldfein, Pak; O'Brien; Reidl; Ziamoe] but also increasingly in the **EU**. After much has been said about conditional merger clearances [Broberg; Motta, Polo, Vasconcelos; Valois Turk; Budzinski, Kochinke], the **spotlight is on commitments decisions since 2006** [Armengol, Pascusal; Botteman, Patsa; Cook 1; Cook 2; Forrester 2; Hinds; Temple Lang; Kellerbauer 1; Kellerbauer 2; Mariniello; Martinez Lage, Allendsalazar; Messina, Ho; Moullet; Pera, Carpagnano; Rab, Monnoyeur, Sukhtankar; Schweitzer 1; Schweitzer 2; Siragusa, Guerri; Sousa Ferro; Wagner-Von Papp; Whish; Wils 1; Budzinski,

Kuchinke]. The EU *settlement procedure* is also being considered [Cook 2; Mehta, Tierno Centera; O'Bien; Siragusa, Guerri; Wils 1; Wils 2; Budzinski, Kuchinke] often in relation to *Leniency*. Also in Poland, aside from rich literature on merger clearances [see in: Skoczny 1], the doctrine is also mostly focusing on discussing commitments decisions [Kozieł; Piszcz 1] and settlement. [Krajewska, Piszcz; Sieradzka]

11. Literature is generally divided into two streams: one focuses on the essence of public enforcement and the basic differences between the adversarial and the non-adversarial model; the other emphasises the benefits and losses associated with these two models.

12. Despite the variety of doctrinal sources, there is no consensus in the **EU** yet as to what best to call these trends and their specific elements (unlike in the USA where the term *settlements or antitrust settlements* is usually used). [Wood] European English-language literature tends to use the term **settlement**: *settlements in antitrust enforcement* [Ascione, Motta], *negotiated settlements* [Siragusa, Guerri; Cook 2; Reindl], *formal and informal settlements* [Hausfeld, Rainer, Campbell], *formal settlement* [Hinds] or a reflection of a growing *settlement culture.* [Ginsburg, Wright; Waelbroeck 2] Another term used in this context is consensus: *consensual competition law enforcement* [Wagener-Von Papp; Waelbroeck 2] or *consensual arrangements.* [Budzinski, Kuchinke] Some commentators place greater emphasis on the **negotiated character** of such trends speaking of: *negotiated rule-making* [Hoffman; Ziamou], *negotiated antitrust settlements* [Bach], *negotiated deals* [Schweitzer 2] or *negotiated instruments of competition law enforcement.* [Sage] French speaking literature uses similar terms: *solutions négociées* [Waelbrock 1] or *non-contested procedures.* [De River] German doctrine tends to use the term: *einvernehmliche Lösungen.* [Kellerbauer; Wagener-Von Papp]

13. In order to avoid terminological confusion, it is not advisable to use the term *settlement* to describe the wider enforcement trend subject to this discussion because of the specific EU legal instrument of known as cartel settlement (Article 10a Reg 773/2004). The EU settlement procedure is but one of the different legal tools discussed in this context and arguably, not as consequential as conditional merger clearances and commitments decisions. Similarly, the term *consensus* emphasises the reaching of an agreement. However, when it comes to commitments decisions at least, their addressees specifically reject the accusation ('likely' infringements), albeit they do reach a consensus on the remedial measures. Also, comments made by 3rd parties, although considered and commented upon, do not actually have to be met in the final decision. As such, there does not need to be a consensus reached here, be it about the appropriateness of the measures or about closing the case in a non-adversarial manner.

14. The term *negotiated enforcement* of competition rules seems thus most accurate to describe the entirety of both the discussed trends and their elements. It emphasises the common thread essential to this discussion – the shift from assessing and deciding competition cases singlehandedly by the authorities to a more cooperative, dialogue-based model where both sides impact the result of the case. Considering negotiations the essence of non-adversarial enforcement is reflected by some of the key statements made in the *Google* case. Already early one, Commissioner Almunia stressed that 'since the adoption of our Preliminary Assessment we have been negotiating with Google in order to find a potential solution through the Article 9 route…'. [Almunia 2] Similar statements were made later in the procedure also (see the discussion on Google below). [Almunia 3]

3. Adversarial vs. negotiated enforcement models

15. In light of existing legislation and doctrinal arguments, **two theoretical concepts** of competition law enforcement can be identified in the EU and its Member States:

(a) the classic adversarial model (contested, controversial) and

(b) the negotiated model (non-contested, non-controversial, settlement).

16. This distinction is primarily based on the assumption that the legal instruments used by public enforcement within the two models significantly differ [Sage] as to: (1) the aims pursued by the parties (authority vs. undertakings); (2) the extent of their cooperation during the evidentiary proceedings and, as a result, their varying quality and, finally; (3) the importance and scope of penalties.

17. Applying these three criteria, the **adversarial model** [Schweitzer 2] fully fulfils public-law paradigms and is the reflection of authoritative, unilateral top-down hierarchical command. [Wagener-Von Papp] It is thus predominantly reactive and characterised by:

(a) contradictory goals of the opposing parties of the enforcement procedure – the authority aims to resolve the competition concern by way of prohibiting an incompatible concentration or establishing that an infringement took place and imposing a fine; the undertaking aims to protect itself by preventing such decision/penalty generally by way of judicial control;

(b) one-sided, adversary nature of the procedure whereby the burden of proof is placed on the authority (a fact that complicates and lengthens evidentiary proceedings since the investigated undertaking has no interest in helping the authority to prove its accusations);

(c) generally repressive nature of public intervention into the practices of an undertaking reflected in high fines for breaking competition law prohibitions.

18. By contrast, the **negotiated model** contains some elements of the contract-law paradigm. [Wagener-Von Papp] It is largely pro-active and characterised by:

(a) the existence, or even predominance of mutual will to resolve the identified competition problem including the elimination of the infringement and the mutual achievement of other gains (e.g. faster market impact, less damage to company image);
(b) the essential role played by public-private dialogue – cooperation [Hinds] in how the procedure is conducted between the authority and the undertaking in order to reach the best possible outcome for both sides in other words, dynamic, cooperative equilibrium [Siragusa, Guerri]; this results in better evidentiary proceedings thanks to information provided voluntarily by the company;
(c) (arguable) lesser repressiveness of public intervention (no penalties).

