Between Enforcement and Regulation

A Study of the System of Case Resolution Mechanisms Used by the European Commission in the Enforcement of Articles 101 and 102 TFEU

Katharina Voss
Between Enforcement and Regulation
A Study of the System of Case Resolution Mechanisms Used by the European Commission in the Enforcement of Articles 101 and 102 TFEU

Katharina Voss

Academic dissertation for the Degree of Doctor of Laws in European Law at Stockholm University to be publicly defended on Friday 12 April 2019 at 10.00 in Nordenskiöldsalen, Geovetenskapens hus, Svante Arrhenius väg 12.

Abstract
This thesis examines the current design of the system of case resolution mechanisms used by the European Commission (the Commission) where an infringement of Articles 101 and 102 TFEU is suspected and advances some proposals regarding this design. Infringements of Articles 101 and 102 TFEU cause considerable damage to the EU economy and ultimately, to consumers. Despite intensified enforcement of Articles 101 and 102 TFEU and ever-growing fines imposed for such infringements, the Commission continues to discover new infringements, which indicates a widespread non-compliance with EU competition rules. This raises the question of whether the enforcement currently carried out by the Commission is suitable for achieving compliance with Articles 101 and 102 TFEU.

The thesis is divided into four main parts: First, the objectives pursued by the system of case resolution mechanisms used by the Commission are identified. Second, taking stock, the case resolution mechanisms currently employed are assessed in the light of these objectives. Third, the question of whether and how the different case resolution mechanisms could be viewed through the lens of regulatory enforcement is considered. Fourth, an assessment is made as to whether a different approach to case resolution could be employed based on a prescriptive theory of regulatory enforcement, responsive regulation.

The research conducted shows that the main objectives pursued by the system of case resolution mechanisms used by the Commission are: to bring infringements to an end, to punish and deter infringers, to prevent infringements and to clarify competition rules. These objectives shall be achieved in an effective and efficient manner.

The case resolution mechanisms that are assessed are Article 7 decisions, Article 9 decisions and cartel settlements. These mechanisms pursue varying sets of objectives. Their fulfilment depends, on the one hand, on the legal and procedural modalities of each case resolution mechanism and, on the other, on the types of cases allocated to that case resolution mechanism. The assessment returns varied results showing that some objectives are difficult for the Commission to achieve. Moreover, the choices made by the Commission when allocating case resolution mechanisms to cases are sometimes counterproductive with regard to the fulfilment of the relevant objectives.

Taking into account the different characteristics exhibited by the case resolution mechanisms, an attempt is made to categorise these mechanisms as pursuing different regulatory enforcement styles. The conclusion is that this is not fully possible, exposing the multi-faceted nature of the case resolution mechanisms currently at the Commission’s disposal.

Finally, a potential design of a case resolution system based on the theory of responsive regulation is advanced. This design is specifically aimed at remedying some of the deficiencies identified in the current approach to resolving potential infringements of Articles 101 and 102 TFEU. Instead of choosing a case resolution mechanism on a case-by-case basis, a prescriptive system based on infringement history and the cooperation offered by the undertaking would determine what case resolution mechanism to employ. The aim of such case resolution mechanisms would be to reduce the focus on fines. Instead, focus would be placed on cooperation as a means of bringing infringements to an end and preventing infringements by way of corporate compliance programmes.

Keywords: EU competition law, enforcement, compliance, antitrust, Regulation 1/2003, case resolution mechanism, regulatory enforcement theory, responsive regulation, corporate compliance programme.
BETWEEN ENFORCEMENT AND REGULATION

Katharina Voss
Between Enforcement and Regulation
A Study of the System of Case Resolution Mechanisms Used by the European Commission in the Enforcement of Articles 101 and 102 TFEU

Katharina Voss
Für Opa
Acknowledgements

Writing this doctoral thesis has many times been a rather lonely journey. Yet, at the end of it, there are so many people I would like to thank as there have been numerous helping hands over the years that have, in one way or the other, contributed to my journey towards this finished product.

First of all, I would like to thank my supervisors, Antonina Bakardjieva Engelbrekt and Vladimir Bestidas Venegas. The two of you make up the perfect team, complementing one another and providing support at different times. Antonina, without your dedication to detail, numerous comments and questions, this thesis would never have become what it is today. Thank you for that. Vladimir, thank you for supporting me right from the start, for being curious about learning more and for always pushing me further.

I would also like to thank those who have read and commented the manuscript at various stages: Erling Hjelmeng, Lars Henriksson, Jane Reichel, Claes Lernestedt, Michaela Ribbing and Mauro Zamboni. I also owe a great deal to Moritz Jesse, without whose encouragement I would never have pursued a doctoral degree in the first place. I would like to thank Elisabeth Eklund and Johan Sahl for their insights from the ‘real world’ of competition law enforcement. I also learned a great deal during my 3-month internship at DG Competition and would in particular like to thank Rainer Becker and Josefine Hederström for their kindness and patience. Thank you to Louise Ratford for language editing the manuscript.

Without the community of doctoral students at Stockholm University, my years as a doctoral student would never have been the same. I would like to thank you one and all for sharing ups and downs and for (unwittingly) teaching me Swedish. No need to mention names as you know who you are. A special thanks to Louise Dane without whom these last few months of work on the thesis would have been much harder to bear.

I am grateful to Stockholm University and the Swedish Competition Authority for their financial support throughout my time as a doctoral student as well as to Stiftelsen av den 28 oktober, Winroths stipendiestiftelse and Elsa Eschelssons stiftelse.

Last, but definitely not least, I would like to thank my family for their unfailing support over the years. Cedric, without you this thesis would never have been written. Thank you for all your help, for being understanding and so supportive always. Samson, du bist Mamas kleiner Schatz, vergiss das nie.
## Contents

1  Introduction .......................................................................................................................... 1
    1.1  Aim and research questions ............................................................................................. 5
    1.2  Scope ..................................................................................................................................... 7
    1.3  Terminology .......................................................................................................................... 9
        1.3.1  Law Enforcement ........................................................................................................ 9
        1.3.2  Consequentialist and retributionist theories of punishment ..................................... 10
            1.3.2.1  Deterrence ......................................................................................................... 11
            1.3.2.2  Retribution ......................................................................................................... 13
        1.3.3  Regulation ..................................................................................................................... 14
        1.3.4  Compliance ................................................................................................................... 18
    1.4  Method ................................................................................................................................... 20
        1.4.1  Approach to research findings from social sciences .............................................. 22
            1.4.1.1  Meta studies ......................................................................................................... 25
            1.4.1.2  Quasi-experimental studies ................................................................................. 25
            1.4.1.3  Vignette studies ................................................................................................... 26
            1.4.1.4  Surveys .................................................................................................................. 27
            1.4.1.5  Bureaucratic data ................................................................................................. 28
            1.4.1.6  Case studies .......................................................................................................... 28
        1.4.2  Identifying the objectives of the system of case resolution mechanisms .............. 29
        1.4.3  Assessing the different case resolution mechanisms ............................................ 33
        1.4.4  Case resolution mechanisms through the lenses of regulatory enforcement styles . . 35
        1.4.5  Designing a responsive case resolution system ..................................................... 35
    1.5  Structure ............................................................................................................................. 37
2  Legal Context .......................................................................................................................... 39
    2.1  Articles 101 and 102 TFEU and their enforcement challenges .................................... 39
2.2 Public enforcement of Articles 101 and 102 TFEU ....................................................... 41
  2.2.1 From Regulation 17/62 to Regulation 1/2003 .................................................... 42
  2.2.2 The enforcement of Articles 101 and 102 TFEU under Regulation 1/2003 ...... 45

2.3 Constitutional restraints ................................................................................................. 50
  2.3.1 Fundamental rights ............................................................................................ 52
  2.3.2 Proportionality .................................................................................................. 53
  2.3.3 Legal certainty .................................................................................................. 56
  2.3.4 Legitimate expectations ..................................................................................... 57
  2.3.5 Equal treatment ................................................................................................ 59

3 Objectives ......................................................................................................................... 61
  3.1 Identifying the objectives of the system of case resolution mechanisms .......... 62
    3.1.1 Bringing infringements to an end ................................................................... 66
    3.1.2 Punishing and deterring infringers ............................................................... 68
    3.1.3 Preventing infringements .............................................................................. 71
    3.1.4 Clarifying competition rules ......................................................................... 73

3.2 General enforcement objectives .................................................................................... 74
    3.2.1 Effectiveness .................................................................................................. 75
    3.2.2 Efficiency ...................................................................................................... 75

3.3 Conclusions ................................................................................................................... 76

4 Assessing the Case Resolution Mechanisms ................................................................. 79
    4.1 Article 7 Decisions ............................................................................................. 80
      4.1.1 Bringing infringements to an end ................................................................. 81
        4.1.1.1 The Commission’s power to impose remedies ...................................... 82
        4.1.1.2 The means pursued by remedies ........................................................... 86
        4.1.1.3 Evidence of whether undertakings actually bring infringements to an end.. 90
        4.1.1.4 The Microsoft Case ............................................................................. 91

      4.1.2 Punishing and deterring infringers ............................................................... 94
        4.1.2.1 The Commission’s Fining Guidelines .................................................... 95
        4.1.2.2 The Fining Guidelines and retribution theory ....................................... 96
        4.1.2.3 The Fining Guidelines and deterrence theory ....................................... 98
        4.1.2.4 The principle of proportionality as a limit to fines imposed as a deterrent 103
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.1.2.5</td>
<td>Assumptions in the calculation of fines imposed as a deterrent</td>
<td>106</td>
</tr>
<tr>
<td>4.1.2.6</td>
<td>Empirical evidence of whether cartel fines are sufficiently high to act as a deterrent</td>
<td>110</td>
</tr>
<tr>
<td>4.1.2.7</td>
<td>Calculating deterrent fines for non-cartel infringements</td>
<td>112</td>
</tr>
<tr>
<td>4.1.2.8</td>
<td>Recidivism and the deterrent effect of fines</td>
<td>113</td>
</tr>
<tr>
<td>4.1.2.9</td>
<td>Reflections on punishment and deterrence</td>
<td>118</td>
</tr>
<tr>
<td>4.1.3</td>
<td>Preventing infringements</td>
<td>119</td>
</tr>
<tr>
<td>4.1.3.1</td>
<td>General deterrence and fines</td>
<td>120</td>
</tr>
<tr>
<td>4.1.3.2</td>
<td>Other sources of general deterrence</td>
<td>122</td>
</tr>
<tr>
<td>4.1.3.3</td>
<td>Other sources of prevention</td>
<td>124</td>
</tr>
<tr>
<td>4.1.4</td>
<td>Clarifying competition rules</td>
<td>127</td>
</tr>
<tr>
<td>4.1.5</td>
<td>Efficiency in the resolution of cases</td>
<td>129</td>
</tr>
<tr>
<td>4.2</td>
<td>Cartel Settlements</td>
<td>132</td>
</tr>
<tr>
<td>4.2.1</td>
<td>Punishing and deterring infringers in the context of cartel settlements</td>
<td>135</td>
</tr>
<tr>
<td>4.2.2</td>
<td>Efficiency in the cartel settlement procedure</td>
<td>136</td>
</tr>
<tr>
<td>4.2.3</td>
<td>Constitutional restraints and hybrid settlements</td>
<td>137</td>
</tr>
<tr>
<td>4.3</td>
<td>Article 9 decisions</td>
<td>140</td>
</tr>
<tr>
<td>4.3.1</td>
<td>Bringing suspected infringements to an end in the context of Article 9 decisions</td>
<td>144</td>
</tr>
<tr>
<td>4.3.1.1</td>
<td>The Commission’s powers to make remedies binding</td>
<td>145</td>
</tr>
<tr>
<td>4.3.1.2</td>
<td>Negotiating remedies</td>
<td>147</td>
</tr>
<tr>
<td>4.3.1.3</td>
<td>Suitable and proportionate remedies in Article 9 decisions</td>
<td>149</td>
</tr>
<tr>
<td>4.3.2</td>
<td>Punishing and deterring infringers in the context of Article 9 decisions</td>
<td>151</td>
</tr>
<tr>
<td>4.3.3</td>
<td>Clarifying competition in the context of Article 9 decisions</td>
<td>151</td>
</tr>
<tr>
<td>4.3.3.1</td>
<td>The effects of favouring Article 9 decisions over Article 7 decisions</td>
<td>152</td>
</tr>
<tr>
<td>4.3.3.2</td>
<td>The guiding effect of Article 9 decisions on undertakings</td>
<td>153</td>
</tr>
<tr>
<td>4.3.3.3</td>
<td>An illustration: Most favoured nation clauses</td>
<td>154</td>
</tr>
<tr>
<td>4.3.4</td>
<td>Efficiency in the Article 9 procedure</td>
<td>158</td>
</tr>
<tr>
<td>4.4</td>
<td>Conclusions</td>
<td>162</td>
</tr>
<tr>
<td>4.4.1</td>
<td>Summary of findings</td>
<td>163</td>
</tr>
<tr>
<td>4.4.2</td>
<td>Analysis</td>
<td>165</td>
</tr>
</tbody>
</table>
Case Resolution Mechanisms through the Lenses of Regulatory Enforcement Styles .......................................................... 169

5.1 Regulation classes and enforcement styles ................................................................. 170
5.2 Article 7 decisions ...................................................................................................... 172
5.3 Cartel settlements ...................................................................................................... 175
5.4 Article 9 decisions ...................................................................................................... 177
5.5 Guidance by the Commission .................................................................................. 178
5.6 Case Analyses ........................................................................................................... 181
   5.6.1 The Google Search (Shopping) case ........................................................... 184
   5.6.2 The ARA case ............................................................................................. 191
   5.6.3 Reflections on the Google Search and ARA cases ...................................... 199
5.7 Conclusions ............................................................................................................. 201

6. Designing a Responsive Case Resolution System .......................................................... 203

6.1 Responsive Regulation .............................................................................................. 207
6.2 Transposing responsive regulation into an existing legal framework ......................... 210
   6.2.1 The practical design and utilisation of responsive regulation .................... 213
   6.2.2 The concept of recidivism in EU competition law ....................................... 214
   6.2.3 The application of the principles of equal treatment and legitimate expectations .. ............................................................. 217
6.3 Corporate compliance programmes as a part of case resolution mechanisms .......... 218
   6.3.1 The effectiveness of corporate compliance programmes .......................... 220
   6.3.2 The design and monitoring of corporate compliance programmes .......... 223
   6.3.3 The Australian example ............................................................................ 232
6.4 Framing a proposal for a responsive case resolution system .................................... 235
6.5 Article 101 TFEU – cartel cases ................................................................................. 240
   6.5.1 Appropriate case resolution mechanisms for cartel cases ....................... 240
   6.5.2 The enforcement pyramid for cartel cases ................................................. 243
   6.5.3 Practical use of the enforcement pyramid ................................................. 244
      6.5.3.1 Infringement history ........................................................................ 245
      6.5.3.2 Cooperation ..................................................................................... 246
      6.5.3.3 Fine reductions .............................................................................. 248
   6.5.4 Corporate compliance programmes as a remedy ........................................ 250
Tables

Table 1 Overview of case resolution mechanisms ....................................................49
Table 2 Types of guidance ......................................................................................179
Table 3 Legislative changes necessary for a responsive case resolution system ....285
Figures

Figure 1 Case output by case resolution mechanism .............................................. 131
Figure 2 Case output in cartel cases ........................................................................ 137
Figure 3 Comparison of results from Marx’s and Mariniello’s studies ............ 160
Figure 4 Example of an enforcement pyramid ........................................................ 207
Figure 5 CMA four-step approach to compliance ................................................. 227
Figure 6 Enforcement Pyramid for Cartel Cases .................................................. 243
Figure 7 Enforcement Pyramid for Non-Cartel Cases ............................................ 256
Figure 8 Enforcement pyramid for infringements of Articles 101 and 102 TFEU . 276
Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACCC</td>
<td>Australian Competition &amp; Consumer Commission</td>
</tr>
<tr>
<td>AG</td>
<td>Advocate General</td>
</tr>
<tr>
<td>BKartA</td>
<td>Bundeskartellamt</td>
</tr>
<tr>
<td>CCP</td>
<td>Corporate Compliance Programme</td>
</tr>
<tr>
<td>CMA</td>
<td>Competition and Markets Authority</td>
</tr>
<tr>
<td>DG</td>
<td>Directorate General</td>
</tr>
<tr>
<td>EC</td>
<td>European Community</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Charter of Human Rights</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>ISO</td>
<td>International Organisation of Standardization</td>
</tr>
<tr>
<td>LoF</td>
<td>Letter of Facts</td>
</tr>
<tr>
<td>MFN</td>
<td>Most Favoured Nation</td>
</tr>
<tr>
<td>NCA</td>
<td>National Competition Authority</td>
</tr>
<tr>
<td>SO</td>
<td>Statement of Objections</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
</tr>
<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
</tr>
</tbody>
</table>
1 Introduction

Corporations have neither bodies to be punished, nor souls to be condemned; they therefore do as they like.
- Edward Thurlow, 1st Baron Thurlow

This pessimistic view on the attitude of undertakings towards the law summarises the essential problem at the heart of this study: how can law enforcers ensure that undertakings comply with the law? This author disagrees with Edward Thurlow in substance. As this study will seek to demonstrate, the reality of corporate conduct is far more complex, which also makes the task of ensuring compliance with public law more sophisticated.