19. When it comes to the abuse of dominance prohibition, the two enforcement paths focus on specific legal instruments

a) **the adversarial model uses infringement decisions** (based on Article 7 Reg 1/2003 in the EU and Article 10 of the Competition Act of 2007 in Poland).

b) **the negotiated model uses commitments decisions** (based on Article 9 Reg 1/2003 in the EU and Article 12 of the Competition Act of 2007 in Poland).

20. In truth, every individual competition law procedure in Europe starts in an adversarial model and it can so finish '*by default and by right'*. [Wils 2] This classic manner of a '*fully adversarial disposal of cases'* [Wils 2] can shift/be switched during an investigation into a more negotiated model – for conditional merger clearances and commitments decisions this would involve a separate normative basis and a special type of decision. In the case of settlement and Leniency, the decision remains 'adversarial' in nature, but the manner in which it is has been reached is characterised by far more cooperation. In other words, negotiated enforcement is an alternative to the well-established standard [Hinds; Rab, Monnoyer, Sukhtankar], a *fully-fledged procedure of a completely adversarial nature* [Siragusa, Guerri], which ends in a merger ban or 'classic' infringement decision. They are an alternative (exception to the rule) also because the authorities can always revert to the classic adversarial procedure (*fallback option*). [Siragusa, Guerri]

4. Commitments decisions as the main tool of negotiated enforcement

21. Commitments decisions are **a clear example of negotiated enforcement tools** available to European enforcers not only because their use itself but also because their ultimate content are directly based on the existence of public-private dialogue between competition authorities and investigated undertakings (and increasingly 3rd parties). 'Commitment decisions allow for the quicker resolution of competition concerns on a more cooperative basis.'[Communication:

Ten Years, 7] Analogue instruments have now been introduced in individual Member States also. [Schweitzer 2; Communication: Ten Years]

22. Infringement decision used in the adversarial enforcement model contain: (1) finding of an infringement, (2) duty to bring the infringement to an end, they can impose conduct remedies to that effect or to eliminate the effects of the infringement; (3) can impose a fine.

23. Infringement decisions based on Article 7 are primarily characterised by:

(a) the fact that they contain a definite **condemnation** of an actual infringement (they declare that a given market practice constitutes an infringement of competition law);

(b) it is for the **authority to prove** that a given market practice constitutes an infringement despite the proofs/objections/justifications provided by the investigated company; as a result, such decisions should contain detailed economic and legal assessments and an extensive justification of the findings of the competition authority;

(c) they generally **impose a penalty** on the offender;

(d) they are **usually appealed**, primarily by the addressee of the decision.

24. C**ommitments decisions** are primarily characterised by:

(a) the fact that they state the **likelihood**, **rather than** provide actual **proof**, of an infringement of competition law; they are therefore not definite in their legal assessment of the investigated practice/practices;

(b) existence of **public-private dialogue** in the reasoning (evidencing) of the decision;

(c) the **non-penal character** of the decisions – no fine is imposed since the competition authority has not proven an infringement;

(d) introduction of formal and binding commitments, which are **not normally appealed** by the undertaking concerned.

5. Advantages and disadvantages of negotiated enforcement

25. The negotiated enforcement model offers [Georgiew] significant, mutual benefits to both sides of the procedure. [Sage; Schweitzer 2] However, its steady growth is not without major repercussions many of which have now been identified. [Rab, Monnoyer, Sukhtankar]

26. In the unilateral field, key among these advantages is the fact that the use of CD might often be the **only way to 'deal' with a complex abuse issue.** [Nagy; Sage] Where the use of either method can resolve the competition problem, **two potential** [Wagener-Von Papp] **advantages** of CD are usually stressed – **greater speed of proceedings and lower costs** (eg the *Microsoft Tying* & *Samsung SEP* proceedings took only two years). Negotiated enforcement can thus be the opposite of the long adversarial method. [Wils 2] The authorities benefit from: fixing the identified problem faster [Communication: Ten Years], cost savings

mostly associated with less/no judicial appeals, and their resulting ability to deal with more cases. [Wils 2] In other words, negotiated enforcement should increase efficiency and effectiveness of dealing with competition cases by public authorities. [Siragusa, Guerri] Time and cost savings are also relevant for companies [Wils 2; Schweitzer 1] although avoiding fines and a declaration of an infringement (which can facilitate private enforcement) remain key. Saving company image (and shares value) can be a motivator also, as can the company's ability to design tailor-made commitments. [Sage; Schweitzer 2; Botteman, Patsa]

27. However, negotiated enforcement (where CD are used instead of ID) in abuse cases can also have long-term **negative effects for the competition law system**. Literature identifies in this context a number of problems relating to both the legal and the practical characteristics of the use of commitments decisions. [Wils 2, Gregoriev] Their detailed assessment would greatly exceed the scope of this conference paper so they are only named below.

28. **Lack of definite proof of an abuse** does not provide the market with **legal certainty (no precedential value)** outside the context of the authority and the undertaking concerned. **[…]** It is unclear yet whether this will cause an **obstacle to private enforcement** [Dekeyser, Becker, Calisti] and/or cause major **inconsistencies in decentralised enforcement** of Article 102 TFEU. [Schweitzer 1 & Schweitzer 2; Bottemand, Patsa; Nagy; Jurkowska-Gomułka]

29. Lack of fines prevents public condemnation of the offender and lowers, if not **eliminates, the deterrence effect** normally expected from public enforcement. [Siragusa, Guerri] This is true especially if all detected infringements are deal with by CD (creating a justified expectation for the market that facing an ID is unlikely even if accused of committing a serious infraction). Extensive use of CD might thus allow the EC to deal with more cases, but it may also create the need to deal with more infringement. [Chone, Souam, Vialfont]