At the centre of this study is the question regarding how the European Commission can ensure that undertakings comply with Articles 101 and 102 of the Treaty of the functioning of the European Union (TFEU). As is well known, Articles 101 and 102 TFEU set out the foundations of EU competition law and policy, prohibiting restrictions on competition in the Internal Market of the Union. While Article 101 TFEU is directed at anti-competitive agreements, Article 102 TFEU addresses chiefly unilateral restrictions on competition, that is the abuse of a dominant position. Infringements of Articles 101 and 102 TFEU cause considerable damage to the EU economy and ultimately, to consumers. For example, cartels are estimated to overcharge their customers by between 20 and 30 per cent compared to the competitive price. Enforcing competition rules is thus an important task carried out by the Commission. Despite intensified enforcement of Articles 101 and 102 TFEU and ever-growing fines imposed for such infringements, the Commission continues to discover new infringements. This raises the question of whether the enforcement currently carried out by the Commission is suitable for achieving compliance with Articles 101 and 102 TFEU. To attempt to answer

---

1 Edward Thurlow, 1st Baron Thurlow, quoted in: John Poynder, Literary Extracts, vol 1 (John Hatchard & Son 1844) 268.
the question raised, this study analyses in detail the case resolution mechanisms employed by the Commission where an infringement of Article 101 or 102 TFEU is suspected. The legal mechanisms in place to conclude potential cases of infringements have an important impact on whether undertakings, both infringers and others, subsequently comply with competition rules.

Since the term ‘case resolution mechanism’ is a central term employed in this study, it is pertinent to define this term already at the outset. A case resolution mechanism is a legal instrument, in the sense of a precise set of measures and procedures, used to resolve a case where the Commission believes that an infringement of Article 101 or 102 TFEU may have occurred. Each case resolution mechanism is concluded by a Commission decision. Chapter III of Regulation 1/2003 sets out three different types of decisions that can be taken by the Commission to resolve a suspected infringement of Article 101 or 102 TFEU: decisions according to Article 7 (Article 7 decisions), decisions according to Article 9 (Article 9 decisions) and decisions according to Article 10 (Article 10 decisions). Each of these decisions is preceded by a procedure specific to that decision type. In this regard, the Commission has established a separate legal instrument in Article 10a of Regulation 773/2004 that also leads to the adoption of an Article 7 decision. The procedure set out in Article 10a of Regulation 773/2004 is very distinct from the one carried out to reach an ‘ordinary’ Article 7 decision. This instrument, denoted a ‘cartel settlement’, must therefore be conceived as a separate case resolution mechanism for the purposes of this study. Thus, a functional approach to case resolution mechanisms is adopted here, focusing on the utilisation of the different types of decisions defined in Regulation 1/2003, rather than on their

---

5 This study uses ‘the resolution of a case’ and ‘a case resolution’ interchangeably to describe the application of a case resolution mechanism to a specific case.
7 Article 8 of Regulation 1/2003 sets out a fourth type of Commission decision, allowing the Commission to impose interim measures. Such a decision does however not resolve a case, which is why such decisions are not considered in this study.
8 The Commission has never adopted an Article 10 decision, which is why this mechanism is only considered in the latter part of this study. See section 6.8.
10 See section 4.2.
11 This view is also supported by the General Court’s reasoning in: Case T-456/10 Timab Industries and Cie financière et de participations Roullier (CFPR) v European Commission EU:T:2015:296, para 96.
legal form. In sum, the case resolution mechanisms at the Commission’s disposal are Article 7 decisions, cartel settlements, Article 9 decisions and Article 10 decisions. Taken together, these case resolution mechanisms can be viewed as a system of case resolution mechanisms used by the Commission in cases where it suspects an infringement of Article 101 or 102 TFEU.

Each case resolution mechanism has different characteristics, for example, regarding the cooperation required by the undertaking or the remedies that can be imposed by the Commission. Thus, Article 7 decisions usually consist of a cease-and-desist order and a substantial fine. Essentially, an Article 7 decision communicates to undertakings to stop their behaviour, not to repeat it and subsequently punishes them. The assumption is that undertakings act rationally and maximise their profits, refraining from competition law infringements where they are not profitable. Large fines are also meant to prevent other undertakings from engaging in infringements of competition rules. In contrast to Article 7 decisions, Article 9 decisions and cartel settlements include cooperative elements that aim to facilitate the Commission’s resolution of a case and make it more efficient. Furthermore, Article 9 decisions aim at ending problematic behaviour in a targeted manner. Thus, the variety of case resolution mechanisms at the Commission’s disposal does not reflect the view that undertakings ‘do as they like’ in all circumstances or that they only act in a calculated manner, but it tries to secure compliance in different ways. Different case resolution mechanisms can be said to adopt different approaches, reflecting not only a view of undertakings as callous maximisers of profits, but also relying on the desire of undertakings to comply with the law and to act in a cooperative manner, although all are aimed at reaching the ultimate objective of compliance with Articles 101 and 102 TFEU.

Given the increasing variety of means for securing compliance employed by the different case resolution mechanisms, it is argued in this study that the enforcement of competition law has moved closer to the realm of regulation. In the relevant literature, regulation is broadly defined as steering inherently beneficial conduct of individuals or undertakings, typically imposed and enforced by the state. Conducting a business can readily be conceived as a

---

12 See Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) arts 7 and 23.
14 See section 3.1.3.
15 See sections 4.2 and 4.3.
16 See section 1.3.3.
beneficial activity for society.\textsuperscript{17} While competition law enforcement is not traditionally viewed as regulation, certain case resolution mechanisms de facto exhibit some of the traits usually ascribed to regulation. However, with reference to the \textit{ex post} character of competition law enforcement, relying predominantly on cease-and-desist orders and fines, emphasis is often placed on distinguishing competition law from regulation.\textsuperscript{18} From a policy perspective, Commissioners for Competition have sometimes sought to emanate a perception that competition law lies within the sphere of criminal law. Drawing a parallel to murder, Commissioner Kroes stated that: ‘Cartels strike a killer blow at the heart of healthy economic activity.’\textsuperscript{19} While the criminal prosecution of individuals for infringements of competition law is possible in some jurisdictions,\textsuperscript{20} this is not the case for the Commission’s enforcement of Articles 101 and 102 TFEU. Viewing competition law as regulation is not to downplay the seriousness of competition law infringements or indeed the sanctions imposed for such infringements.\textsuperscript{21} Rather, for the purposes of this study, it is to suggest that viewing competition law enforcement in general, and case resolution mechanisms in particular, from a regulatory perspective may add interesting insights to the question how competition authorities can secure compliance with EU competition law.

More specifically, since this study is concerned with the enforcement of Articles 101 and 102 TFEU, the concept that will be used is ‘regulatory enforcement’ rather than the broader term ‘regulation’. ‘Regulatory enforcement’ refers to actions taken by an enforcement authority to ensure compliance with particular regulatory standards.\textsuperscript{22} There is a distinct body of scholarship regarding ‘regulatory enforcement’.\textsuperscript{23} This scholarship is

\textsuperscript{17} Only consider the status accorded to conducting a business in the Charter: Charter of Fundamental Rights of the European Union [2016] OJ C 202/389, art 16.

\textsuperscript{18} Imelda Maher, ‘Regulating Competition’ in Christine Parker and others (eds), \textit{Regulating Law} (Oxford University Press 2004) 187.


\textsuperscript{20} The USA and the UK are two examples of such jurisdictions.

\textsuperscript{21} Sanctions which, at least with reference to Italian competition law have been considered as having a criminal nature. See: \textit{A Menarini Diagnostics v Italy} (app no 43509/08) ECtHR Judgment of 27 September 2011, paras 38-45.


\textsuperscript{23} See, for example: Robert A Kagan and John T Scholz, ‘The “Criminology of the Corporation” and Regulatory Enforcement Strategies’ in Keith Hawkins and John M Thomas (eds), \textit{Enforcing Regulation} (Kluwer-Nijhoff 1984); Christine Parker and Vibeke Lehmann Nielsen
characterised by the pursuit of the question of how to steer inherently beneficial behaviour toward the goal of securing compliance with certain regulatory standards. Therefore, viewing case resolution mechanisms through the lens of the scholarly discourse of regulatory enforcement is considered to be well suited for the purposes of the present study.

The subject of the present study is thus the system of case resolution mechanisms employed by the Commission to secure compliance with Articles 101 and 102 TFEU, taking into account scholarly discourse regarding regulatory enforcement.

1.1 Aim and research questions

At the centre of this study lies the question of how compliance with Articles 101 and 102 TFEU can be secured by the Commission. Securing compliance is a complex process that can be studied from a number of angles and from the points of view of different scholarly disciplines. The present study approaches the question of securing compliance by focusing on the legal instruments employed to reach that objective, namely the case resolution mechanisms used to enforce of Articles 101 and 102 TFEU. More concretely, the aim is to map out the current design of the case resolution mechanisms used by the Commission and assess whether they reflect, pursue and reach the objectives set out to secure compliance with Articles 101 and 102 TFEU. This study further aims to examine whether it is possible to reveal potential improvements in the design of case resolution mechanisms by viewing them in the light of regulatory enforcement theory.

To achieve these aims, this study first turns to the concrete objectives pursued by the Commission’s enforcement instruments and thus by its case resolution mechanisms. Since different case resolution mechanisms aspire to secure compliance with Articles 101 and 102 TFEU in different ways and in order to ensure a more precise assessment, the overarching objective of securing compliance is broken down into more specific objectives. These objectives serve as a point of reference throughout the entire study.

The mechanisms for the resolution of potential infringements of Articles 101 and 102 TFEU currently employed by the Commission are mapped out with special regard to the different objectives they pursue. In the assessment of the


24 See further: Maher (n 18) 188.
different case resolution mechanisms, this study analyses both the possibilities and restraints the legal framework establishes for each case resolution mechanism in relation to the objectives pursued. Based on the available literature and analyses in the area of competition law enforcement, the study assesses where possible the Commission’s success in attaining the desired objectives. While exposing the functioning of individual case resolution mechanisms and weighing their strengths and weaknesses, this assessment also sheds light on the trade-offs faced by the Commission when choosing one mechanism over another.

Building on the assessment of current case resolution mechanisms, the study then turns to its main contribution. It considers first where the different case resolution mechanisms can conceptually be placed in regulatory enforcement theory and in particular within different enforcement styles. Such a regulatory enforcement perspective is not commonly attached to the enforcement of EU competition law. Yet, it is believed that insights gained in the field of regulatory enforcement may contribute to a new understanding of and advance novel ideas about the design and employment of case resolution mechanisms, which would be conducive to the objective of securing compliance with Articles 101 and 102 TFEU.

Subsequently, the study considers whether regulatory enforcement theory can help construct an alternative approach to resolving cases of suspected infringements of Articles 101 and 102 TFEU that would relate better to the objective of securing compliance. More specifically, it is considered whether a prescriptive approach to enforcement, one that has become known as responsive regulation, could be used as a basis for designing and organising different case resolution mechanisms. Broadly defined, responsive regulation establishes a system of ordering regulatory enforcement strategies in a hierarchy, from more cooperative to more coercive strategies.

Four research questions concretise the aims set out above:

1. What are the objectives pursued by the Commission by the system of case resolution mechanisms used to enforce Articles 101 and 102 TFEU?
2. To what extent do the case resolution mechanisms used by the Commission reflect, pursue and reach their objectives?
3. Can viewing the different case resolution mechanisms through the lenses of regulatory enforcement styles provide new perspectives on and thereby

---

25 However, for an example concerning Australian competition law, see Yeung, Securing Compliance: A Principled Approach (n 22). For certain regulatory enforcement aspects, see also: Eva Lachnit, Alternative Enforcement of Competition Law (Eleven International Publishing 2016); Niamh Dunne, Competition Law and Economic Regulation: Making and Managing Markets (Cambridge University Press 2015).
improve our understanding of these mechanisms and the way they are currently employed by the Commission?

4. How might a system of case resolution mechanisms be designed based on responsive regulation theory with a view to securing better compliance with Articles 101 and 102 TFEU?

This study thus aims to make two contributions to existing research: Firstly, to provide a systematic assessment of the Commission’s system of case resolution mechanisms where an infringement of Article 101 or 102 TFEU may have occurred. Secondly, to consider how different case resolution mechanisms could be better understood and possibly redesigned by using theory from regulatory enforcement, specifically responsive regulation, a perspective which is currently not commonly employed by legal researchers in EU competition law.

1.2 Scope

This study is limited to assessing case resolution mechanisms used by the Commission within the competences outlined in Regulation 1/2003 and the legal framework attached to it. More specifically, it deals with the decisions that the Commission may adopt in accordance with Articles 7 and 9 of Regulation 1/2003 and the fines attached to Article 7 decisions as provided in Article 23 of Regulation 1/2003. Further, cartel settlements according to the procedure set out in Article 10a of Regulation 1/2003 are considered as a separate case resolution mechanism. Important instruments also addressed in this study include, but are not limited to: the Settlement Notice,26 Leniency Notice,27 the Fining Guidelines28 as well as decisions according to Article 10 of Regulation 1/2003 and the Notice on Novel Questions.29

The study does not assess measures taken by national competition authorities (NCAs) irrespective of whether they apply EU or national competition law. This limitation is necessary because the enforcement of EU competition law

29 For example: Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases [2004] OJ C 101/6.
by the Commission differs from the enforcement by NCAs, as the procedures and instruments of enforcement as well as the kind of cases managed by these authorities differ considerably.\textsuperscript{30} Furthermore, studying the Commission’s case resolution mechanisms will be most fruitful since the Commission has the longest experience of enforcing EU competition law. Despite the decentralisation reform carried out by Regulation 1/2003, the Commission remains today the most important authority in the enforcement of Articles 101 and 102 TFEU as it is the only authority designated to deal with cases of Union interest.\textsuperscript{31} Conversely, the NCAs have only been given full competence to enforce EU competition law since Regulation 1/2003 came into effect.\textsuperscript{32} Furthermore, they also have to enforce national competition law in parallel with EU competition law, which necessitates a different, national, point of view.\textsuperscript{33} That being said, this study brings up a number of examples from the enforcement practice of NCAs, both those located within as well as those outside the EU. However, these examples are used in an illustrative manner, mainly to help assess the prospects of specific reform proposals.

Apart from the actions taken by public enforcers of Articles 101 and 102 TFEU, so-called private enforcement has become an important part of competition law enforcement overall. Private enforcement refers to enforcement which is driven by private claimants, usually before national civil courts. Private enforcement pursues a different objective than public enforcement, most notably economic compensation of damages caused by competition law infringements. That being said, private enforcement is likely to have an impact on an undertaking’s overall compliance with competition rules. However, it is not feasible to cover all the possible aspects that may have an impact on an undertaking’s compliance in this study. Focus is here placed on the public enforcement of competition rules. Private enforcement, given that it operates within a different setting, based on different procedures and with a different objective than the Commission’s enforcement of EU competition law, will not be assessed here.

Any form of criminalisation of competition law, for example, by holding the agents of undertakings personally liable for competition law infringements, is excluded from the scope of this study. It appears unlikely that the Commission, with the current system of division of competences within the EU, would be given the power to attach criminal liability to individuals

\textsuperscript{30} See the obligations of NCAs according to: Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 3.
\textsuperscript{31} ibid art 11(6).
\textsuperscript{32} From 1 May 2014. See: ibid art 45.
\textsuperscript{33} ibid art 3(1).
infringing Article 101 or 102 TFEU. While this study analyses other mechanisms not currently part of the Commission’s enforcement of Regulation 1/2003, all of these mechanisms focus on undertakings rather than their agents. Considering that including some form of criminalisation in the scope of this study would also require a thorough analysis of the procedural and legal consequences for the Commission as an enforcer and indeed the legal framework of EU competition law enforcement as a whole, such a delimitation of this study would not be feasible. While criminal law, in substance, lies outside the scope of this study, literature from criminal law is used here to promote the understanding of certain key concepts. This relates, for example, to theories of punishment such as deterrence and retribution. Literature on criminal law is essential to the definition and understanding of these concepts for the purposes of this study.

Lastly, the focus of this study is on the general case resolution mechanisms used against suspected infringements of Articles 101 and 102 TFEU, rather than on measures aimed at specific industrial sectors or types of agreements. The legal frameworks attached to these sectors are too specific to be done justice in this study. Therefore, any measures taken by the Commission under the Block Exemption Regulations also lie outside the scope of this study.

This study reflects the law as per 31 December 2018. Documents and material published after that date are not taken into account.

1.3 Terminology

This study uses a number of terms and concepts whose meaning is contested, especially where those terms are used in several different fields of research and sciences. To avoid confusion, it is therefore necessary to define these terms for the purposes of this study.