30. Practical lack of judicial review is one of the most commonly stressed problems surrounding CD, albeit it is also one of its key efficiency gains. Not only does it **lower legal security** [Mariniello; Siragusa, Guerri; Waelbroeck 1; Schweitzer 2], it also poses concerns about the EC's powers going unchecked. Reservations are expressed here about the **imbalance of powers** between the authority and the investigated undertakings [Waelbroeck 1; Wagener-Von Papp]; these can lead to the highly criticised **instrumentalisation** of competition law enforcement. [Colomo; Forrester 1] Concerns are also voiced in light of the CJ *Alrosa* ruling [Cook 2; Kellerbauer; Mische, Višnar; Siragusa, Guerri; Wagener Von-Papp] which has **lowered the applicability of the proportionality standards** in CD, albeit some endorse the view of the CJ. [Massina, Ho] Much of the literature considers the **scope of the EC's discretion as to accepting commitments** [Ginsburg, Write; Brudzinski, Wright;

Forrester 1; Botteman, Patsa; Colomo], particularly the difference in the type/strength of remedies imposed in ID & CD. Emphasis is placed on the fact that negotiated enforcement should not be excluded from the obligation to ensure appropriate **procedural standards**, [Bernatt; Colomo; Kellerbauer; Massina, Ho; Mische, Višnar; Siragusa, Guerri], especially the right to be heard. [Schweitzer 1; Togo] Indeed, without the input of the Courts, fears are expressed about lowering of legal standards, the 'societal cost to the "effectiveness" of competition authorities [GAEC] and the danger of giving up on the '*struggle for competition law'*. [Wagener-Von Papp] Moreover, since CD are rather sparse in their assessment of both legal and economic circumstances, they themselves provide little guidance to the market. [Sage]

31. Considering the subject matter of this paper, special attention has to be paid to the **lack of clarity and transparency in the criteria for choosing whether a** CD **or an ID should be pursued.** Recital 13 of Reg 1/2003 states only that CD are not appropriate in cases where the EC intends to impose a fine, yet without specifying this criteria any further. The EC Antitrust Manual of Proceedings clarifies only that CD are not suitable for cartels as these always 'warrant' a fine leaving the EC with vast discretion when to use or refuse the use of a CD. It is fair to say therefore that in the EU at least, the applicable criteria lack a clear normative basis [Wagener-Von Papp; Messina, Ho], they are not properly defined [Hinds], let alone consistently applied. [Botteman, Patsa; Schweitzer 2] The Polish NCA declared in its 2012 CD Guidelines that it will not use CD in case of hard core cartels.

32. The use of CD in minor cases is to be recommended [Pera, Campagno; Sage] especially those previously dealt with by individual exemptions (such as the 1st CD in the EU, the *Bundesliga* case of 2005 which closely resembles the earlier *UEFA Champions League* case of 2003 (individual exemption)). In more complex situations, a CD should only be used when the gains of a negotiated procedure outweigh its losses. In order to do so, Wils claims three conditions must be fulfilled: 1) companies cannot have the right to use the negotiated procedures [CJ Alrosa, point 130]; 2) authorities must retain their ability to effectively use the adversarial method; 3) authorities should avoid starting negotiated enforcement prematurely. [Wils 2] Hence, "Ideally commitment decisions should only be used where the public interest in achieving an early termination of potentially anti-competitive behaviour and resulting enforcement efficiencies outweigh the benefits of conventional infringement decisions.' [Hinds] Still, in order to assess whether that was in fact the case, each CD must contain a justification why the issuing authority believed the negotiated path was appropriate in a given case.

33. Particular doubts about the use of CD surround cases such as *Rambus* or the infamous *De Beers* where the use of CD was strongly opposed by 3rd parties – Hynix complained that the use of a CD was too lenient, while Alrosa made the exact opposite claim. The use of a CD in the *Microsoft Tying* case can also be questioned since an analogous infringement was severely punished in an earlier decision suggesting a repeat offence. [Sage] Voices can also be heard that CD should not be used to deal with novel issues, like *Distrigaz* where the choice of the enforcement model might have been determined by the result that the EC wanted to achieve. [Forrester 1] So in practice, it is possible that the EC does not apply the 'fining' criterion and that the real "pre-requisite for engaging in the commitment path is that effective, clear and precise remedies are identified, and effectively offered, by the parties". [Staff Doc: Ten Year] In any case, this issue should be clarified at least with relevant EU soft law.

III. Predominance of negotiated enforcement in abuse cases

1. This part of the paper aims to verify that the practical importance of the negotiated model has grown immensely over the last decade and that the growth of its impact is most noticeable with respect to the enforcement of the abuse prohibition. Considered subsequently is the thesis that it is the special characteristics of most 'modern' abuse cases that make negotiated enforcement so prevalent in this field**.**

1. Changes in proportions

2. Similarly to the USA [Ginsburg, Wright], Europe sees a steady increase in competition law proceedings which rely on greater cooperation. They are characterised by a shift in the relationship between the authorities and the investigated companies from the classic adversarial to a more negotiated model. Public-private dialogue amounts now to a key element of 'dealing' with most competition cases in Europe.

3. Looking specifically at the use of commitments decisions, their numbers grew steadily since their introduction in 2004. [Botteman, Patsa; Schweitzer 1; Schweitzer 2] 29 such decisions have been issued in the EU so far (most recently, *Samsung SEP* in April 2014), a number twice as high as that of infringement decisions (excusing cartel cases) issued in the same time frame (most recently, *Slovak Telecoms* in October 2014). Looking at the quantity of CD, a sharp increase is visible under the two subsequent Competition Commissioners – 14 CD *vs.* 9 ID were issued under Commissioner Kroes (November 2004 - February 2010) and 15 CD *vs.* 5 ID under Commissioner Almunia (February 2010 - October 2014). [Mariniello] The latter statistics seem to suggest that Commissioner Almunia must have had prioritised the

use of CD. [Schweitzer 2] It remains to be seen how this trend will develop under Commissioner Westager who took over the office in autumn 2014.