1.3.1 Law Enforcement

Law enforcement in a broad sense describes the entire chain of action taken by one or several authorities or other designated bodies to ensure compliance with a given law. This includes the discovery, investigation and
establishment of law infringements as well as the imposition of sanctions for such an infringement.\textsuperscript{37} Law enforcement may be carried out by public authorities or by private claimants with the assistance of courts or with the use of alternative dispute resolution mechanisms. Furthermore, law enforcement may, as Hutter points out, also include ‘education, advice, persuasion and negotiation’.\textsuperscript{38} Lachnit terms such actions by law enforcement authorities and bodies as ‘alternative enforcement’, which she defines as a ‘deviation from command-and-control style enforcement’.\textsuperscript{39} Law enforcement concerning a single law may involve only one or several law enforcement authorities of varying types. Law enforcement authorities include the police, government agencies, courts, prisons and so on.

As is self-evident from the description above, there is some confusion about the exact delineation of the term law enforcement. For the purposes of this study, a broad definition of law enforcement appears suitable, given that certain case resolution mechanisms employed by the Commission exhibit characteristics that could be defined as ‘alternative enforcement’. For example, Article 9 decisions do not include the finding of an infringement of Article 101 or 102 TFEU, but rather resolve a case on the basis of ‘commitments’ negotiated between the Commission and the undertaking in question.

1.3.2 Consequentialist and retributionist theories of punishment

The above-mentioned case resolution mechanisms frequently include punishment for infringements of the law. There are a number of theories of punishment that, at their core, aim to justify the need for punishing infringements of the law and prescribe the terms of punishment, such as whom to punish and how.

There is disagreement concerning the answer to the questions: what justifies punishment, who should be punished and how harsh should that punishment be? This debate is marked by a deeply rooted disagreement between different

---


\textsuperscript{39} Lachnit (n 25) 21.
philosophical points of views. Duff and Garland summarise the main differences concisely:

Consequentialist theories of punishment are instrumentalist and forward-looking: they justify punishment as a contingently efficient technique for achieving certain beneficial effects. Retributionist theories are intrinsicalist and backward-looking: they justify punishment in terms of its relation to a past offence.

Consequentialist theories, aiming to prevent crime, can be further divided into those seeking general prevention and those seeking individual or specific prevention of crime. General prevention can be sought by different means like deterrence, moral education or habit formation. Individual prevention can for instance, be sought through deterrence, incapacitation or rehabilitation.

The two relevant theories of punishment for the purposes of this study are deterrence (both general and individual/specific deterrence) and retribution.

1.3.2.1 Deterrence

Deterrence can be defined as ‘the omission of [an] (...) act because of the fear of sanctions or punishment.’ The concept of ‘deterrence’ can be approached from three particular dimensions that are of relevance for this study. Firstly, deterrence is conceptualised as a justification for punishment, forming the foundation of an entire theory of punishment. The goal of deterrence justifies punishment because deterrence is assumed to reduce crime. Secondly, and related to the justification for punishment, deterrence is used as a benchmark regarding the magnitude of the punishment that should be imposed. Thirdly, deterrence is also used in regulatory enforcement literature to designate a style of enforcement. This third dimension is briefly addressed under ‘compliance’ below, but is not used in this study, to avoid misunderstandings about the

---

43 Lernestedt (n 42) 118–19.
meaning of the term deterrence.\textsuperscript{46} The first two dimensions of deterrence are further defined below.

With regard to the justification of sanctions, deterrence has not always been conceived as an economic concept as it often is conceived today. In fact, deterrence can be traced back to the philosophers of the classical school such as Bentham (1748-1832) and Beccaria (1738-1794), who argued that the human character was such that it would lead humans to give up certain freedoms when they joined society, which provided legitimacy to the establishment of law and the punishment of violators.\textsuperscript{47} Humans would then rationally weigh the consequences of infringing the law against the benefits of the crime and choose whichever was more advantageous. This line of reasoning led to the concept of deterrence, which assumed that individuals could be prevented from committing crimes if only the punishment were harsh enough.\textsuperscript{48} Modern deterrence theory extended the ideas of punishment and deterrence developed by the classical school to distinguish the concepts of general and specific deterrence. Specific deterrence is aimed at the individual being punished, preventing them from future infringements. General deterrence is aimed at the general public to prevent infringements of the law more broadly.\textsuperscript{49}

Part of the appeal of deterrence as a theory of punishment is that it offers relatively clear guidance as regards the magnitude of the punishment to be imposed, at least where the punishment consists of fines.\textsuperscript{50} A deterrent fine can be calculated, in theoretical terms, along defined parameters. There are, broadly speaking, two main economic models used to determine whether and when fines should be imposed and what the magnitude of those fines should be: optimal deterrence and absolute deterrence. According to the model of optimal deterrence, fines should be calculated by carrying out a cost-benefit analysis for an individual infringement of the law. If the infringing behaviour causes 'harm to others', it should be penalised with a fine equal to that harm. However, if an unlawful activity has benefits which outweigh its costs, it

\textsuperscript{46} See section 1.3.4.
\textsuperscript{48} Jeremy Bentham, \textit{An Introduction to the Principles of Morals and Legislation} (Clarendon 1879) 178–79.
\textsuperscript{50} Of course, deterrence theory can also be used to calculate damages to private claimants. However, it should not be forgotten that public fines and private damages interact from the perspective of optimal deterrence. See further: Nils Wahl, \textit{Konkurrensskada} (Jure 2000) 33–42.
should not be penalised, avoiding over-deterrence.\footnote{Becker (n 13) 172–174; William M Landes, ‘Optimal Sanctions for Antitrust Violations’ (1983) 50 The University of Chicago Law Review 652, 655–56.} In contrast, the model of absolute deterrence assumes that an unlawful activity is always harmful to society and fines are accordingly calculated equalling the ‘unlawful gain’ from the illegal behaviour. Both models assume that all law infringements are detected, that enforcement is costless and that the infringer is risk neutral. Hence, further adjustments need to be made to the fine to take account of these factors.\footnote{Robert Cooter, ‘Prices and Sanctions’ (1984) 84 Columbia Law Review 1523, 1537–38.} For the purposes of this study, the difference between these two deterrence models is of relevance when assessing how deterrent fines should be calculated and whether the fines imposed for infringements of Articles 101 and 102 TFEU act as a deterrent.\footnote{See section 4.1.2.3.} Given that the assessment below is based on research by scholars representing both models, it is not possible to restrict the definition given here to one model only. However, the broad concept of deterrent fines is the same for both models: preventing undesirable actions with the threat of such fines that do not make it worthwhile to engage in such actions.

1.3.2.2 Retribution

Like deterrence, retribution (or ‘just deserts’) is a theory of punishment, but it relies on radically different reasoning as regards both justifying punishment and the desirable magnitude of punishment. From a retributive point of view, illegal behaviour deserves to be punished. In other words, retribution is based on the age-old ‘an eye for an eye’ principle.\footnote{Jeremy Waldron, ‘Lex Talionis’ (1992) 34 Arizona Law Review 25, 26; Hart, Punishment and Responsibility: Essays in the Philosophy of Law (n 40) 8.} Specifying in concrete terms why illegal actions deserve punishment is more difficult and reasons vary among retributionists. Von Hirsch, for example, holds that illegal actions should be punished to express moral blame and censure.\footnote{Andrew von Hirsch, Censure and Sanctions (Clarendon 1993) 8–9.} In contrast, according to Finnis, the infringer attains an unfair advantage from the illegal behaviour, which is removed by the punishment.\footnote{John Finnis, Natural Law and Natural Rights (2nd edn, Oxford University Press 2011) 262–64.}

As regards the magnitude of fines, the ‘eye for an eye’ maxim would suggest that the punishment should equal the illegal behaviour in some way. Considering the type of behaviour that is criminalised, it is not possible to repay every illegal action by inflictng the crime on the perpetrator.\footnote{Waldron (n 54) 32–37.} In more modern terms, ‘deserved punishment’ is reflected in the principle of
proportionality, weighing the magnitude of the sanction against the seriousness of the offence. The seriousness of the offence is expressed in terms of harm and culpability. Whether the principle of proportionality relates to an exact target to be reached by the punishment or rather a limit as to the acceptable punishment is contested among retributionists. Braithwaite and Pettit, for example, define the magnitude of punishment along two conceptual lines, which they call positive and negative retribution. Positive retribution means that the punishment ‘must not be less than of a degree commensurate with the nature of the crime and the culpability of the offender.’ Negative retribution endorses punishment which ‘must not be more than of a degree commensurate with the nature of the crime and the culpability of the offender.’ Positive retribution thus defines an exact punishment that must be imposed, while negative retribution sets a maximum for the punishment that may be imposed.

For the purposes of this study, retribution is an important component aside from deterrence to assess fines imposed for infringements of Article 101 or 102 TFEU. As we will see below, fines imposed for infringements of competition law in fact rely on both deterrence and retribution, with regard to justification as well as the actual calculation of fines.

1.3.3 Regulation

Regulation, as a concept, can be and has been defined in various ways, making it difficult to find a succinct definition suitable for the present study. Regulation can be understood broadly as a system of control of human activity, as Hood et al. define it:

(...) any control system in art or nature must by definition contain a minimum of the three components (...). There must be some capacity for standard-setting to allow a distinction to be made between more and less preferred states of the system. There must also be some capacity for information-gathering or monitoring to produce knowledge about current or changing states of the

---

58 Yeung, Securing Compliance: A Principled Approach (n 22) 74–75.
59 See for example: Hirsch (n 55) 15–16; Finnis (n 56) 264.
61 ibid.
62 The term ‘regulation’ as defined here is not to be confused with ‘Regulations’ denoting a type of legislative instrument used in the EU legal system. See: Treaty on the Functioning of the European Union (n 2) art 288.
63 Morgan and Yeung (n 37) 3.
system. On top of that must be some capacity for behaviour-modification to change the state of the system.\textsuperscript{64}

Both Yeung and Simpson have advanced definitions of regulation that focus on the component of behaviour-modification mentioned above.\textsuperscript{65} Yeung defines regulation as:

(...) the sustained and focused attempt by the state to alter behaviour thought to be of value to the community.\textsuperscript{66}

Simpson meanwhile defines regulation with reference to Stone as the:

(...) state-imposed limitation in the discretion that may be exercised by individuals or organizations, which is supported by the threat of sanction.\textsuperscript{67}

None of the above definitions can claim to be perfect, but they combine the essential elements necessary to consider for the purposes of this study. While Yeung puts an emphasis on regulation as steering positive behaviour, Simpson focusses more on the limitation of the freedom to choose negative, non-valuable measures. Both definitions regard regulation as state-imposed. Simpson also adds the threat of sanctions which may follow on non-compliance with the relevant regulation. Yeung further makes a crucial distinction between regulation and conduct falling within the traditional scope of criminal law.\textsuperscript{68} Criminal law prohibits behaviour which is not considered to be of value to society. Conversely, conduct which is of value to society can be regulated to ensure that the conduct is carried out in such a manner that that value (whatever it may be) is actually generated.\textsuperscript{69}

Regulation can take various forms. Morgan and Yeung, for example, distinguish several ‘classes’ of regulation.\textsuperscript{70} Among lawyers, there may be a tendency to equate ‘regulation’ with ‘command-and-control regulation. In its most basic form, the state specifies a certain conduct (command) which is supported by the threat of law enforcement and sanction in case of non-

\textsuperscript{65} It deserves to be repeated that regulation can be defined much broader, including actors beyond the state and regulation beyond the legal context. See: Morgan and Yeung (n 37) 3–4.
\textsuperscript{66} Yeung, \textit{Securing Compliance: A Principled Approach} (n 22) 5.
\textsuperscript{68} The ECtHR considers that penalties imposed for infringements of competition law fall within the outer sphere of criminal law. See: \textit{A. Menarini Diagnostics v. Italy} (n 21).
\textsuperscript{69} Yeung, \textit{Securing Compliance: A Principled Approach} (n 22) 6.
\textsuperscript{70} Morgan and Yeung (n 37) 80.
compliance (control). With regard to the enforcement of regulation, reference is often made to ‘regulatory enforcement’ in the relevant literature. This term refers to the actions taken by an enforcement authority to ensure compliance with the standards of a particular regulation. Enforcement of command-and-control regulation may also take on different regulatory enforcement styles, then the coercive threat of sanction. These enforcement styles are usually placed somewhere along a cooperation-coercion continuum. Cooperative enforcement aims to convince actors to comply with the regulation, for instance through education or guidance. Coercion, at the other end of the spectrum, aims to force actors to comply by punishing non-compliance with sanctions. Such sanctions may be fines, but may also be some form of incapacitation making it impossible for the actor to infringe the law in question.

Given the plethora of definitions of ‘regulation’, it needs to be clarified whether and how competition law fits into that concept. For the purposes of this study, regulation is defined as a combination of Simpson’s and Yeung’s definitions cited above. Regulation is defined as limitations on beneficial conduct by individuals or undertakings that are imposed and enforced by the state. At the overall level, competition law limits a beneficial behaviour, namely an undertaking’s participation in the market economy. Hence, with that definition, EU competition law may be viewed as regulation, emanating from the central substantive provisions which lay down the type of behaviour that is prohibited. In concrete terms, Articles 101 and 102 TFEU are commands concerning the type of behaviour of undertakings that is prohibited. The Commission’s enforcement is one part of the enforcement of those commands. Further enforcement is also carried out by NCAs in the EU Member States and by private damages claimants.

Conversely, competition law is also often contrasted with ‘regulation’. What is meant by ‘regulation’ in that context is usually ‘sector specific regulation’ in fields where the competitive process does not function properly due to natural monopolies or network effects (for example, telecommunications, electricity or digital markets). Ogus explains the difference between competition law and regulation as follows:

---

71 Beyond command-and-control, Morgan and Yeung identify four more ‘classes’ of regulation, namely competition, consensus, communication and code. See further: ibid 80–105.
72 Yeung, Securing Compliance: A Principled Approach (n 22) 12.
Competition is a crucial assumption of the market model. Where it is seriously impaired by monopolies and anti-competitive practices there is market failure. Competition (or antitrust) law is the principle instrument for dealing with this problem (...) A natural monopoly is a special kind of problem. While the undesirable consequences (...) arise equally in relation to natural monopolies, the remedy for the latter lies not in competition. Rather, the natural monopoly is allowed to prevail; and some form of (economic) regulation is necessary to control those consequences.\(^{75}\)

Ogus’s quote above can be contrasted with the above-mentioned view that competition law represents a limit to an undertaking’s freedom of action. Ogus presents competition law as a tool to be used if the market model of (free) competition does not function as intended. Conversely, the view that competition law may be perceived as regulation emphasises the constraining and controlling function of the law.\(^{76}\) There are thus conflicting views regarding the function of competition law enforcement.

Seeking to define the traditional distinction between competition law and regulation more concretely, Dunne outlines five characteristics of sector specific regulation: First, regulation typically applies to a specific sector of business, rather than to all undertakings regardless of their business, as competition law does. Second, competition law enforcement is carried out \emph{ex post} that is after the infringement has occurred. Conversely, regulation is carried out \emph{ex ante}, before an infringement can occur. Third, regulation is prescriptive, dictating certain behaviour to its subjects, rather than proscriptive, merely prohibiting certain behaviour. Fourth, competition law pursues first and foremost goals of economic efficiency, while regulation often has further non-economic goals such as universal service obligations. Lastly, competition law often relies on the market to solve competition problems, while regulation prescribes desired outcomes on a market with less flexibility as regards market mechanisms.\(^{77}\)

While competition law can be contrasted with sector specific regulation with regard to some aspects such as its application, EU competition law enforcement also bears some of the characteristics traditionally associated with sector specific regulation. There are several elements of EU competition law enforcement which apply \emph{ex ante} rather than \emph{ex post}. The former system of notification for exemptions under Article 101 TFEU was one such example. While that system has been abolished, certain mergers and concentrations

---

75 Anthony Ogus, \emph{Regulation: Legal Form and Economic Theory} (Clarendon 1994) 30.

76 See further: David J Gerber, \emph{Law and Competition in Twentieth Century Europe: Protecting Prometheus} (Clarendon 1998) 9.

must still be notified to the Commission and cleared before they can be implemented. Competition law also contains prescriptive elements: Block Exemption Regulations for instance, establish detailed rules for types of behaviour which are permissible for undertakings in certain sectors of the economy or for certain types of agreements. Commitments made binding as part of Article 9 decisions may also contain detailed rules as to the permissible behaviour of the undertaking(s) subject to that decision.\textsuperscript{78} This is not to say that the distinction between competition law enforcement and sector specific regulation should be erased, but rather that a functional and structural distinction is too narrow given the current, sophisticated functions and structure of the Commission’s enforcement of competition law. Indeed, the legislative frameworks of competition law and sector specific regulation complement one another.\textsuperscript{79}

Thus, it is submitted here that EU competition law enforcement, broadly understood as limitations on beneficial conduct of undertakings imposed and enforced by the state, may be considered as a form of regulation.

1.3.4 Compliance

Put most simply, compliance refers to a state of obedience with the standards prescribed by a given law by its subjects.\textsuperscript{80} Within regulation literature, compliance is considered to be ‘as much a process as an event’.\textsuperscript{81} An enforcement authority finding an infringement of the law must show that the subject has not complied with the law at a certain point in time or during a certain period in time. However, the finding of an infringement does not mean that the subject is ‘in compliance’ with the law after that fact. Rather, achieving full compliance may take time.

In regulation literature, ‘compliance’ has also a second meaning which may lead to confusion. In that context, ‘compliance’ designates an enforcement approach which relies on persuasive and cooperative mechanisms to achieve

\textsuperscript{78} See more exhaustingly: Ibáñez Colomo, ‘On the Application of Competition Law as Regulation: Elements for a Theory’ (n 74) 263–76.


\textsuperscript{81} Hutter (n 38) 13.
compliance with the law. This enforcement approach is frequently contrasted with a ‘deterrence approach’, which primarily relies on sanctions to secure compliance.\textsuperscript{82} To avoid further misunderstandings, the term ‘compliance’ is not used to designate an enforcement approach in this study.

Within the ambit of regulation literature, there is also a strand of research concerning addressing the question of why undertakings comply with the law. This strand can be linked to research on different classes of regulation and regulatory enforcement styles. In their seminal paper, Kagan and Scholz presented several answers to the question of why undertakings infringe the law.\textsuperscript{83} However, in more recent years, scholarly endeavours have been redirected to the more positive question of why undertakings comply with applicable law. Motives explaining why undertakings comply with the law include the:

[1] fear of detection and punishment; [2] a concern about the consequences of acquiring a bad reputation and [3] a sense of duty, that is, the desire to conform to internalized norms or beliefs about right and wrong.\textsuperscript{84}

It is possible to link the first of these motives, a fear of detection and punishment, to the classic economic calculus of deterrence introduced above.\textsuperscript{85} This motive is congruent with Kagan and Scholz’s ‘amoral calculator’.\textsuperscript{86} The second motive refers to the ‘social license’ under which undertakings operate. They are subject to pressure from customers, employees, the media, shareholders and/or business associates. If the undertaking does not behave in a compliant manner, it may have a harder time recruiting employees, selling its products or may trigger negative media coverage.\textsuperscript{87} This reputational damage may be caused by detected and punished law violations or by complaints, which subsequently lead to law enforcement. Thus, not only is the threat of law enforcement relevant concerning compliance, but also regarding so-called ‘informal sanctions’, that is the cost associated with damaged...

\textsuperscript{82} Parker, ‘Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance’ (n 80) 66–67; For an example, see: Hawkins (n 73) 3.
\textsuperscript{83} Kagan and Scholz (n 23) 67–68.
\textsuperscript{85} See section 1.3.2.1.
\textsuperscript{86} Kagan and Scholz (n 23) 69–71.
\textsuperscript{87} Kagan, Gunningham and Thornton (n 84) 42.
relations with customers, business associates, etc. A third motive mentioned above is the sense of duty to act according to the law. Such compliance may either relate to compliance for the sake of following the law or a moral alignment with the content of the law.

It seems that an earlier discourse concerning ignorance of applicable laws has partially disappeared from the debate on the compliance of undertakings, perhaps because ‘ignorance’ is not a valid answer to the question of why an undertaking complies with the law. It can nonetheless be kept in mind that if undertakings are ignorant of a law, they cannot comply with it either.

Considering the different motives for an undertaking’s compliance, research has also been conducted looking into whether undertakings can be said to act due to one of the motives outlined above or whether there is rather a ‘mix’ of motives that can be used to explain an undertaking’s behaviour. This research not only claims that different undertakings may act with different motives, but also that a single undertaking may have different motives in different situations.

By extension, the research summarised above highlights a central problem for an enforcement authority in its task of securing compliance: how should enforcement authorities act to secure compliance? As an answer to this question, responsive regulation, the theory employed in chapter 6 below, has been developed.

1.4 Method

The primary subject of this study is law. However, the method utilised here cannot be appropriately categorised in line with an established legal method, but is specific to the research questions investigated. The main part of this study is divided into four chapters (chapters 3-6), each answering one of the research questions posed above, each requiring a separate explanation of the method used.

---

89 Kagan, Gunningham and Thornton (n 84) 44–46.
90 Kagan and Scholz (n 23) 80–84.
92 See section 6.1.
In general terms, it is possible to distinguish different types of research: Research may, for example, seek to describe a certain natural phenomenon or human behaviour. It may then aim to explain why that phenomenon exists or why humans behave in a certain manner. However, the prevalent kind of research conducted in law is normative research, for instance aiming to ascertain how a certain legal rule should be interpreted or applied to certain circumstances.\textsuperscript{93} Within the domain of doctrinal legal research, it is common to distinguish between research seeking to find what the law is, research \textit{lex lata,} and what the law \textit{should be,} research \textit{lex ferenda.}\textsuperscript{94} \textit{Lex ferenda} research may accommodate different types of research questions, from research aiming to fill gaps in the law to the proposal of entirely new legal provisions or laws.\textsuperscript{95}

This dichotomy of research \textit{lex lata} and \textit{lex ferenda} is too narrow to categorise the research carried out in this study, given that it departs from a classical doctrinal legal method. Rather, it is more useful to define the research carried out here in a more descriptive manner. First, the objectives of the Commission’s system of case resolution mechanisms are \textit{identified and analysed}. Second, an \textit{assessment} is made to ascertain to what extent these objectives are reflected, pursued and fulfilled by the said case resolution mechanisms with reference to the relevant legal framework and findings from economic studies as well as statistical data. Third, the Commission’s case resolution mechanisms are \textit{described, categorised and analysed} in terms of regulatory enforcement theory. Fourth, an analysis is made as to whether the theory of responsive regulation could be used to \textit{design} a ‘responsive approach’ establishing a system of case resolution, considering both the legal and practical characteristics such an approach would need to fulfil.

In the following section, each of the methods used in chapters 3, 4, 5 and 6 is elaborated further. As a preliminary step, a separate section is devoted to the more overarching question of the use of findings and data from social science research in legal research and the general methodological challenges this involves.


\textsuperscript{95} \textit{Lex ferenda} research as a legitimate activity for the legal scholar has been contested. For an early reasoning as to the legitimacy of \textit{lex ferenda} research, see: Walther Schücking, \textit{Die Organisation der Welt} (A Kröner 1909) 7–9.
1.4.1 Approach to research findings from social sciences

In the beginning of his three-volume work ‘Law, Legislation and Liberty’ Hayek observed that

(...) although the problem of an appropriate social order is today studied from the different angles of economics, jurisprudence, political science, sociology, and ethics, the problem is one which can be approached successfully only as a whole.96

Even though the subject of the present study is of a considerably narrower nature than Hayek’s work, the issue that Hayek points to is no less pertinent. The behaviour of undertakings vis-à-vis laws and law enforcement is studied in a number of social sciences. Further, in the application of law, findings from other social sciences are used in various ways. Scholarly disciplines relevant to this study include economics, sociology, political science and criminology. As already explained above, research conducted in these disciplines is employed in different ways in this study. The following sections explain the overarching methodological considerations with regard to this research.

Generally, where a legal study goes beyond the conventional domain of doctrinal legal analysis and enters the realm of questions whose answers require the use of empirical methods, the legal scholar may take two courses of action: Either, to conduct the necessary studies using the appropriate social science methods. Or, to rely on already existing studies, drawing conclusions from the empirical data and findings generated and processed by scholars in other social disciplines. In this study, the latter approach is taken. This decision requires a further elaboration of the approach taken when incorporating findings from other sciences into the assessment of case resolution mechanisms conducted here.

The legal scholar seeking to use existing findings from other social sciences must first identify the question that is asked and how that question can be answered. Depending on the outcome, the study of findings in non-legal research may be more or less demanding.97 Vranken summarises three general steps that he believes need to be taken when employing findings from social sciences other than law: (1) The identification of the scholarly disciplines that may provide findings relevant to the legal question to be answered; (2) the determination of whether the findings are reliable and valid; and (3) if the


97 On different types of uses of empirical material, see: Claes Sandgren, ‘Om Empiri och Rättsvetenskap (del I)’ [1996] Juridisk Tidskrift 726.
findings are reliable and valid, the translation of the findings into the legal context. Findings from other social sciences thus need to be ‘translated’ to be used to answer a legal question.98 Such a ‘translation’ may, for example, relate to the presumptions and simplifications used in the relevant literature and which sometimes limit the applicability of their conclusions to the law. Furthermore, empirical studies may be carried out with varying methods and in varying contexts. In these cases, ‘translation’ may relate to an assessment of the value of different studies in relation to one another or the value of a certain study for the context studied by the legal scholar. These issues are also considered more specifically below.99

The disciplines from which insights and findings are used in this study are, as already mentioned, economics, sociology, political science and criminology. Regarding economics, use is exclusively made of studies from neo-classical economics, mainly to assess the fulfilment of objectives in chapter 4. Concerning sociology, political science and criminology, the research referred to throughout this study relates to studies of regulation and more concretely regulatory enforcement, a field where research from these disciplines appears to overlap.100 Building up a basic knowledge of the limitations of the disciplines used is essential for their later utilisation. For instance, assumptions are almost always made in social sciences to simplify real-life situations. For example, neo-classical economists use perfect competition as a basis for setting up different models, even though it is a well-known fact that it is unlikely or even impossible for the conditions of perfect competition to ever occur in reality. Perfect competition assumes, amongst other things, the presence of a large number of buyers and sellers of one homogeneous product and perfect information on the part of the buyers.101 Legal scholars using economic theory have to be aware of these assumptions, since economists often take them for granted, with the presumption that their audience consists of other economists instead of legal scholars. Further, there are different strands of research that exist within one discipline and assumptions can

99 See sections 1.4.3 and 1.4.5.
100 Prominent authors in this field are for example: Braithwaite (a criminologist), Kagan (a political scientist) and Hutter (a sociologist).
change within that body of literature as compared to a different strand of research.\textsuperscript{102}

Empirical sciences are subject to different quality controls than legal science. Important parameters are, amongst others, validity, reliability and representativeness. \textit{Validity} can be defined as ‘the extent to which any measuring instrument measures what it is intended to measure.’\textsuperscript{103} Importantly, the measuring instrument must be suited to the purpose of the study. In other words, not only is the instrument itself important, but so is also the purpose it is used for. These two variables must be in congruence.\textsuperscript{104} \textit{Reliability} is ‘the extent to which an experiment, test, or any measuring procedure yields the same results on repeated trials.’\textsuperscript{105} Unfortunately, any measurement is prone to some degree of error, so that 100 per cent reliability is impossible to achieve. However, the margin of error may be higher or lower depending on the measurement method.\textsuperscript{106} Lastly, \textit{representativeness} is ‘the extent to which a study's results can be generalized to other situations or settings.’\textsuperscript{107} This is especially important when empirical studies are used for legal scholarship. The importance of these quality criteria when employing empirical studies in the context of a legal study varies depending on the question asked and the conclusions drawn in the legal study.

To ‘translate’ findings from research in social sciences to legal science, it is of manifest importance to draw appropriate conclusions from the relevant studies and data. For example, it is easy to be confused by the varied results of empirical studies regarding the same question. The different studies must be compared in order to identify the reason for the divergent outcome. Sometimes, differences are due to the fact that different studies relate to different periods of time or different samples. Even if the same samples are used, divergent results may occur due to methodological differences. Where relevant, the differences between such studies must be pointed out. Different methods have different possibilities and limitations, thus influencing the result concerning the question(s) asked. Both considering the shortcomings of the


\textsuperscript{103} Edward G. Carmines and Richard A. Zeller, \textit{Reliability and Validity Assessment} (Sage 1979) 17.

\textsuperscript{104} ibid.

\textsuperscript{105} ibid 11.

\textsuperscript{106} ibid.

methods used in different studies and potential shortcomings of this author with regard to the completeness of the literature collected, it is important to avoid jumping to rapid conclusions. That being said, where many studies point in one direction, this can be considered as sufficiently strong support to draw conclusions in line with the results of the said studies.

With regard to the present study, empirical studies employing a range of different methods are cited. Given that legal scholars tend to be unfamiliar with many of the methods and parameters of quality used in the scholarly disciplines named above, it is relevant give a short introduction to the relevant methods employed by the empirical studies cited in the present work. Naturally, these different methods entail advantages and disadvantages which have an impact on their applicability for the present study. The aim here is not to repeat what can be learned from general textbooks on research methods, but rather to point out the relevant features of the studies used in the present work, especially concerning the features relevant to assess the value of these studies.

1.4.1.1 Meta studies

Meta studies aim to synthesise existing knowledge from other empirical studies. However, instead of describing studies one by one, as a narrative study would do, they pool the results of all studies and analyse them by statistical means. Essentially, each study is treated as a case and all cases are subsequently analysed by the same statistical means. For example, Simpson et al. have conducted a meta study on the deterrent effect of law enforcement against corporate crime. Meta studies are most easily carried out where data from previous studies is available, but can also be carried out on qualitative material.

1.4.1.2 Quasi-experimental studies

Quasi-experimental studies, or ‘natural experiments’ as they are also called, are not performed in a laboratory but rather study naturally occurring situations or subjects. Quasi-experimental studies have the advantage of taking place in ‘real’ situations rather than in ‘unnatural’ laboratory situations. The disadvantage is that it is more difficult to control for different factors and it is thus more difficult to establish causal relationships with a sufficient

---

110 Hakim (n 108) 20.
degree of reliability. Quasi-experimental studies used in the present work usually compare situations before and after a legislative change came into effect, for instance new fining guidelines. Fines imposed before and after a legislative change can be compared in quasi-experimental studies. The weakness of such studies is that the two ‘groups’ subject to different fining guidelines cannot be controlled in a natural setting. This means that the results of the study may be unreliable due to differences in the two groups.

1.4.1.3 Vignette studies

Vignette studies can methodologically be placed somewhere in between experiments and surveys. A vignette is a hypothetical situation used in surveys as a basis for questions asked to the participants of the study. Vignettes are often used in psychological or sociological studies to reveal the perceptions, social norms or culture of the participants. Each vignette study will usually employ a number of different vignettes and each vignette consists of a number of different variables considered relevant to the question researched. For example, Simpson’s study on regulatory enforcement strategies used vignettes describing situations of corporate crime, such as price-fixing and bribery. To accommodate as many different situations as possible, the studies were carried out as factorial studies, where each participant received different vignette studies. The main weakness of factorial vignette studies is that depending on the number of participants, not all possible variables will be utilised and that each participant will answer questions regarding different vignettes. In that way, it is not possible to test whether different participants would have reacted differently to the same vignette. In general, vignette studies, while offering the controlled setting of a laboratory, do not observe actual behaviour in a specific situation, but rather what participants say they would do in that situation. Further, vignette studies are often administered to students within a targeted profession (due to availability), rather than actual practitioners of that profession, making it difficult to draw conclusions as regards the actual perceptions of practitioners.

111 ibid 109–10.
114 David R Heise, Surveying Cultures: Discovering Shared Conceptions and Sentiments (John Wiley & Sons 2010) 75–76.
115 ibid 76–77.
116 More details on factorial vignettes can be found at: ibid.
117 ibid 78–80.
118 Simpson, Corporate Crime, Law, and Social Control (n 49) 112 and 141–42.
1.4.1.4 Surveys

Surveys are a common way to collect data on a range of questions. Surveys are administered to sample populations of individuals, as it is usually too costly to survey all members of a specific population. Designing a sample poses its own challenges, mostly related to the representativeness of the sample. Survey questions may vary greatly, from factual questions to questions of perceptions and from simple yes or no questions to open-ended questions. Depending on the aim of the survey, different questions will be more or less suitable and may return more or less useful results. For example, where the aim is to collect data for quantitative analysis, forced choice questions will be more useful than open questions. Besides the questions themselves, how the surveys are administered may influence the outcome. In self-complete surveys, it is not possible to control who answers a survey and in what setting. Where the subject is asked questions by an interviewer, that interviewer may influence the answers. How a survey is administered may also influence the return rate. Postal returns may, for example, return fewer responses than surveys administered via telephone.\(^{119}\)

Most surveys cited in this study concern corporate law-breaking in some sense. This means that concerns about social-desirability bias (subjects answering falsely due to what they perceive as the correct answer) and respondent anonymity are particularly challenging. For example, Parker and Nielsen, in a survey considering business compliance, hold that:

A more fundamental problem with self-report measures is that respondents might show social desirability or other biases that make it difficult for them to answer questions truthfully. Like other researchers, we sought to overcome this set of potential reliability problems by making (and following through on) strict guarantees of confidentiality and anonymity in our handling of the data in order to ensure that respondents felt they could safely answer questions honestly. Moreover, to the extent possible, we framed our questions as specifically as possible so that it should be relatively easy for the person filling out the questionnaire to determine objectively whether the answer should be yes or no, eliminating as far as possible the element of subjectivity that makes it easier to respond in a socially desirable way (...).\(^{120}\)

An advantage of surveys is that they can be used for a variety of purposes such as to collect factual data, to survey perceptions or to supplement existing bureaucratic data.