4. Although the **gradual increase in the overall use of CD** is somewhat expected as the familiarity with the 'new' enforcement tool grows both for the authority and the market, enforcement practice has shown that their use **is particularly prevalent in abuse cases**. Out of the total 29 CD issued so far, **twice as many related to Article 102 TFUE** (19) as to Article 101 TFUE (10) [*Rio Tinto Alcan* concerned both]. Indeed, the steady increase in the use of CD is especially noticeable with respect to abuse cases considering their numbers were never particularly high. Since 2004, about 75% of such cases were closed with an Article 9 decision. [Sage] However, CD are rarely subject to judicial review, with the notable exemption of the EC's *De Beer* decision of 2006 which was first annulled by the GC in 2006 (*Alrosa* T-170/06*)* but later upheld by the CJ in 2010 (*Alrosa* C-441/07 P). [Rab, Monnoyer, Sukhtankar; Botteman, Patsa; Kellerbauer 1; Messina, Ho; Mische, Višnar; Wagner-Von Papp] Unlike ID, which are appealed as a rule, the recent shift toward the prevalent use of CD in most EU abuse cases has resulted in a noticeable fall in the input of the Courts towards the enforcement of the abuse prohibition in Europe.

5. The above statistics have been noted by literature and it is certainly true that 'commitments decisions appear to have become the Commission's tool of choice when resolving abuse of dominance cases' [Botteman, Patsa; Mariniello; Schweizer 2], at least during the last 4 years. The EC acknowledges also that "most companies implicated in anti-competitive practices go for the solution that can best protect their interests and reputation" [Almunia 1] and this is now almost inevitably a CD. Even if undertakings request a negotiated procedure (like TP SA or Motorola*)*, the EC still issues infringement decisions if: no effective remedies can be designed for the identified competition concern other than stopping the illegal activity (*Telecomunikacja Polska* decision of 2011), to penalise and deter a particularly grave, socially reprehensible infringement (the Article 101 TFEU *Lundbeck* decision of 2013) or to create a legal precedent in a novel field (*Motorola SEP* of 2014). It is interesting to note in conclusion that some industry sectors have been more likely to benefit from commitments decisions (IT and the automobile industries) while others were so far only ever subject to infringement decisions (pharmaceuticals and telecoms). The energy sector is a special case as it has been, until recently, only ever subject to CD. This trend has changed however with the issue of an ID against *OPCOM* (Romania's only power exchange) in March 2014; it is unclear yet what will happen with the SO send in August 2014 to BEH (Bulgaria's incumbent electricity provider).

6. The number of CD is increasing in Poland also. Unfortunately, there is no exact data on how many of such decisions were issued before 2011. However, 60 CD were issued in 2012-2013 (25% of all final decisions on restrictive practices). Incidentally, all but one concerned abuses! A similar trend is visible in the 19 CD issued in 2014.

7. Importantly, the absolute majority (over 80%) of all Polish CD concern abuses on local markets for public services (eg water supply and sewage, refuse collection and disposal, or cemetery services). CD are used to eliminate entry barriers caused by the monopolistic position enjoyed by local authorities (*gminy*) or communal undertakings with respect to infrastructure, and their abuse usually through the favouring of their own service providers. Only exceptionally did the NCA use CD to improve competitive conditions on 'national' markets and thus tackle large undertakings. The national copyright collecting society ZAiKS was the subject to the 1st Polish decision of this kind where it was obliged to significantly shorten the time period for withdrawal of rights vested in ZAiKS by its members (authors) [decision 2010; CCP Court 2006]. Incidentally, the Polish NCA ruled here that the practice was likely to have infringed not just the Polish but also the EU abuse prohibition. The intervention responded to the EC's policy towards copyright collecting societies and complied with the 2005 Recommendation on collective cross-border management of copyright.

2. Special characteristics of recent abuse cases

8. It is certainly true that: 'Owing to these mutual advantages, a pronounced shift can be observed since the entry into force of Regulation 1/03, away from "adversarial" completion law enforcement towards "negotiated deals" – both at the EU level and in the Member States.' [Schweitzer 2] Yet although **negotiated enforcement** generally offers advantages to both the authority and the investigated companies, its use **has proven most common specifically in abuse cases**. Three issues have to be noted before considering the reasons for the particular popularity of CD in abuse cases. First, companies cannot force the authorities' to follow a negotiated path [Wils 2; Almunia 1] and thus **it is ultimately the authorities' decision to 'negotiate' most of its abuses that made CD so popular here**. Second, **the EC has been very inconsistent** [Schweitzer 2] (or as some say 'puzzling') [Botteman, Patsa] when choosing which cases are suitable for a CD. Third, the enforcement practice of the EC and the Polish NCA differ considerably in this regard.

9. Looking at a selection of CD issued by the EC in unilateral cases (a full analysis would greatly exceed the scope of this paper), the predominance of CD with respect to EU abuse cases can be traced back, first of all, to the enforcement priorities of the EC – in other words, issues the EC wants to fix most of all (eg so-called 'mobile phone wars'). However, most of

these 'prioritised' issues have proven to have certain special characteristics which make the use of the classic adversarial method particularly difficult, costly or ineffective considering its length. 1) Many of its current **abuse investigations are very complex** and often occur on fast paced markets – making it difficult to prove an 'infringement' and design effective remedies; 2) **dominance is based on/related to IPRs** making it necessary to find flexible ways to 'deal' with abuses resulting from the exercise of IPRs without endangering innovation; and finally, 3) it is often necessary to enforce Article 102 TFEU in newly **liberalised fields** where sector-specific regulation fails to prevent abuses. Entering into public-private negotiations allowed the EC to deal with each of these special characteristics.