---

\(^{119}\) Gomm (n 113) 151–60.

1.4.1.5 **Bureaucratic data**

Instead of collecting data by, for example, surveys, many of the empirical studies used in this work collect data from the Commission’s official case records. Certain problems are associated with using data collected by a bureaucratic entity such as the Commission. The case search function\(^{121}\) provided on the Commission’s homepage is not designed for use in scientific studies, but rather serves as an informative public record. For a researcher, it is difficult to check the origin of data contained in the database and whether it is correct. For example, dates may easily be entered incorrectly or certain data may be missing for some cases. Further, it can be assumed that a number of Commission officials have access to and enter data into the case database. These officials may classify data differently, meaning that the available data is difficult to process in a uniform manner.\(^{122}\) In some cases, it might be possible to validate bureaucratic data with other data, for example surveys. For instance, estimates of the probability of the detection of cartel activity on the basis of case data from the Commission have been supplemented with surveys among professionals regarding the perception of the probability of being caught.\(^{123}\)

1.4.1.6 **Case studies**

Legal scholars sometimes use the term ‘case study’ when they examine one or a select few cases with regard to a certain aspect. In that context, the term ‘case’ is used in the literal sense, usually denoting a case from a court or an enforcement authority. In social sciences, the term ‘case study’ is used in a broader sense where:

Case studies take as their subject one or more selected examples of a social entity – such as communities, social groups, organisations, events, life histories, families, work teams, roles or relationships – that are studied using a variety of data collection techniques.\(^{124}\)

Case studies may be used for a variety of research aims: they may be exploratory, where little research exists on a certain issue, or illustrative, where the researcher seeks to give a more detailed picture of an ‘average’ situation found by other research designs. Case studies may also be used to

---


\(^{122}\) Gomm (n 113) 139–149.


\(^{124}\) Hakim (n 108) 61.
isolate certain factors which are thought to explain casual relationships by finding the best available case confirming the hypothesis. In contrast, case studies may be used to disprove a hypothesis, by studying a deviant case. Case studies may also be based on a large number of cases (for example, in meta studies) or may take the form of longitudinal studies, where a case is sometimes followed over several decades. Given the variation of case studies, it is difficult to isolate advantages and disadvantages. One obvious issue is the choice of individual case or sample of cases used for a study. This may have an impact on the representativeness of the study.\textsuperscript{125}

A relevant example of a case study with many cases is the event study carried out by Günster and Van Dijk on stock market reactions to competition law interventions against undertakings, namely dawn raids, infringement decisions and court decisions.\textsuperscript{126}

\subsection*{1.4.2 Identifying the objectives of the system of case resolution mechanisms}

This study now turns to the specific methods used to answer the research questions posed and first to the method used in chapter 3. In that chapter, the objectives of the system of case resolution mechanisms, which are used as a tool for assessment in this study, are set out.

The objectives of the system of case resolution mechanisms relate to the outcome to be achieved by the Commission when applying the different case resolution mechanisms to suspected infringements of Article 101 or 102 TFEU. These objectives are not explicitly set out in the relevant legislative instruments, which is why they must first be ascertained, something that will be done chapter 3. It must be underlined that the set of objectives ascertained in chapter 3 relate to the system of case resolution mechanisms employed by the Commission at an overall level, rather than to specific case resolution mechanisms. The assignment of these objectives to individual case resolution mechanisms is conducted as part of chapter 4.\textsuperscript{127}

Essentially, ascertaining the objectives of the system of case resolution mechanisms means finding the \textit{telos} of the legal rules attached to those case resolution mechanisms.\textsuperscript{128} Finding the \textit{telos} of legal rules requires the use of

\begin{itemize}
  \item \textsuperscript{125} ibid 61–65.
  \item \textsuperscript{127} See section 1.4.3.
  \item \textsuperscript{128} Friedrich Carl von Savigny, \textit{System des Heutigen Römischen Rechts}, vol 1 (Veit 1840) 213.
\end{itemize}
doctrinal legal method. Interpreting the law in this manner depends on the use of authoritative sources, such as the legal text itself, preparatory works and case law. Which sources are considered as authoritative varies across fields of law and jurisdictions and is not seldom contested among legal scholars. In essence, doctrinal legal method aims to interpret the law, taking account of all the relevant, sometimes contradictory, sources from a defined pool, so that the law is a system that is coherent within itself at the time of interpretation. It is thus crucial to define the sources used when ascertaining the objectives of the system of case resolution mechanisms employed by the Commission.

For the definition of the objectives of the system of case resolution mechanisms, it is necessary to first consider the Treaty provisions on which they are based. Articles 101 and 102 are central provisions of the Treaties, where the Union has exclusive legislative competence and the Commission is endowed with broad enforcement powers. However, Articles 101 and 102 TFEU do not include any mention of how they should be enforced. Rather, this task is detailed in secondary legislation adopted on the basis of Article 103 TFEU, the legal basis on which regulation 1/2003 is based.

In EU secondary law, Regulation 1/2003 and Regulation 773/2004 can be used to ascertain the objectives of the system of case resolution mechanisms. Most obviously, the text of the legal act itself and the recitals of these acts may give guidance regarding the objectives aimed at. Further, guidance on the objectives of the system of case resolution mechanisms may be derived from preparatory documents from the Commission, the Council and the European Parliament.

The Treaties and the legal acts of the EU are authoritatively interpreted by the Court of Justice of the European Union (the Court). Thus, the judgments issued by the Court are highly significant, especially bearing in mind that access to the preparatory works of the original Treaty texts, including

---


130 Smits (n 94) 6–7; van Gestel and Micklitz (n 129) 65.

131 Treaty on European Union [2010] OJ C 83/01, arts 3(b) and 105; Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6).

132 It can be noted here that the abbreviation ‘the Court’ may denote both the Court of Justice of the European Union as a whole, including both the General Court and the Court of Justice or only denoting the Court of Justice specifically. The approach taken in this study is to refer to the General Court or the Court of Justice specifically when citing case law. When referring to ‘the Court’ the Court of Justice of the European Union as a whole is meant.

133 Treaty on the Functioning of the European Union (n 2), art 267.
current Articles 101 and 102 TFEU, is poor.\textsuperscript{134} For the purposes of this study, cases appealing Commission decisions may consider objectives of the system of case resolution mechanisms. It is in this context important to distinguish cases reviewing Commission decisions, which thus concern the Commission’s enforcement, from preliminary rulings, usually concerning the Member State’s enforcement of competition law. The former can be used to analyse case resolution mechanisms within the current framework of competition law enforcement, while the latter may only be used with regard to general questions of interpretation.

Given that the Commission itself makes the first instance decision in the competition cases it pursues, these decisions are an important source for the present study, albeit bearing in mind that the Commission’s decisions are subject to an appeal lodged with the Court.

The Commission, in its capacity as enforcer of Articles 101 and 102 TFEU, has issued various soft law documents concerning its enforcement policy. Article 288 TFEU holds that soft law instruments, such as recommendations and opinions, have no legal binding force.\textsuperscript{135} The same can be said for Commission notices, guidelines and the like.\textsuperscript{136} Thus, their value and relationship with legally binding acts need to be explained. According to Snyder, soft law can be defined as ‘rules of conduct which, in principle have no legally binding force but which nevertheless may have practical effects.’\textsuperscript{137} The Court of Justice has held in the \textit{Grimaldi} case that where soft law interprets binding rules it may have a legal effect with regard to this interpretation.\textsuperscript{138} However, the Commission cannot create new legal obligations which go beyond those set out in the legally binding instrument that the soft law instrument is based on.\textsuperscript{139} Even though soft law cannot create new obligations for third parties, the authoring EU institution obliges itself to

\begin{footnotesize}
\begin{itemize}
  \item\textsuperscript{134} Wulf-Henning Roth, ‘Europäische Verfassung und Europäische Methodenlehre’ (2011) 75 Rabels Zeitschrift für ausländisches und internationales Privatrecht 787, 800.
  \item\textsuperscript{135} Treaty on the Functioning of the European Union (n 2) art 288.
  \item\textsuperscript{139} Case C-303/90 \textit{French Republic v Commission of the European Communities} EU:C:1991:424, para 33.
\end{itemize}
\end{footnotesize}
act in accordance with what is set out in its own soft law instruments.\textsuperscript{140} Therefore, the Commission is bound by the guidelines and notices it issues. These instruments allow the Commission to clarify its enforcement policy, but also limit the discretion of the Commission when enforcing Articles 101 and 102 TFEU. For instance, Article 23(2) of Regulation 1/2003 allows the Commission to impose fines of up to 10 per cent of an undertaking’s turnover of the previous business year. Nevertheless, the Commission has chosen to limit this wide discretion when calculating fines by publishing Fining Guidelines that detail the method by which the Commission calculates fines.\textsuperscript{141} Other soft law instruments establish a Commission policy, on certain aspects of enforcement which is more or less independent from legally binding sources, such as the Commission’s leniency policy, which allows a significant reduction in the fines for undertakings that cooperate with the Commission in cartel cases.\textsuperscript{142} Soft law may also detail the Commission’s interpretation of certain rules, such as the one at issue in the Grimaldi case. An example is the Commission’s Guidelines on the Effect on Trade concept.\textsuperscript{143} However, it is necessary to be mindful of the fact that such guidelines are an interpretation of a legal concept by the Commission. It is the Court, which ultimately has the task of ensuring authoritative interpretation and the Court may or may not agree with the interpretation made by the Commission.\textsuperscript{144}

Finally, to ascertain the objectives of the system of case resolution mechanisms, it may be helpful to also consider the interpretations made by other scholars in this regard.

The above sources are together used to ascertain a set of objectives which are collectively pursued by the system of case resolution mechanisms employed by the Commission.

\textsuperscript{140} Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri A/S (C-189/02 P), Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others (C-202/02 P), KE KELIT Kunststoffwerk GmbH (C-205/02 P), LR af 1998 A/S (C-206/02 P), Brugg Rohrsysteme GmbH (C-207/02 P), LR af 1998 (Deutschland) GmbH (C-208/02 P) and ABB Asea Brown Boveri Ltd (C-213/02 P) v Commission of the European Communities EU:C:2005:408, para 211; See further: Oana Ştefan, Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union (Kluwer Law International 2013) 185–187.

\textsuperscript{141} Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28).

\textsuperscript{142} Commission Notice on immunity from fines and reduction of fines in cartel cases (n 27).

\textsuperscript{143} Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C 101/81.

\textsuperscript{144} Ştefan (n 140) 230.
1.4.3 Assessing the different case resolution mechanisms

Having set out the objectives against which the current case resolution mechanisms have to be assessed, the study proceeds with exploring the question of the extent to which the case resolution mechanisms at hand reflect, pursue and fulfil the objectives identified. This does not mean that each case resolution mechanism must fulfil each objective, but that the system of case resolution mechanisms as a whole shall be as close to meeting the set of objectives as possible. The objectives of the Commission’s case resolution mechanisms vary in nature and therefore require different methods for assessment.

Given that not all objectives are to be fulfilled by all case resolution mechanisms, it is important to identify which mechanisms shall fulfil which objectives. This assessment is carried out using the doctrinal legal method. With regard to assessing the different case resolution mechanisms vis-à-vis the objectives to be achieved, different objectives allow different types of assessments. Certain objectives can be assessed from a legal point of view, others allow a quantitative assessment with reference to empirical evidence. Therefore, the second research question is posed in a differentiated manner relating to the extent to which the objectives are reflected, pursued or fulfilled.

As set out above, some of the objectives may be assessed with reference to legal sources. The essential task with regard to these objectives is to analyse the legal rules aimed at fulfilling the objectives defined in chapter 3. This analysis requires a critical analysis of the relevant legal rules, their interpretation by the Court and the Commission, and their application in case law. Further, when analysing the relevant legal rules, it is imperative that the extent to which the constitutional restraints may prevent the Commission from pursuing certain objectives to their full extent is considered where relevant. For example, the extent to which the Commission’s Fining Guidelines reflect and pursue the objective of imposing deterrent fines may be studied, also taking into account constitutional restraints such as the principle of proportionality. Where possible, these assessments are supported by case

---

analyses referring to relevant cases from the decisional practice of the Commission and the case law of the Court.

Some objectives refer to concepts defined in other social sciences while others can be measured quantitatively to conclude to what degree they are fulfilled. In these instances reference is made to the relevant data and literature in assessing whether the Commission’s case resolution mechanisms pursue and/or achieve their objectives. For example, the calculation of deterrent fines may be ascertained with reference to economic theory and the question of whether fines are of a deterrent magnitude is also subject to empirical studies by economists. Therefore, in chapter 4, research findings from social sciences are used to support the analysis and conclusions in this study.

The material from social sciences necessary for the assessment detailed above consists of both statistical data and research findings in the field of neo-classical economics. The cited data is partly obtained from the Commission’s own statistics such as that available in its annual reports. Other data is obtained from empirical studies collecting and analysing data from the Commission’s decisional practice. In addition, some data originates from Ibáñez Colomo’s public case database.

With regard to research findings employed, when navigating through the rich theoretical literature, the ambition has been to rely on writings reflecting scholarly consensus within neo-classical economics, while still being mindful of existent diverging opinions. Regarding research that studies the Commission’s practice, like retrospectively considering whether fines reach the required magnitude to act as a deterrent, the ambition has been to collect as many relevant studies as possible, even though no claim of exhaustiveness is made here.


1.4.4 Case resolution mechanisms through the lenses of regulatory enforcement styles

Based on the findings of the assessment carried out in chapter 4, chapters 5 views the different case resolution mechanisms through the lenses of regulatory enforcement styles. The different case resolution mechanisms are classified and analysed in line with regulatory enforcement styles. This exercise is complemented by an illustrative case analysis.

Methodologically, answering the research question posed in chapter 5 entails considering how findings from regulatory enforcement theory can be ‘translated’ and applied to the Commission’s case resolution mechanisms. With regard to the classification of case resolution mechanisms into regulatory enforcement styles, the extent to which the existing case resolution mechanisms fit into existing categories of regulatory enforcement styles along a cooperation-coercion scale is considered. This exercise also includes analysing, for example, where, how much and in what respects case resolution mechanisms diverge from existing categories, given the legal context(s) within which these categories have been developed.

As already noted, research into regulatory enforcement is conducted by both legal scholars and scholars in other sciences such as sociology, political science or criminology. However, that research does not appear to be conducted separately within these different disciplines, but rather there seems to be a discourse that spans across different social sciences. Thus, this study does not distinguish between different types of research on the basis of different social sciences.

With regard to the case analyses carried out in chapter 5, the two cases chosen, ARA and Google Search, are well suited to illustrate the findings made with regard to the different case resolution mechanisms. They also show to what extent the Commission’s case resolution mechanisms already relate to established regulatory enforcement theory.

1.4.5 Designing a responsive case resolution system

Chapter 6 explores the possibility of designing a system of case resolution mechanisms pertaining to infringements of Articles 101 and 102 TFEU on the
basis of a prescriptive approach to regulatory enforcement theory: responsive regulation.\textsuperscript{152}

The literature at the basis of the assessment carried out in chapter 6 is derived from social sciences other than law. When taking findings from social sciences into account in normative questions concerning what the law is or should be, different types of legal questions must be distinguished. On the one hand, the interpretation of a law by doctrinal legal method ordinarily leaves little room for the utilisation of material or findings from other sciences.\textsuperscript{153} However, what ‘works’ as Smiths puts it, may be relevant when considering the design of legal instruments, such as that considered in the present study.\textsuperscript{154} Taking a model developed in social sciences as a basis for the case resolution mechanisms employed by the Commission can be likened to comparative law in some (but not all) respects. The fundamental question asked is ‘how a specific problem can most appropriately be solved.’ Just as it is possible to compare the solutions to a specific problem in different legal orders, it is also possible to employ a model solution to a specific problem to consider whether that model could be applied within a specific legal order. As in comparative law, the scholar must consider how the ‘alien’ solution to the problem could be implemented into an already existing legal order, considering \textit{inter alia} questions of legality, legitimacy, terminology and suitability.\textsuperscript{155}

In particular, the investigation made in chapter 6 pertains to whether and how a responsive system of case resolution mechanisms could be designed. This entails comparing the theoretical system proposed by Ayres and Braithwaite to the legal system in which the Commission’s case resolution mechanisms operate and assessing to what extent responsive regulation could be applied within that system. Further, it is considered whether the theory of responsive regulation allows new insights as regard how compliance with competition rules can be secured. Whether and how a system of case resolution mechanisms could be designed and carried out in a responsive manner is examined from a functional point of view. This entails considering how undertaking’s motives for compliance, the objectives of the system of case resolution mechanisms as well as the relevant constitutional restraints can simultaneously be taken into account in designing a responsive case resolution system suitable for the enforcement of Articles 101 and 102 TFEU. Such an assessment self-evidently also requires the use of doctrinal legal analysis.

The design of a responsive case resolution system involves the use of further literature from social sciences, besides that pertaining to responsive

\begin{flushleft}
\textsuperscript{152} Ayres and Braithwaite (n 91).
\textsuperscript{153} Giesen (n 98) 2.
\textsuperscript{154} JM Smits, \textit{The Mind and Method of the Legal Academic} (Edward Elgar 2012) 29.
\textsuperscript{155} See further: Konrad Zweigert and Hein Kötz, \textit{Introduction to Comparative Law} (Tony Weir tr, Oxford University Press 2011) 11–12.
\end{flushleft}
regulation. This literature relates theory regarding regulatory enforcement established in sociology, criminology and political science. Furthermore, empirical studies concerning select questions are incorporated in this study where suitable. For instance, studies on the effectiveness of corporate compliance programmes (CCPs) in preventing infringements of competition law are cited. The majority of these studies are perceptual, that is to say based on surveys, either directly surveying perceptions on a given issue or through the employment of vignettes. Some of the studies also rely on case study designs. The challenge related to these studies is to understand the representativeness of the chosen studies, as most of them relate to data collected in another area of law altogether, or, where they relate to competition law, data is collected from another jurisdiction than the EU. Thus, being mindful of the methods employed by researchers in sociology, political science and criminology, this study only cites the findings that appeared most relevant and suitable for the purposes of the enforcement of competition law studied here.

To illustrate and concretise the theoretical research on regulatory enforcement, examples of practices of competition authorities other than the Commission are given. These examples aim to be just that, illustrations, rather than proof that the Commission should adjust its case resolution mechanisms in a certain manner. This study does not have a comparative aim either. Illustrations made stem from both EU-member jurisdictions and non-member jurisdictions are used. In this regard, it must be remembered that Member States enjoy national procedural autonomy and the rules governing the enforcement may differ substantially between jurisdictions. Naturally, non-EU states have different procedural rules. These differences may, for example, relate to the powers of competition authorities, the case resolution mechanisms available and so on. Further, the cases chosen for illustrative means are those judged most relevant for the aims of this study, rather than pursuing a representative view of the competition law enforcement carried out in the jurisdiction in question.

1.5 Structure

Following this introduction of the main premises for this study, chapter 2 provides the necessary legal background. This includes the substance of Articles 101 and 102 TFEU and the main rules and principles governing their enforcement by the Commission. Most importantly, each of the case resolution mechanisms assessed in this study is presented. Furthermore, more general restraints set out by the constitutional framework of EU law, specifically relevant fundamental rights and general principles of EU law are introduced.
Chapter 3 then identifies and analyses the concrete objectives that the Commission’s present case resolution mechanisms addressing infringements of Articles 101 and 102 TFEU shall achieve. Chapter 3 distinguishes between objectives specifically pursued by the system of case resolution mechanisms and general enforcement objectives.

Chapter 4 is structured according to the case resolution mechanisms assessed in that chapter, starting with Article 7 decisions, followed by cartel settlements and Article 9 decisions. Each case resolution mechanism is assessed with reference to the relevant objectives set out in chapter 3.

Chapter 5 follows the structure of chapter 4 as it analyses and categorises each case resolution mechanism from the point of view of different regulatory enforcement styles. In addition, guidance provided by the Commission is analysed separately from the different case resolution mechanisms. Lastly, two case analyses are used to illustrate the findings in this chapter.

Chapter 6 introduces responsive regulation as a prescriptive approach to law enforcement and proposes a possible design for a responsive approach to the case resolution mechanisms used against potential infringements of Articles 101 and 102 TFEU. After introducing the theory of responsive regulation as suggested by Ayres and Braithwaite, the required adjustments to the theory are analysed. Subsequently, a responsive approach to the Commission’s system of case resolution mechanisms is outlined and analysed. This exercise is structured according to different types of infringements of Articles 101 and 102 TFEU namely cartel and non-cartel type infringements of Article 101 TFEU and infringements of Article 102 TFEU. Finally, an overall responsive case resolution system is outlined and analysed.

Chapter 7 concludes by weaving together a number of themes that run through this study, summarising its findings and providing a broader outlook.
2 Legal Context

In order to set the scene of this study, the substance of Articles 101 and 102 TFEU as well as the legal framework for their enforcement by the Commission are briefly introduced. Furthermore, as the Commission’s powers as an enforcer of Articles 101 and 102 TFEU are delimited by certain general principles of EU law and fundamental rights, these are also introduced in this chapter.

2.1 Articles 101 and 102 TFEU and their enforcement challenges

Articles 101 and 102 TFEU, which are the two main Treaty provisions relevant for the present study, regulate two very different types of commercial behaviour, but are enforced in a similar manner and under the same legislative framework.\(^{156}\)

Article 101 TFEU prohibits certain types of cooperation between undertakings that aim to restrict competition in a given market or that have such an effect. A typical example is a cartel that fixes prices or allocates markets. More concretely, Article 101 TFEU is aimed at agreements, decisions of associations of undertakings as well as collusion between undertakings.\(^{157}\) This prohibition is designed as a catch-all system for all types of agreements between undertakings, even those

\[
(\ldots)\text{ form[s] of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded,}
\]

\(^{156}\) The two main legislative instruments are: Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6); Commission Regulation 773/2004/EC, of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (n 9).

\(^{157}\) See further, for example: Whish and Bailey (n 101) 82ff.
knowingly substitutes practical cooperation between them for the risks of competition.\textsuperscript{158}

It is relevant for the purposes of the present study, to underline that the prohibition of Article 101 TFEU is directed at anti-competitive cooperation between undertakings, rather than against the restriction of competition as such. In fact, Article 101 TFEU prohibits cooperation that leads to the fixing of prices, not the price fixing in itself.\textsuperscript{159}

Conversely, Article 102 TFEU prohibits the abuse of a dominant market position which limits competition in a given market in different ways. Importantly, Article 102 TFEU does not prohibit undertakings from holding a dominant position, but rather the abuse of that position. Further, it should be noted that Article 102 TFEU primarily denotes unilateral behaviour by one undertaking, rather than cooperation between several undertakings.\textsuperscript{160}

Defining what constitutes abusive conduct is not always straightforward. For example, granting quantity rebates to customers is usually considered pro-competitive, since it makes use of economies of scale and benefits customers. However, granting certain types of loyalty rebates is considered an abuse under Article 102 TFEU.\textsuperscript{161}

Articles 101 and 102 TFEU thus differ not only in their substantive content, but also in the problems they generally pose from the point of view of public enforcement. The secretive nature of cartels makes their existence difficult to detect, investigate and prove.\textsuperscript{162} Abuses of a dominant position are more difficult to conceal, since they are carried by major players on the relevant market and frequently aim to damage competitors. Here, the problem is rather that it needs to be proven, that the undertaking in question enjoys a dominant position in the relevant market and that the behaviour in question has actually been abusive. Given that such behaviour may be perfectly legal for an undertaking that is not in a dominant position, and that abusive behaviour may

\textsuperscript{158} Case 48/69 Imperial Chemical Industries Ltd v Commission of the European Communities EU:C:1972:70, para 64.
\textsuperscript{160} See further, for example: Whish and Bailey (n 101) 180ff.
\textsuperscript{161} There is considerable controversy about the exact delimitations of this issue, as the Intel saga shows: Opinion of AG Wahl in Case C-413/14 P Intel Corp v European Commission EU:C:2016:788, paras 52ff; Case T-286/09 Intel Corp v European Commission EU:T:2014:547, paras 75-78; Case C-413/14 P Intel Corporation v European Commission EU:C:2017:632; Whish and Bailey (n 101) 748–50.
\textsuperscript{162} The Court has on occasion annulled a Commission decision because of lack of proof of collusion: Case T-442/08 International Confederation of Societies of Authors and Composers (CISAC) v European Commission EU:T:2013:188; See also: Whish and Bailey (n 101) 105.
change as technology and the nature of business evolves, this is often a difficult task.

What Articles 101 and 102 TFEU both have in common is that they prohibit behaviour that distorts competition in a given market. As Recital 9 of Regulation 1/2003 points out, the objective of Articles 101 and 102 TFEU is ‘the protection of competition on the market’.

Having set out the substance of Articles 101 and 102 TFEU above, the main legal framework for enforcement of Articles 101 and 102 TFEU is introduced in general terms below.

2.2 Public enforcement of Articles 101 and 102 TFEU

Public enforcement of EU competition law encompasses two branches: First, the enforcement carried out by the Commission, subject to review by the Court and second, the enforcement carried out by Member States’ NCAs and the national courts. The enforcement carried out by NCAs is, as pointed out above, not the subject of assessment in this context, although examples from NCA practice are used in the later part in this study.

In the context of EU competition law enforcement, it is important to understand what the respective roles of the Commission and the Court are. The Commission has a special position within the enforcement of EU competition law, as it enjoys three-fold competences. It investigates, punishes and enforces penalties pertaining to infringements of EU competition law. The Commission also has a broad margin of discretion when enforcing EU competition law. For example, it enjoys the discretion to decide which cases to investigate, regardless of whether these cases are brought to its attention by complainants, leniency applications or whether they are investigated ex officio. Furthermore, it has the discretion to choose which case resolution mechanism to use in which cases. For example, the question of whether a case might be settled is subject to the Commission’s ‘broad margin of

163 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) arts 4-6 and 31.
164 See section 6.3.2.
discretion'. In short, the Commission is the first-instance enforcer of EU competition law. Subsequently, all decisions of the Commission can be appealed first to the General Court and then to the Court of Justice for a full review. This nevertheless means that a large part of the responsibility for assessing and enforcing breaches of EU competition law lies on the shoulders of the Commission.

To facilitate better understanding of the current legal framework of the enforcement of Articles 101 and 102 TFEU, a short excursus into previous legal framework based on Regulation 17/62 and the circumstances that led to the adoption of Regulation 1/2003 is necessary.

2.2.1 From Regulation 17/62 to Regulation 1/2003

Regulation 17/62, the precursor to Regulation 1/2003, represented an important step to ensure that what are now Articles 101 and 102 TFEU were more than just political statements, but instead actual prohibitions to be enforced by the Commission. Even though Regulation 17/62 allowed the Commission to enforce competition law against undertakings in a concrete manner, the initial enforcement activity was low, with the pioneering decision in Consten/Grundig being made in 1964. The Commission needed to both establish itself in its new role as an enforcer and agree on how competition law should be applied in specific cases. Moreover, Regulation 17/62 included a notification requirement that would become a significant burden over time. This requirement implied a duty for undertakings to notify agreements that could fall within the scope of Article 101(1) TFEU in order

---

167 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 (n 26) para 5.
171 Joined cases 56/64 and 58/64 Établissements Consten SàRL and Grundig-Verkaufs-GmbH v Commission of the European Economic Community EU:C:1966:41.
to receive an exemption according to Article 101(3) TFEU.173 If the undertaking did not apply for such an exemption, it was not possible to be granted such an exception afterwards, when the Commission investigated a potential infringement of Article 101 TFEU.174 This notification system was deemed necessary to ensure that effective supervision of agreements, which could potentially impede functioning competition, was guaranteed.175 Historically, this can be explained by the fact that the application of what is now Article 101 TFEU was rather unclear at the time when Regulation 17/62 was adopted.176 Prior to that, cartels were widespread in Europe and had even been considered as a beneficial, stabilising factor for the economy.177 When Regulation 17/62 was finally adopted, the Commission needed to establish its practice as to the proper application of this provision. Notifications facilitated this objective because they automatically provided cases which the Commission had to relate to. The aim of pre-notification was not only to establish practice regarding Article 101 TFEU, but also to supervise and guide the measures of undertakings, ultimately preventing infringements of EU competition law. Unfortunately, notification became a heavy burden soon after Regulation 17/62 was adopted.178 Most agreements notified to the Commission proved meritless and it was thus considered that the resources needed to deal with actual infringements were not available.179

Under Regulation 17/62, the majority of the enforcement cases under Articles 101 and 102 were in the hands of the Commission. NCAs were allowed to apply Articles 101 and 102 TFEU, but there was no requirement to do so and the lack of direct effect of Article 101(3) TFEU strongly hampered the NCAs’ possibilities to apply Article 101(1) TFEU.180 This centralisation guaranteed consistency in the practice established through enforcement. Centralisation also contributed to the abovementioned objective of establishing a robust and coherent system of application of competition rules after the adoption of Regulation 17/62. With the Commissions’ enforcement practice established

173 Regulation 17/62 First Regulation implementing Articles 85 and 86 of the Treaty (n 169) art 4.
174 ibid art 4.
176 ibid.
177 See, for example: Sächsischer Holzstoff (RG 04.02.1897, RGZ 38, 155).
178 Pérez and Scheur (n 172) 27.
180 Regulation 17/62 First Regulation implementing Articles 85 and 86 of the Treaty (n 169) art 9(3).
quite firmly by the end of the 1990s, the possibility of letting NCAs and national courts enforce EU competition law became viable.

Besides the Commissions’ determination to allow NCAs and national courts apply competition law, the huge backlog created by the notification system was the main reason for reforming EU competition law enforcement, a process which led to the adoption of Regulation 1/2003. Through this reform, the notification system was abolished, Article 101(3) TFEU was declared directly applicable and NCAs were tasked with enforcing Articles 101 and 102 TFEU in parallel with the Commission.\textsuperscript{181} This reform was revolutionary for EU competition law enforcement, especially with regard to the relationship between the Commission and NCAs. Further, Regulation 1/2003 and the continuing reform process after its adoption, made changes that were aimed at giving the Commission instruments to enforce Articles 101 and 102 more efficiently. Among those, cartel settlements and Article 9 decisions, further introduced in the following section can be noted.\textsuperscript{182}

While Regulation 17/62 focused on the establishment of consistent practice on the application of Articles 101 and 102 TFEU, Regulation 1/2003 emphasises efficient enforcement. In other words, the aim is to use the limited resources available to enforce EU competition law in a more targeted manner. For undertakings, Regulation 1/2003 relies fully on the self-assessment of their own behaviour, and the notification of agreements is no longer possible. Instead, the Commission has a number of guidelines and notices in place that are designed to facilitate undertakings’ self-assessment.\textsuperscript{183} Hence, the current legal framework gives the Commission more control over the which cases it pursues with reference to Articles 101 and 102 TFEU.

\begin{footnotesize}
\begin{footnotes}
\item[181] Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 3(1); Heike Schweitzer and Kiran Klaus Patel, ‘EU Competition Law in Historical Context: Continuity and Change’ in Heike Schweitzer and Kiran Klaus Patel (eds), The Historical Foundations of EU Competition Law (Oxford University Press 2013) 214.
\item[182] Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 9; Commission Regulation 773/2004/EC, of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (n 9) art 10a.
\item[183] See for instance: Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (n 143); Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28); Commission Notice on immunity from fines and reduction of fines in cartel cases (n 27); 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 (n 26).
\end{footnotes}
\end{footnotesize}
2.2.2 The enforcement of Articles 101 and 102 TFEU under Regulation 1/2003

In the following section, an overview of the functioning of and interaction between the different legislative and soft-law instruments governing the enforcement of Articles 101 and 102 TFEU is presented.

To begin with, Articles 101 and 102 TFEU are subject to the same procedural framework when enforced, but the concrete instruments applicable for their enforcement differ slightly, due to their different nature.\textsuperscript{184} It is possible to divide the enforcement procedure before the Commission into three stages: the discovery of infringements, investigation of infringements and resolution of infringements.