10. Since in its application of Article 102 the EC always tended to deal with major companies, it can, in comparison, suffer from an information deficit and sparse resources. [Chone, Souam, Vialfont] With no clear-cut abuses and the EC's duty to prove an infringement, it can struggle to make its arguments when faced with the opposition, or even outright obstruction, from the investigated company. Moreover, globalisation and the growth of IT make the EC faces a growing need to enforce Article 102 towards increasingly **complex** economic practices which are difficult to investigate, even harder to prove and especially problematic to effectively counteract (complex does not equal novel; see below). Adversarial enforcement in abuse cases is always costly and lengthy; ID were thus never frequent and their validity is endangered by judicial review. Multijurisdictional cooperation can only help to a varying degree (due to limits on information sharing or a different approach). It is not surprising therefore that EU investigations against companies such as Microsoft or Intel can take a decade and might not even generate expected improvements due to difficulties in implementing conduct remedies. Procedural efficiencies offered by negotiated enforcement are thus particularly pronounced in complex abuse cases.

11. Using a negotiated procedure largely counteracts these problems allowing the authorities to lower their 'factual and legal risks' [Nagy] thanks to the input from the investigated companies. The latter are also likely to want to engage in negotiations as it is considered less risky than an adversarial procedure (although not necessarily less burdensome eg *De Beers*) and gives them the chance to influence the 'sentence' of the decision to follow [Schweitzer 2], a fact that can be seen as a form of reward for cooperating with the authorities. [Skoczny] However, companies should only choose to pursue a CD if they are fully prepared to offer sufficient commitments [Hinds] since it provides the authorities with a degree of detail about the companies which it would not normally be privy to (apart from merger proceedings).

12. This aforementioned 'reward' that companies gain for engaging in negotiated enforcement centres on their ability to design the solutions (tailor-made commitments) [Schweitzer 2] to the identified competition concern in full consideration of their own interests and strategic plans. They are thus not just tailor-made but also forward-looking, similarly to merger remedies. [Botteman, Patsa] Cooperation in the design of remedies can benefit authorities also primarily because it can generate faster market improvements as shown by the Microsoft Tying case which only took two years to complete. Microsoft's fine for failing to implement its commitments [*Microsoft Tying* FINE of 2013], showed that the EC is fully prepared to severely punish any such breaches and made it 'toughened' its demands as to implementation oversight (eg Monitoring Trustees). Lack of oversight over the 'adequacy' of commitments in any given case [Botteman, Patsa] remains a cause for concerns, especially in light of the CJ's *Alrosa* judgment which limits even potential judicial review to 'manifest' error only.

13. Indeed, since the EC is largely free and unchallenged in its choice to follow the negotiated path, its **use of CD to deal with complex abuse cases is not without dangers.** According to Botteman & Patsa, the EC uses the 'less burdensome' CD more often 'Where economic theory does not readily provide a solid foundation for prohibiting a certain conduct, but the empirical evidence points towards a tangible risk of harmful exclusion.' It is questionable whether the fact that the EC has a choice now between following an adversarial and a negotiated path (ID *vs.* CD respectively) in abuse cases, should affect their decision whether to pursue a given case at all. If knowing that it might not need to prove its findings to a judicially acceptable standard was to determine the EC's enforcement choices, this might easily lead over-regulation (for instance, using CD to deal with a 'mere incentive of a vertically integrated incumbent to discriminate' [Colomo]) or growing instrumentalization of competition law enforcement. [Forrester 1; Colomo]

14. The rapid growth in the importance of negotiated enforcement in abuse cases is also the reflection of the advantage of a more flexible enforcement approach in cases where the authorities are adamant to improve often clearly identified competition concerns, but without facing the accusation of overly intruding on the rights of the undertaking concerned. This is particularly true for competition problems based on the exercise of IPRs. In the increasingly information-based economy, market dominance based on IPRs (both patents and copyright) is becoming more common posing the question: **what type of practices (IPR exercise/ exploitation) would be considered abuses**, and **how best to deal with it.**

16. The assessment of the question **whether a given manner of exercising IPRs constitutes an** abuse would likely constitute a novel substantive completion law issue, which should not

be dealt with by way of a CD considering its lower legal standards (especially the lack of precedential value/no judicial review) even if proving such case would be difficult otherwise. The EC seems to have recently taken the same view and decided to follow the adversarial path in its investigation of Motorola's practices concerning the use of injunctions with respect to its SEPs. The resulting ID was designed to act as a precedent and provide "a 'safe harbour' for standard implementers who are willing to take a licence on FRAND terms". [EC MEMO] On the same premise, criticism was voiced against pursuing a CD in the Google case because it is likely to contain 'novel' issues. [Botteman, Patsa] The same argument has been made about the earlier *Distrigaz* CD. [Forrester 1] By contrast, using a CD in the *Microsoft Tying* case could be supported precisely because the alleged 'abuse' (tying) was subject to an earlier precedent (*Microsoft* decision of 2004). [Sage]

17. On the other hand, negotiated enforcement proved extremely well suited to finding the best means possible to solving competition problems caused by the exercise of IPRs. They have largely replaced individual exemptions in multilateral cases (*Bundesliga*) [Colomo; Sage] and have now repeatedly been used in unilateral cases relating mostly to standardisation and licensing. CD allowed the EC to influence the exercise of IPR by, for instance, imposing a major royalty cut (*Rambus*) or shape licensing terms (*Thomson Reuters*). They also allowed companies accused on an IPRs-related 'abuse' to directly shape the 'solution' to the identified concern, ensuring their fully tailor-made nature (*Microsoft Tying*).

18. Specific, tailor-made commitments that do not overly intrude onto the IPRs sphere were also designed in the recent *Samsung SEP* case. Arguably following the *Motorola* ID, although both decisions were effectively issued at exactly the same time, the *Samsung SEP* case is thus said to implement "the 'safe harbour' concept established in the Motorola decision in practical terms". [EC MEMO] Incidentally, Samsung clearly disagreed with the EC's accusations concerning its alleged abuse, [*Samsung SEP*] and yet it still agreed to follow a negotiated enforcement instrument despite the fact that it could have insisted on pursuing an adversarial procedure. A similar stance was taken by Reuters which ultimately also offered a complex licensing commitment despite its disagreement with the accusation. [Blanke] Both cases illustrate that negotiated instruments seem the preferred method of Article 102 enforcement not just for the EC but also for companies.

19. Negotiated enforcement has proven effective in dealing with another feature of the enforcement priorities of the EC – the ineffectiveness of sector-specific regulation in preventing abuse in some network industries, energy (electricity and gas) in particular. After conducting a sector inquiry in 2005-2007, [Final Report 2007], the EC concluded that

European electricity and gas markets still face **high concentration levels, vertical foreclosure and low levels of cross-border trade** despite efforts based on the 1st and 2nd Energy Package [Colomo; Botteman, Patsa; Forrester 1; Rab, Monnoyyeur and Sukthankar]. It thus took a political decision to accelerate liberalization and improve competitive conditions in the energy sector but not on the basis of ID (last used in the GdF-E.ON cartel-type market sharing) but on the basis of CD, which were effective thanks to their lower standards of intervention and suitable especially for recently liberalised sectors [Colomo]. So between 2007 and 2013 the EC issued **10 CD** in the energy sector – **5 on electricity markets** (*German electricity wholesale market 2008* and *German electricity balancing market 2008*; *Long term electricity contracts in France 2010*; *Swedish Interconnection 2010*; *CEZ 2013*) and **5 on gas markets** (*Distrigaz 2007*; *RWE Gas Foreclosure 2009; GdF foreclosure 2009*; *E.ON gas foreclosure 2010*; *ENI 2010*). Importantly, the EC used this tool first of all to open the biggest European electricity and gas markets of Germany and France (6 CD).

20. Using the commitments proceedings, the EC mainly tackled **abusive practices** such as: limiting generation or import of energy to artificially rise prices (*German electricity wholesale market 2008*; *GdF gas foreclosure 2009; E.ON gas foreclosure 2010*), restricting demand of secondary balancing reserves (*German electricity balancing market 2008*) or curtailing interconnector capacity (*Swedish Interconnection 2010)*; incumbents concluding long-term supply contracts with market foreclosure and resale restrictions (*Long term electricity contracts in France 2010*); refusing to grant networks access (transit networks or gas pipelines) to undertakings from other EU Member States or granting access on discriminatory conditions, including margin squeezing (*GdF gas foreclosure 2009; E.ON gas foreclosure 2010*; *ENI 2010; CEZ 2013*).

21. Bearing in mind that all the commitments made legally binding by the EC were voluntarily offered, it is unsurprising that foreclosure created by the vertically-integrated electricity and gas operators could be effectively eliminated thanks to **structural commitments**. (Botteman, Patsa; Rab, Monnoyyeur and Sukthankar) Divestments hence covered: approximately 5,000 MW of E.ON's electricity generation capacity (*German electricity wholesale market 2008*) or one of proposed generation assets (*CEZ 2013*); E.ON's transmission system business (*German electricity balancing market 2008*); RWE's gas transmission network (*RWE Gas Foreclosure 2009*); ENI's shares in companies related to international gas transmission pipelines (*ENI 2010*); one of proposed generation assets to a suitable purchaser and forbidding CEZ, for a period of 10 years, to acquire back direct or indirect influence over it (*CEZ 2013*).

22. However, the EC considered **behavioural commitments** also suitable to eliminate its concerns including: assuring availability of certain minimum gas volumes for alternative suppliers (*Distrigaz 2007*); making a major reduction in long-term reservations of gas import capacity in France (*GdF gas foreclosure 2009*); curtailing a maximum duration for new contracts to 5 years (*Long term electricity contracts in France 2010*) or 2 years (*Distrigaz 2007*); releasing a certain volume of freely allocable entry capacities into E.ON's as transmission network (*E.ON gas foreclosure 2010*) or GdF's gas import capacity (*GdF gas foreclosure 2009*). Some of these commitments are quasi-structural (*GdF gas forclosure 2009*) or very strong otherwise (eg investment duty placed on SvK (*Swedish Interconnection 201.*).

23. It is worth noting in conclusion that the Polish NCA also shows a clear preference for the use of CD to deal with abuse cases although its enforcement priorities and the resulting characteristics of investigated abuse largely differ from the EU (for instance, no IPRs cases). Incidentally, according to an exceptionally interesting study by Schweitzer, NCAs tend to focus in their growing use of CD on two types of cases: those that follow established EC policy in competition law enforcement (eg the energy sector) and those that would have in the past been the subject of individual exemptions (eg copyright collecting societies) [Schweitzer 2, 11-16]. By contrast, 80% of all Polish CD relate to minor cases on local network markets. In other words, they follow the original assumption behind CD.

IV. Shifting winds on the newest battlefield – the *Google* case

1. On 15 April 2015, a Statement of Objection (hereafter: SO) was issued in the ongoing investigation into Google's behaviour in vertical searches (separate proceedings were also opened into Google's practices relating to its Android mobile phone software). [PR 4] In conclusion to this paper, it is thus worth considering what light this event might shed on how the EC treats some of the problems afflicting negotiated enforcement of the abuse prohibition in Europe. The relevance of this case to this analysis lies primarily in the fact that it shows a rare procedural development: what might amount to a procedural shift from a negotiated procedure (CD) pursued for the past 3 years back to an infringement procedure (ID).

2. The EC opened an official investigation into Google's vertical searches in November 2010 [PR 1] following Microsoft's complaint. The EC is said to have approached Google about commitments in May 2012, despite the fact that it had not yet officially formulated its competition concerns. Subsequently, the 1st unofficial commitments offer is said to have been

under discussion as early as July 2012. [BN 1] A Preliminary Assessment (hereafter: PA) was sent in March 2013 [PR 3] containing four separate alleged abuses, the most relevant of which is 1) Google's preferential display of its own specialized searches services. Google was also challenged for 2) using others' content in its vertical searches without consent; 3) imposing exclusive supply arrangements on website publishers wanting to use its advertising and; 4) hindering the transfer of ad campaigns from Google's AdWord to other platforms.