\textit{The discovery of cases} may stem from three different origins: leniency applications, complaints and \textit{ex officio} discovery. Leniency offers full immunity or fine reductions for undertakings which provide the Commission with evidence of cartel-type infringements according to Article 101 TFEU.\textsuperscript{185} Complaints may be of a formal or informal nature and may be submitted by any natural or legal person, although competitors or customers of dominant undertakings who are abusing their dominant position are often best placed for such complaints.\textsuperscript{186} Furthermore, the Commission has introduced special procedures for individual whistleblowers, such as, for example, employees of undertakings.\textsuperscript{187} The Commission may also open proceedings \textit{ex officio}, for example, as a result of sector inquiries conducted in accordance with Article 17 of Regulation 1/2003.\textsuperscript{188}

Once the Commission has an indication of an infringement, it can begin to investigate, for example, by trying to understand the structure of a particular market, the position of the undertaking(s) that may be involved in the infringement and so on. One of the most important tools for this exercise is a request for information, which may be of a formal or informal nature.\textsuperscript{189} Requests for information are mainly used to gather factual information from undertakings, such as sales data, information about an undertaking's business

\begin{footnotes}
\item \textsuperscript{184} See section 2.1.
\item \textsuperscript{185} Commission Notice on immunity from fines and reduction of fines in cartel cases (n 27) paras 8 and 23.
\item \textsuperscript{186} Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] OJ C 101/5, para 2.
\item \textsuperscript{188} Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 7.
\item \textsuperscript{189} ibid art 18.
\end{footnotes}
practices and the markets it operates in, the identity of suppliers and customers, etc. The Commission can further conduct inspections on the premises of the undertaking(s) concerned and even in private homes under certain circumstances. The power to inspect is, however, confined to undertakings established on the territory of the EEA.\textsuperscript{190} Evidence may of course also be gathered with the help of one or several leniency applicants. Once the Commission believes that it has sufficient evidence to formally open a case, the investigation becomes public.\textsuperscript{191}

Cases can be \textit{resolved} using several different case resolution mechanisms. First, the ‘standard’ route leading to a decision according to Article 7 of Regulation 1/2003 is described: Once proceedings in a case are officially opened, a statement of objections (SO) is prepared and sent to the undertakings concerned. This may also occur simultaneously with the opening of proceedings in cases where the gathering of evidence is a delicate matter and the Commission does not wish to alert the undertaking of its investigation, for example, in cartel cases.\textsuperscript{192} After the SO has been sent, undertakings are given an opportunity to respond, both in writing and at an oral hearing.\textsuperscript{193} Undertakings must further be granted access to the Commission's file.\textsuperscript{194} If this procedure changes the Commission's analysis of the infringement, for example, as regards the theory of harm or the remedies necessary to bring the enforcement to an end, it may be necessary to send a supplementary statement of objections to the undertaking which once again gives rise to the same procedural rights as the first SO. Minor changes in the analysis may be contained in a ‘Letter of Facts’ (LoF), which does not necessitate a new hearing and access to the file.\textsuperscript{195}

If and when the Commission is convinced it has found and sufficiently proven an infringement, it may adopt a prohibition decision pursuant to Article 7. This

\textsuperscript{190} ibid arts 20 and 21.
\textsuperscript{192} Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C 208/6, para 17.
\textsuperscript{193} Commission Regulation 773/2004/EC, of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (n 9) arts 10 and 11.
\textsuperscript{194} ibid art 15.
decision may order the undertaking(s) concerned to stop the conduct in question and refrain from repeating such conduct in the future (a cease-and-desist order). The Commission may also impose more specific behavioural or structural remedies, should these be necessary to stop the conduct in question as well as its effects.\footnote{Case C-49/92 P Commission of the European Communities v Anic Partecipazioni SpA EU:C:1999:356, para 81.} In most cases, an Article 7 decision is accompanied by a fine pursuant to Article 23(2)(a) of Regulation 1/2003. This is the ‘standard’ procedure for the resolution of a case foreseen by Regulation 1/2003.\footnote{Wouter PJ Wils, ‘Use of Settlements in Public Antitrust Enforcement: Objectives and Principles’ in Claus-Dieter Ehlermann and Mel Marquis (eds), European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law (Hart 2008) fn 2.} An Article 7 decision can subsequently be appealed to the General Court and thereafter to the Court of Justice pursuant to Article 31 of Regulation 1/2003.

There are a number of variations to the ‘standard’ procedure set out in Article 7 of Regulation 1/2003. All of the below variations could be characterised as ‘settlements’ with the Commission. However, there is a specific procedure that is denoted when addressing settlements in the context of EU competition law enforcement by the Commission. Thus, whenever this study refers to a ‘settlement’ with the Commission without any other reference being made, a cartel settlement in accordance with Article 10a of Regulation 773/2004 is denoted. Where other procedures with the Commission are referred to, a more specific reference is made.

The procedure for cartel settlements is laid out in Article 10a of Regulation 773/2004 and elaborated in the Settlement Notice.\footnote{Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (n 26)} A settlement differs from a decision according to Article 7 of Regulation 1/2003 in two ways: (1) the undertaking will receive a 10 per cent reduction of their fine;\footnote{ibid para 32.} and (2) the undertaking must admit the infringement to the Commission.\footnote{ibid para 20(a).} However, the Commission will still adopt a formal decision according to Article 7 of Regulation 1/2003. The expectation is that cartel settlements can be adopted more expediently than ‘standard’ Article 7 decisions leading to a reduction in costs for both sides. The procedure described in Article 10a of Regulation 773/2004 entails that the Commission may ask undertakings subject to investigations of a cartel-type infringement of Article 101 TFEU whether they would be interested in a settlement.\footnote{Commission Regulation 773/2004/EC, of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (n 9) art 10a. If sufficient interest is expressed and the...}
Commission decides to initiate a settlement procedure, it informs the relevant undertakings of the objections that will be raised against them as well as the evidence, and it provides access to that evidence as well as certain other documents in the case file requested by the undertaking. Finally, the Commission must provide information about the envisaged fine. The undertaking must then decide whether it wishes to settle and must make settlement submissions reflecting the results of the settlement discussions and acknowledging their participation in an infringement of Article 81 of the Treaty [now Article 101 TFEU] as well as their liability.

It is imperative that these submissions reflect the contents of the objections envisaged by the Commission. Essentially, the undertaking must admit to the infringement in exchange for the settlement and a 10 per cent reduction of the fine.

The Commission may also resolve a case by Article 9 decision, a case resolution mechanism not available for secret cartels. An Article 9 decision requires a different procedure than an Article 7 decision, which may be initiated before or after an SO has been sent. Essentially, an Article 9 decision requires the undertaking(s) involved to offer behavioural or structural remedies which resolve the Commission's concerns in the case. These so-called commitments are then made binding in the Article 9 decision. If the Commission considers a case to be suitable for commitments and the undertaking is interested as well, the Commission submits its preliminary assessment of the relevant competition concerns to the undertaking (if no SO has previously been sent). The undertaking may thereafter propose remedies as commitments to the Commission. These commitments are subsequently subjected to a ‘market test’, which allows different stakeholders to comment.

---

202 ibid art 10a(2).
203 ibid.
204 ibid art 10a(3).
205 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 (n 26) para 32.
207 ibid 128.
208 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 9.
on the submitted commitments. The Commission will communicate the comments made to the undertaking and these may result in modifications to the proposed commitments. Several rounds of amendments and market tests may follow before the final commitments are made binding in an Article 9 decision. Importantly, an Article 9 decision closes a case without the formal finding of an infringement or the imposition of a fine.210

Thus, depending on the case resolution mechanism used, an infringement of Articles 101 or 102 TFEU may be resolved in different ways. Either, through the finding of an infringement coupled with a (possibly reduced) fine and some type of remedy. Or, commitments are used to resolve a potential infringement. Cases are always closed by a formal Commission decision. For the remainder of this study, the main focus is the different cases’ resolution mechanisms outlined above. The differences between case resolution mechanisms can be summarised as follows:

<table>
<thead>
<tr>
<th>Infringement found</th>
<th>Article 7 decision</th>
<th>Cartel settlement</th>
<th>Article 9 decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Infringement found</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Cooperation required</td>
<td>None beyond legal obligations</td>
<td>Admission of infringement</td>
<td>Suggestion of remedies</td>
</tr>
<tr>
<td>Case types resolved</td>
<td>Article 101 and 102 TFEU</td>
<td>Only cartel cases</td>
<td>Article 101 and 102 TFEU, except ‘secret cartels’</td>
</tr>
</tbody>
</table>

Table 1 Overview of case resolution mechanisms

Aside from the case resolution mechanisms detailed above, the Commission may also, by decision, declare a specific type of conduct permissible. In an Article 10 decision, the Commission may find that Articles 101 or 102 TFEU do not apply to a particular case. However, the Commission must consider whether there is a Community (now EU) public interest for such a finding.211 In the Manual of Procedures, the Commission clarifies that the EU public interest provision is usually used when there is a danger of a misapplication

211 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 10.
of the law. 212 This may be the case where national competition authorities or national courts are misapplying or are in danger of misapplying EU competition law. However, the Commission points out that it will try to intervene in pending proceedings if it sees a danger of misapplication before it issues an Article 10 decision. Overall, the emphasis of the Commission is that Article 10 should be used in exceptional cases and that it should not become a substitute notification for undertakings that wish to legitimise their conduct. 213 To this author’s knowledge, the Commission has never issued a decision according to Article 10 of Regulation 1/2003. This reflects the restrictive interpretation of the EU public interest expressed by the Commission in the Manual of Procedures. As there is no existing practice on Article 10 decisions, they are not reviewed as a case resolution mechanism in chapter 4. However, a potential use of Article 10 decisions is part of the assessment made in chapter 6. 214

2.3 Constitutional restraints

Whenever the Commission adopts a decision within the meaning of Article 288 TFEU, it needs to act in conformity with the EU legal framework as a whole. That framework delimits the Commission’s discretion to apply Articles 101 and 102 TFEU. Such limits may be inherent in the legal framework concerning enforcement by, for example, outlining the fines that may be imposed for certain infringements. Regulation 1/2003 and the legal instruments associated with it set certain limits for the Commission. However, beyond these immediate limitations, there are also limits set at the constitutional level of the EU legal order. The concrete constitutional restraints relevant to this study are certain general principles of EU law and fundamental rights.

With regard to the constitutional restraints relevant in this study, their function is to limit the actions that can be taken by the Commission. 215 In this regard, the Court of Justice has consistently held that:

The European Economic Community [now the European Union] is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures

213 ibid.
214 See section 6.8.1.
adopted by them are in conformity with the basic constitutional charter, the Treaty.216

And, with reference to fundamental rights, that:

In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the community.217

It follows that any decision taken by the Commission in the context of EU competition law enforcement is subject to review by the Court with regard to general principles of EU law, fundamental rights and the Treaty framework in general. Many, but not all, general principles of EU law and fundamental rights are nowadays codified, for example in the Treaty and in the Charter of Fundamental Rights (the Charter).218 However, these statutory provisions do not apply in all situations where they may become relevant.219 Where a restraint is applied outside the application of a specific Treaty or Charter provision, reference needs to be made to the Court’s interpretation. Further, in the interpretation of fundamental rights that are laid down in the Charter, which are also part of the European Convention of Human Rights, it is also necessary to take account of the interpretation of these provisions by the European Court of Human Rights.220

Below, relevant fundamental rights are introduced first, followed by relevant general principles of EU law. The relevant general principles of EU law are the following: The principle of proportionality is explicitly mentioned in Article 7 of Regulation 1/2003 in relation to measures that are needed to end an infringement. Furthermore, the principles of equal treatment, legal certainty and legitimate expectations are all relevant guaranteeing that parties know what to expect in relation to other undertakings, the law and the Commission’s enforcement of Articles 101 and 102 TFEU.

218 For instance, the principles of proportionality and subsidiarity are codified in: Treaty on European Union (n 131) art 5; Charter of Fundamental Rights of the European Union (n 17).
219 Charter of Fundamental Rights of the European Union (n 17) art 51.
220 ibid art 52(3); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).
2.3.1 Fundamental rights

With regard to fundamental rights, these evolved as and were initially considered an integral part of the general principles of EU law. However, many fundamental rights have now been codified in the Charter of Fundamental Rights, whose application is triggered by the Commission’s enforcement of competition law. The right to a fair trial, the principle of the presumption of innocence and right of defence, the right to good administration and the right to conduct a business are all relevant in the enforcement of EU competition law.

With regard to the resolution of cases more particularly, the General Court clearly states in *Icap* that the Commission must comply with fundamental rights, notwithstanding the importance of the objectives pursued by it:

> the requirements relating to compliance with the principle of presumption of innocence cannot be distorted by considerations linked to the safeguarding of the objectives of rapidity and efficiency of the settlement procedure, no matter how laudable those objectives may be. On the contrary, it is for the Commission to apply its settlement procedure in a manner that is compatible with the requirements of Article 48 of the Charter of Fundamental Rights.

For the purposes of the Commission’s case resolution mechanisms, the presumption of innocence as well as the right to conduct a business are especially relevant. As illustrated by the quote from the *Icap* case above, the presumption of innocence can be relevant in certain case resolutions, for instance in so-called hybrid settlements, constraining the Commission’s pursuit of efficiency.

---

222 Charter of Fundamental Rights of the European Union (n 17) art 51(1); The application of the Charter may trigger reference to the ECHR by virtue of Article 52(3) ECHR. An example of the application of the ECHR in the field of competition law is the Menarini case, even though this concerned national competition law. See further: Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) (n 220); *A. Menarini Diagnostics v. Italy* (n 21).
223 Charter of Fundamental Rights of the European Union (n 17) art 47.
224 Charter of Fundamental Rights of the European Union (n 17) art 48.
225 ibid art 41.
226 ibid art 16.
228 ibid.
As regards the right to conduct a business, EU competition law may legitimately limit this right.\(^{229}\) However, there is a limit to the Commission’s discretion when it imposes an Article 7 decision that contains remedies aimed at bringing infringements of Article 101 or 102 TFEU to an end, as it may not encroach on the undertaking’s freedom of contract or the freedom to conduct a business.\(^{230}\)

Thus, fundamental rights, particularly the presumption of innocence and freedom of contract, may create an important restraint in certain case resolutions conducted by the Commission.

### 2.3.2 Proportionality

At its most basic level, the principle of proportionality is a balancing exercise. This is reflected in Article 5(4) of the Treaty on European Union (TEU) stating that ‘(…) the content and form of Union measure shall not exceed what is necessary to achieve the objectives of the Treaties.’\(^{231}\) With respect to the case resolution mechanisms subject to this study, the principle of proportionality serves to ensure that the measures taken by the Commission do not restrict the rights of the undertakings subject to competition law in an undue manner.\(^{232}\)

As a general principle of EU law, the application of the principle of proportionality follows a number of criteria. As Andersson observes, unfortunately, there is no universally accepted formulation of these criteria. In addition to that problem, the Court does not always make the steps it takes when applying the principle of proportionality explicit.\(^{233}\) Generally speaking, the proportionality test may consist of three criteria:\(^{234}\)

---


\(^{230}\) Joined cases C-241/91 P and C-242/91 P Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities (Magill) EU:C:1995:98, para 91; Case T-24/90 Automec Srl v Commission of the European Communities (n 159) para 52; Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17, explanation pursuant to art 16.

\(^{231}\) Treaty on European Union (n 131) art 5(4).

\(^{232}\) For an example of considerations taken by the Court, see: Case C-441/07 P European Commission v Alrosa Company Ltd EU:C:2010:377, paras 34-50.


\(^{234}\) Opinion of AG van Gerven in Case C-159/90 The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others EU:C:1991:378, para 27.
First, the measure must be suitable to reach the desired objective. Suitability refers to the relationship between the legitimate aim pursued and the measure taken to achieve that aim. Any measure that would reach the aim qualifies at this stage.235

Second, the measure must be necessary to attain the objective. This stage of the test limits the means that can be chosen from the pool of suitable measures to that or those measure(s) considered ‘least restrictive’. Thus, the measure chosen to fulfil the aim should restrict the rights of the subject as little as possible.236

Third, the burden imposed by the measure may not be disproportionate to the advantages achieved by the objective of the measure. That last criterion is also defined as proportionality stricto sensu.237 Proportionality stricto sensu entails a balancing exercise between the weight of the restrictions imposed by the measure in question and the rights of the subject in question.238

Whether or not proportionality stricto sensu is part of the proportionality test under EU law is disputed and as Craig observes, this is problematic:

(…) since the existence of the third limb changes the nature of the test. If proportionality comprises merely suitability and necessity then once these hurdles are surmounted the measure would be regarded as legal, even if the burden imposed might be disproportionate to the desired objective.239

Craig finds that the Court often considers the third limb of the proportionality test if the applicants put forward arguments to that effect, but rarely of its own accord. Nevertheless, the Court sometimes considers the third criterion in the necessity test by assessing whether the measure in question has imposed too high a burden on the applicant.240 This view is also confirmed by Tridimas, holding that ‘in practice the Court does not distinguish between the second and the third test.’241 According to him, the proportionality test is in its essence a balancing test that weighs the objectives of the restriction against the restriction of personal interests.242

236 Tridimas (n 215) 139; Barak (n 235) 317.
237 Craig (n 215) 591.
238 Tridimas (n 215) 139.
239 Craig (n 215) 591.
240 ibid.
241 Tridimas (n 215) 139.
242 ibid.
As concerns the case resolution mechanisms assessed in this study, the principle of proportionality is mainly relevant with regard to the calculation of fines and the remedies made binding in Article 7 and Article 9 decisions.

As to remedies, it is possible to identify a differentiated application of the principle of proportionality by the Court. Article 7 of Regulation 1/2003 explicitly states that the Commission needs to take the principle of proportionality into account when imposing remedies to bring infringements of Article 101 or 102 to an end. Furthermore, the Court of Justice clarifies in *Alrosa* that the Commission needs to comply with the principle of proportionality anytime it adopts a decision within the meaning of Article 288 TFEU.\(^{243}\) However, the principle of proportionality may be applied more or less strictly with regard to remedies made binding on undertakings. The Court of Justice holds in this regard that:

> The specific characteristics of the mechanisms provided for in Articles 7 and 9 of Regulation No 1/2003 and the means of measure available under each of those provisions are different, which means that the obligation on the Commission to ensure that the principle of proportionality is observed has a different extent and content, depending on whether it is considered in relation to the former or the latter article.\(^{244}\)

In relation to remedies imposed under Article 7 of Regulation 1/2003 aiming at bringing infringements to an end remedies must be ‘(…) proportionate to the infringement committed and necessary to bring the infringement effectively to an end.’\(^{245}\) Whereas in relation to remedies made binding under Article 9 of Regulation 1/2003, the Commission’s task is ‘(…) confined to examining, and possibly accepting, the commitments offered by the undertakings concerned in the light of the problems identified by it in its preliminary assessment and having regard to the aims pursued.’\(^{246}\) Thus, the Commission is required to review remedies imposed as part of an Article 7 more strictly with regard to the principle of proportionality than remedies made binding as part of an Article 9 decision.