3. Google offered its **1st official set of commitments** a couple of weeks after it received the PA. The time frame effectively proves that extensive negotiations must have been indeed underway before the issue of the PA. The market test found Google's commitments lacking and so a revised set was proposed in February 2014. According to Commissioner Almunia, this offer responded to all of the alleged forms of abuse identified in the PA by: 1) eliminating preferential treatment (eg the display of 3 prominent links to 3rd party searches at the same graphic level as Google's); 2) stopping the use of others' content without their consent (eg providing opt-out clauses); 3 & 4) discontinuing exclusive supply arrangements with website publishers and the hindering of the transfer of advertising campaigns. [PR 2; Almunia 4]

4. Until then, the case followed the usual path for the negotiated enforcement model: a complaint and a preliminary investigation by the authorities followed by the opening of 'classic' adversarial competition law proceedings. By mid-2012, both sides must have reached an agreement to pursue a CD with commitments being subsequently negotiated which lasted to April 2014. 'The latest round of negotiations … focused on how Google would ensure that rival specialised search services can fairly compete with Google's services' [Almunia 3]

5. Here however also lies the first problem which this case highlights with respect to the use of CD to solve major abuse cases in Europe. **It remains unclear today on what basis did the EC decide to pursue a CD in this case**. Was the 'fining' criteria at all considered? If so, there are only two instances where a suspected abuse would not warrant a fine: a minor offence and a novel issue. It is not likely that Google's practices were seen as minor, did the EC believe it to be 'novel'? However, although the EC is not legally prohibited from issuing a CD in a novel case, such an approach would have to be highly criticised. Yet it is also conceivable that the EC did not consider the 'fining' criteria at all and focused on procedural efficiencies instead – being able to more easily investigate a clearly complex abuse case and, potentially, being able to gain commitments that would solve its competition concerns faster, maybe even better. If that was indeed the case, the EC should have at least made its justification clear, taking special care to show how it balanced efficiency and lesser legal

certainty. Transparency and public trust in administration are essential prerequisites of a state of law.

6. As it stood, by April 2014 a CD was expected shortly and it would have been more in-line with the outcome of a parallel investigation closed in January 2013 by the American FTC which concluded that Google's conduct was not an abuse at all. [Foer, Vaheesan] However, the problem with pursuing a CD in this case was not limited to a transparency question only. It also highlighted the problem of whether **the EC should have had such an extensive and largely unchecked discretion in choosing the negotiated path**. In practice, the use of non-adversarial enforcement against Google faced widespread political (such as Sigmar Gabriel, the German Economy Minister) [Guardian] and societal opposition in Europe, additionally strengthened by the (not competition law) 'right to be forgotten judgment' [C-131/12 *Google Spain* **v** *AEPD and Mario Costeja Gonzalez]*. Mounting political pressure culminated in November 2014 when the European Parliament voted to take steps "to prevent any abuse in the marketing of interlinked services by operators of search engines" asking the EC to "consider proposals with the aim of unbundling search engines from other commercial services". While such a 'politicalisation' of competition law should not be supported, it does suggest that a limitation on the EC's discretion is needed. [Mariniello; BN 2]

7. The fact that changes were in fact underway within the original proceedings became public when the Commissioner Almunia admitted in September 2014 that 'new evidence' put the issue of a CD in the Google case into question. [Almunia 4] **The issue of a SO is clearly an important procedural move** in this investigation but Commissioner Vestager stressed that **'every road is open'**. Google might still have a chance to negotiate appropriate commitments, but the EC also seems prepared to complete the procedure in an adversarial manner. Issuing a SO now, after failing to design effective commitments over the period of two years, responds to Wils' well publicised view that the effectiveness of the use of CD depends on the authorities retaining their discretion to use CD and their ability to effectively use the adversarial method. [Wils 2] Incidentally, this stance has been endorsed by the new head of the Polish NCA who recently stated that he is 'completely open to negotiations, but keeping in mind that [he is] always keeping a proverbial bazooka hanging on [his] wall'. [Adam Jasser's remarks made during a presentation to members of his Advisory Council regarding new consumer protection measures]

8. Although the press called the above procedural step a 'U turn' or a push 'into new territory' [BN 2], **issuing a** SO does not in fact prejudge the outcome of a case – several CD were issued after a SO was sent to the investigated party (eg *Microsoft Tying 2009*, *ENI 2010* &

Long-term contracts France 2010). It does, however, respond to some doctrinal concerns about lower **procedural standards in commitments procedures**. Google has 10 weeks to respond to the specific accusations contained in the SO, which is of course not only more up to date but also a lot more detailed than the PA of 2013. Google is likely to request an oral hearing where it can officially present its response to the SO. It is essential for the EC to comply with all of Google's procedural rights in order to eliminate any potential procedural grounds for an appeal (if an ID is in fact issued). In any case, preparing a SO is a very advisable procedural move which greatly increases transparency and the standard of both the factual and legal analysis performed by the EC and the procedure itself. Even if the case ultimately closes with a CD, a SO and the likely to follow external option of a Hearing Officer will certainly improve the transparency and quality of commitments proceedings.

10. Although the issue of a SO does not prejudge whether the Google investigation will in fact shift back to an adversarial path, some elements of Commissioner Vestager's statement suggest that **the EC might indeed be prepared to issue an ID (**or at least that further pursuing the negotiated path is only possible with a major change in Google's offer). Faced with almost certain judicial review in such a case, the EC seemed to have taken several steps towards ensuring a greater legal standard of its overall assessment. Hence, the scope of the allegation was limited, advantages of a 'precedent' specifically noted, and the type of remedies simplified and focused on consumer welfare and innovation. Whether or not an ID is ultimately issued, these improvements respond to many of the problems associated with CD.

11. First, the SO has a far narrower scope than the PA; not only does it only concern the first of the original accusation it is limited to only one type of vertical searches – shopping comparisons (maps, travels etc were left out) because of its longest duration. By limiting the scope of the SO, the EC limits its own burden of proof and yet it can still provide much needed legal certainly. This view is additionally supported by the Commissioner's use of the term **'precedent'**: 'If an infringement is proven, a case focusing on comparison shopping could potentially establish a broader precedent for enforcing EU competition rules in other instances of Google favouring its own services over competing services.' However, it can only be speculated at this point whether the EC intends to deal with Google similarly to last year's SEPs cases, that is, issue a 'narrow' infringement decision first which would serve as a precedent for later CD? Or is the EC in fact now thinking of issuing a string of ID against Google having first resolved the 'novel' features of the infringement at hand?

12. Providing a narrow precedent would allow the EC to improve legal certainty concerning the abuse as well as eliminate many of the concerns surrounding the **lower proportionality**

standard of commitments. Although it is too early yet to make any predictions about what remedies or commitments will ultimately be imposed upon Google, Commissioner Vestager's statement seems to indicate a change in the type of remedy being sought. Past offers focused on equal display and more user information – they were thus detailed and tailor-made based on changes being made to the manner of display. Instead, the authority now says that 'We do not wish to interfere with screen design, how things are presented on the screen or how the algorithm works … What we would like to see is that shoppers are able to see the best shopping results.' As such, the new approach moves away from the 'how to display' the results and towards 'what' consumers would actually see, that is, giving users the most relevant search result. [PR 4] A very simple 'remedy' exists that could ensure that – forcing Google to use the same algorithm for all search providers (including itself) – but it is to be seen whether Google will now 'offer' it voluntarily or whether it will consider it too intrusive and choose to appeal it on proportionality grounds after the EC imposes it as a conduct remedy.

13. Indeed, with the issue of a SO, the **balance of power** has arguably shifted more in favour of the EC. The authority benefits now from the 'best of both worlds': it gained the key advantage of negotiated enforcement in complex and likely even novel cases – extensive insight into Google's workings. At the same time, the EC has now declared itself to be a negotiating partner willing to go all the way to get the competition problem solved – including not just fines but, most importantly, whatever conduct remedies the Commission sees fit to impose. Completing the procedure in an adversarial model, the EC can now design the remedies on the basis of all the knowledge it gathered during the failed negotiations.

14. The question remains **whether Google would in fact want to continue to pursue a CD considering its position has worsened**. It is fair to say that Google is less motivated by the prospect of a fine than many less successful companies. However, even only the issue of a SO caused the value of Google's shares to fall and a far larger impact is likely from an ID. In the end, it might come down to what would be more burdensome for Google – offering more generous commitments or whatever remedies the EC can design to a judicially appropriate standard of proportionality.

15. In either case, **private enforcement** is definitely also going to follow, including the already pending UK civil procedure started by Foundem (a price comparison site that claims lost revenue before a UK court and one of the earlier sources of complaints in the EC case against Google) – some of its six allegations may significantly overlap with the EU Investigation. [Judge Peter Roth, Infederation v. Google, High Court of Justice, Chancery

Division, No. HC12A02489; BN 3] While a commitments decision would have been of limited help to civil plaintiffs, an infringement decision will make their cases far easier.

16. The new Commissioner also stressed that '[M]any of the Google related concerns voiced in the public debate cannot be addressed in our investigations into the company's alleged anti-competitive practices. We will have to limit ourselves to what we identify as competition problems.' [Vestager] Hence, the Commissioner promised that the Article 102 TFEU case will not embark on a political crusade hopefully eliminating some of the concerns expressed about recent **instrumentalisation of competition law enforcement**.

V. Conclusions

1. The enforcement of the abuse prohibition in Europe can now follow one of two alternative paths: the classic adversarial model centred on the issue of infringement decisions (with or without a fine) and the negotiated model based on the issue of commitments decisions. Each of these enforcement models has its own normative basis and procedural characteristics as well as, importantly, its own advantages: precedential value and deterrence are the key benefits of ID; flexibility and efficiency are the main motivators for using CD.

2. Statistical data of the last decade shows that 75% of all EU abuse cases have been closed with a CD; this number is even higher for Poland. A number of reasons can be identified for the predominance of negotiated enforcement in unilateral cases. In the EU they include: their growing complexity which makes dialogue essential to resolve them; the need to flexibly deal with abuses centred on the exercise of IPRs; and the need to use tailor-made measures to counteract abuses by incumbent operators in newly liberalised sectors. By contrast, CD are predominantly used in Poland in a manner that resembles how they were original designed – as a less burdensome method of dealing with 'minor' cases.

3. The increasing use of CD in abuse cases has however also generated growing concerns. Much of the debate centres on the lack of transparency and legal security when it comes to the use of CD. Also stressed is the largely unchecked discretion of the EC to follow the negotiated path. In the context of this analysis, concerns must thus be expressed especially about the inconsistencies and actual appropriateness of the choice of cases dealt with in a negotiated manner and about the stretching of proportionality standards.

4. Yet in April 2014, the EC refrained from potentially overusing the negotiated enforcement model and issued an infringement decision against Motorola's abuse of its SEP. Providing the market with much needed legal certainty and opening itself to judicial review, the EC found a

way to respond to the complexity and novelty of the case by refraining from taking an antagonistic approach to the company concerned. At the same time, it delivered a parallel CD towards Samsung, which was meant to put a stop to its immediate competition concerns but on the basis of the greater analytical detail and precision of the earlier ID. By preceding a CD with an ID, many of the concerns surrounding negotiated enforcement have been eliminated.

5. Most recently, the EC decided to issue a SO against the longest and best documented of Google's alleged infringements, despite the fact that the investigation has so far followed a negotiated path. Considering this event together with the content of the Statement issued by Commissioner Vesager, several factors might suggest that a reversal from the negotiated to the adversarial path might soon take place. If so, the EC would have benefited greatly from the experiences gained during the negotiated part of the procedure, but at the same time could eliminate many of the problems generally associated with CD, including the provision of an essential precedent to future cases.

6. Although the EC has not yet answered doctrinal concerns in a legislative, or even soft-law manner, last year's developments show a noticeable shift in its enforcement practice with respect to the abuse prohibition. Since this seeming shift corresponds with the 2014 change in Europe's political leadership, there is hope that the EC might acknowledge and deal with the mounting opposition to the arguable 'poisoning' of antitrust enforcement by CD. [Bellis] At the very least, we might finally be seeing some self-restraint in the EC enforcement practice.

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