\(^{243}\) Case C-441/07 P *European Commission v Alrosa Company Ltd* (n 232) para 36.
\(^{244}\) ibid para 38.
\(^{246}\) Case C-441/07 P *European Commission v Alrosa Company Ltd* (n 232) para 40.
2.3.3 Legal certainty

The principle of legal certainty, at its most basic level, shall ensure that the subject of a law who contemplates a measure is able to act in a way that is compliant with that law. As the Court of Justice defines it:

[...] the principle of legal certainty [...] requires, on the one hand, that rules of law must be clear and precise and, on the other, that their application must be foreseeable by those subject to them.247

From a legislator’s point of view, legal certainty can thus be seen as a goal to be achieved in the legislative process. Especially in complicated and technical areas of law, such as competition law, achieving legal certainty is difficult and requires diligence of those drafting the law. As Tridimas points out, if legal certainty is achieved, transaction costs can be saved as actors are able to plan their measures in advance.248 However, Hart reminds us that humans are incapable of predicting the future and that law must, inevitably, balance between creating certainty in rules to be easily applied and the need to create general rules that can be applied to many situations.249

From the point of view of the Commission, the wide margin of discretion afforded to it in its role as first-instance enforcer of EU competition law means that it has a palpable impact on legal certainty. Articles 101 and 102 TFEU are formulated very broadly to take evolving business practices into account. However, this broad drafting of provisions means that legal certainty must to a large degree emanate from the application of these provisions by the Commission and subsequently the review conducted by the Court.

The institutional structure within which Articles 101 and 102 TFEU are enforced makes legal certainty relevant especially with regard to two features: First, the possibility of the Commission to resolve cases of potential infringements in a manner that escapes Court scrutiny, namely in Article 9 decisions. If the Commission uses Article 9 decisions in cases where the law is unclear, this may create legal uncertainty for undertakings.250 Second, the Commission has adopted a number of soft law instruments that affect case resolution mechanisms in general and the calculation of fines in particular. Soft law is an instrument that can be utilised by the Commission, both to delimit its own discretion and to clarify its policy for undertakings. Examples

247 Case C-201/08 Plantanol GmbH & Co KG v Hauptzollamt Darmstadt EU:C:2009:539, para 46.
248 Tridimas (n 215) 242.
are the Fining Guidelines, Leniency Notice and Settlement Notice. Policy expressed in soft law may create legal uncertainty, especially where soft law is itself unclear or reserves a broad margin of case-by-case assessments for the Commission. It appears that many cases of undertakings appealing Article 7 decisions on grounds of violation of the principle of legal certainty indeed concern the calculation of fines. Given that the Court tends to confirm the broad margin of discretion granted to the Commission in these two areas, the exact criteria where the principle of legal certainty would be considered infringed on the part of the Court remains unclear.

To summarise, legal certainty is a remarkably multi-faceted general principle of EU law that affects legislators, law enforcers and judges. For the purposes of this study, legal certainty is most relevant regarding the effects of competition policy issued in the form of soft law and in connection with cooperative case resolutions that are likely to escape Court review.

2.3.4 Legitimate expectations

The principle of legitimate expectations is a separate, but closely related principle to the principle of legal certainty. The protection of legitimate expectations relates more specifically to the actions of authorities in conferring to subjects of the law how they can expect authorities to apply or interpret the law. According to the General Court there are three criteria that

---

251 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28).
252 Commission Notice on immunity from fines and reduction of fines in cartel cases (n 27).
253 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 (n 26).
256 See, for example: Case C-441/07 P European Commission v Alrosa Company Ltd (n 232).
257 Case C-201/08 Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt (n 247) para 46; Tridimas (n 215) 151–52.

---
need to be fulfilled for a successful claim of protection by the principle of legitimate expectations:

First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the Community authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules (…).\(^{258}\)

In this regard, EU legislation or Commission soft law are capable of creating legitimate expectations on the part of the addresses of these instruments.\(^{259}\) However, case law on the principle of legitimate expectations in the field of EU competition law shows that undertakings cannot rely on that principle in an absolute manner, especially not concerning soft law that is subject to change. For example, in a case where the Commission applied Fining Guidelines that were adopted after the opening of a specific case, the General Court held that the undertaking could not rely on the principle of legitimate expectations, as ‘[…] the Commission may decide at any time to raise the level of the fines by reference to that applied in the past.’\(^{260}\)

The principle of legitimate expectations thus sets a high bar for undertakings wishing to claim protection by this principle. This is especially true in a legal context such as competition law enforcement which is characterised by a wide margin of discretion afforded to the Commission.


\(^{259}\) Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri A/S (C-189/02 P), Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others (C-202/02 P), KE KELIT Kunststoffwerk GmbH (C-205/02 P), LR af 1998 A/S (C-206/02 P), Brugg Rohrsysteme GmbH (C-207/02 P), LR af 1998 (Deutschland) GmbH (C-208/02 P) and ABB Asea Brown Boveri Ltd (C-213/02 P) v Commission of the European Communities (n 140), para 186; Case C-510/06 P Archer Daniels Midland Co v Commission of the European Communities EU:C:2009:166, para 60; Tridimas (n 215) 251–52.

\(^{260}\) Case T-329/01 Archer Daniels Midland Co v Commission of the European Communities EU:T:2006:268, para 46; See also: Case C-510/06 P Archer Daniels Midland Co. v Commission of the European Communities (n 259) paras 66-67.
2.3.5 Equal treatment

The principle of equal treatment states that ‘similar situations shall not be treated differently unless differentiation is objectively justified.’ The test carried out by the Court assesses whether the principle of equal treatment has been infringed in two steps: (1) the Court considers whether the party in question has been treated differently than another party in a similar situation; and (2) if there is a case of unequal treatment, it considers whether there is an objective justification for that treatment. Thus, EU institutions are required to treat persons and undertakings equally if they are in the same situation. Naturally, this also applies to the resolution of potential infringements in EU competition law by the Commission.

The Commission has been found in infringement of the principle of equal treatment in several cases relating to competition law, mostly in relation to the calculation of fines in cartel cases. An important distinction to keep in mind is thus that cases concerning Article 101 TFEU usually relate to several undertakings, whereas cases relating to Article 102 TFEU mostly relate to one undertaking only.

For example, in the *Alliance One* case, the Commission decided to hold certain parent undertakings jointly and severally responsible for the participation of their subsidiaries in a cartel fixing prices for raw tobacco. In this particular case, the Commission did not simply apply the presumption that ownership of 100 per cent of the shares of the subsidiary meant that the parent company could be held responsible for the measures of the subsidiary. Instead, the Commission applied the so-called ‘dual base’ approach where it also checked whether there was evidence indicating actual control of the parent company over the subsidiary. Thus, the Commission had concluded that several of the parent companies involved could not be held responsible for the cartel, with the exception of Transcontinental Leaf Tobacco Corp. Ltd. This undertaking was held responsible for the conduct of its subsidiary, World Wide Tobacco Espana, SA, solely based on the fact that it held almost all the shares of that subsidiary. The General Court held, and the Court of Justice confirmed on appeal, that this decision constituted an infringement of the principle of equal

---

261 Joined cases 117/76 and 16/77 *Albert Ruckdeschel & Co and Hansa-Lagerhaus Ströh & Co v Hauptzollamt Hamburg-St Annen and Diamalt AG v Hauptzollamt Itzehoe* EU:C:1977:160, para 7.
262 ibid para 7.
263 Tridimas (n 215) 6.
265 ibid paras 140-41.
266 ibid paras 217-18.
treatment. The Commission is free to determine which undertakings to address its decisions according to Article 7 of Regulation 1/2003, it must make such an assessment on an equal basis for all parties concerned in a certain cartel, unless the undertakings are not in a comparable situation. This case illustrates that the first condition of the test is quite easily fulfilled in cartel cases, where all parties have been involved in the same offence.

Nevertheless, this does not mean the Commission may not differentiate between undertakings when calculating fines. Where several parties to the same case are to be fined, the calculation of the fine will consider the circumstances of each undertaking separately. According to the Fining Guidelines, this includes among other things the turnover of the products concerned, the duration of the infringement and possible mitigating and aggravating circumstances. Thus, the level of the fine for each party may vary significantly.

While parties to the same case can demand that the Commission treats them equally where they are in the same situation as other parties, they cannot demand to be treated equally where they are parties to different cases involving different factual circumstances. For example, in Visa, the General Court held that Visa could not claim that the Commission should have refrained from the imposition of a fine as it had done in MasterCard and Cartes Bancaires. The General Court held that this would 'amount to a plea that [Visa] should benefit from an unlawful act committed in favour of a third party, which would be contrary to the principle of legality.'

The powers of the Commission as the first-instance enforcer of competition law are thus constrained by the principle of equal treatment especially in cartel cases, where it must observe treat all parties to the same cartel in an equal manner.


268 There are a number of other cases concerning the setting of fines and the principle of equal treatment in cartel cases. See for example: Joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 Bolloré SA and Others v Commission of the European Communities EU:T:2007:115; Case T-13/03 Nintendo Co, Ltd and Nintendo of Europe GmbH v Commission of the European Communities EU:T:2009:131.


271 ibid para 219.
3 Objectives

This chapter sets out the objectives against which the Commission’s current and potential case resolution mechanisms are assessed in this study. More precisely, this chapter focusses on what the Commission aims to achieve in its system of case resolution mechanisms at an overall level. Furthermore, this chapter clarifies what general enforcement objectives are relevant with a view to assessing the Commission’s case resolution mechanisms.

Two distinctions need to be made with regard to the terminology concerning the objectives identified and analysed in this chapter: Firstly, the difference between objectives of the system of case resolution mechanisms and of the enforcement of Articles 101 and 102 TFEU is small, but a distinction should be made. Case resolution mechanisms are one part of the overall enforcement of Articles 101 and 102. Thus, all objectives defined here are also objectives of the enforcement of Articles 101 and 102 TFEU. However, the overall enforcement process may pursue further objectives, such as the fairness, timeliness or transparency of procedures.272 Such objectives are not part of the assessment carried out in this study, which is why reference is made to the objectives of the system of case resolution mechanisms. Secondly, it is important to distinguish the objectives of EU competition law enforcement from the objectives of EU competition law in general. The latter objectives underscore the very existence of EU competition law. Objectives such as consumer welfare and economic efficiency, which are frequently named as objectives of EU competition law, target the functioning of the market economy in the EU.273 The enforcement of Articles 101 and 102 TFEU, however, targets the subjects of EU competition law, undertakings, when they engage in behaviour that may be contrary to Article 101 or 102 TFEU.

272 See for example: Yeung, Securing Compliance: A Principled Approach (n 22) 30.
3.1 Identifying the objectives of the system of case resolution mechanisms

As already noted in the method section, the objectives to be achieved by the Commission’s system of case resolution mechanisms are not clearly set out anywhere, which means that they must be ascertained by a doctrinal legal analysis. As will be obvious from the exercise carried out below, this is not a straightforward task to carry out. Different sources refer to different objectives, sometimes referring to enforcement overall, sometimes to the resolution cases and sometimes to specific means used within certain case resolution mechanisms.

Beginning with the most important source, the Treaty, in Article 103 TFEU, which is also the legal basis to Regulation 1/2003, indicates some objectives of the enforcement of Articles 101 and 102 TFEU. Article 103(2)(a) TFEU holds that legislation that is adopted should:

(...)

Two observations can be made about this short reference in the Treaty: Firstly, the reference to ‘compliance’ indicates the overarching aim of the Commission’s enforcement of Articles 101 and 102 TFEU. Case resolution mechanisms, as a part of that enforcement, must also contribute to securing compliance. However, securing compliance as the overarching aim would be too difficult to assess within the setting of this study. The objectives that serve as the basis for analysis in this study must be more specific than the aim of securing compliance. Indeed, and secondly, an indication of one such specific objective is also contained in Article 103(2)(a), which states that compliance shall be secured ‘by making provision for fines and periodic penalty payments.’ By requiring the provision for fines in secondary legislation, Article 103 TFEU sets out the objective of punishing infringers and also the objective of preventing infringements by way of deterrence. Setting out a further objective, Article 105 TFEU allows the Commission to investigate potential infringements of Articles 101 and 102 TFEU and to suggest measures to bring such infringements to an end.

The objectives stated in the Treaty can also be traced in Regulation 1/2003. These objectives can be derived from the substantive provisions outlining the different case resolution mechanisms. Article 7 of that Regulation states that the Commission may order remedies to bring an infringement of Article 101 or 102 TFEU to an end. It is possible to impose an Article 9 decision if the

274 Treaty on the Functioning of the European Union (n 2) art 103(2)(a).
275 ibid art 105(1).
undertaking offers remedies that address ‘the Commission’s concerns’, in the absence of a formal finding of an infringement. Further, Article 23(2) of Regulation 1/2003 allows the Commission to impose fines where it has found an infringement of Article 101 or 102 TFEU.

Beyond what is stated in the Treaty and in Regulation 1/2003, the Commission and the Court have each addressed the objectives of different case resolution mechanisms

Any decision adopted by the Commission as a result of the resolution of a case can be appealed by the undertakings addressed by that decision. Therefore, the Court can only consider the objectives of individual case resolutions carried out by the Commission in the form of appeals. The Court’s reasoning is consequently limited to objectives which appear in the context of appeals. For example, in ENI, the Court of Justice refers to punishment and the prevention of new infringements as objectives:

(...)

In Archer Daniels, the General Court holds more broadly as regards the Commission’s tasks that:

(...)

and

(...) for the purpose of fixing the amount of the fine, the Commission must take into consideration not only the particular circumstances of the case but also the context in which the infringement occurs and must ensure that its measure has the necessary deterrent effect (...). 278

---

276 Case C-508/11 P ENI SpA v European Commission EU:C:2013:289, para 50; See also: Case T-69/91 Georgios Peroulakis v Commission of the European Communities EU:T:1993:16, para 191; Case C-510/06 P Archer Daniels Midland Co. v Commission of the European Communities (n 259) para 149; Case T-329/01 Archer Daniels Midland Co. v Commission of the European Communities (n 260) para 275.

277 Case T-329/01 Archer Daniels Midland Co. v Commission of the European Communities (n 260) para 275.

278 ibid para 176.
What can be observed from the above quotes is that the Court refers to the Commission as the primary enforcer and policymaker in competition law enforcement. Further, it points to the objectives of punishment, deterrence, the prevention of infringements and guidance of undertakings.

The Commission holds in an informal guidance paper that:

The Commission's policy with regards to competition law infringements is one of prevention. Hence it issues extensive guidance on how to comply with the law. Should companies break the law, fines may be imposed. These too are ultimately aimed at prevention, and must hence fulfil two objectives: to punish and to deter.279

The Commission thus aims to prevent infringements of Articles 101 and 102 TFEU. To do this, it uses two methods: it issues guidance on how to comply with those provisions and punishes those who nevertheless infringe Article 101 or 102 TFEU, also aiming to ensure that undertakings are deterred from committing infringements in the future.

The objectives mentioned above are also discussed in the academic literature addressing this question. Wils identifies three objectives of competition law enforcement: (1) to clarify the rules; (2) to prevent violations of competition law; and (3) to deal with the consequences of violations.280 More narrowly, Harding and Joshua define three objectives of ‘case closure’ and sanctions. According to them, the objectives are: (1) to bring the infringement to an end; (2) to remedy the damage done by the infringement; and (3) to punish the offender and to deter other potential offenders.281 Comparing these two views it is apparent that they reflect different approaches to competition law enforcement. Wils seeks to identify the objectives of the entire enforcement chain of actions and not just the objectives of the system of case resolution mechanisms. Harding and Joshua, meanwhile, denote the concrete objectives followed once an infringement has occurred. These two approaches are thus complementary rather than conflicting.

It can also be noted that Wils denotes the objectives of competition law enforcement as they should be, rather than describing the objectives actually followed by the Commission. The question of what objectives should be identified is also relevant in this study. Should the case resolution mechanisms

---

employed by the Commission to enforce Articles 101 and 102 TFEU be assessed here against the objectives that the Commission actually pursues or against the ones that it should pursue? On the one hand, it would be unjust to measure the Commission against objectives that it does set for itself. On the other hand, the Commission can be seen as an agent tasked with ensuring that EU competition law is observed. In that sense, it is not for the Commission alone to decide its objectives, but to implement the objectives set out in the Treaties and legislation as interpreted by the Court. However, it does not appear that the Commission’s and the Court’s views on the objectives of competition law differ substantively, even if they may be expressed somewhat differently. For the purposes of this study, the aim is to assess the actual objectives of the system of case resolution mechanisms as can be derived from primary and secondary law, the case law of the Court as well as the Commission’s policy statements, also taking the available scholarly literature into account.

It deserves to be repeated that the quoted sources above refer to objectives of different subjects. While some refer to the enforcement of competition law in general, others refer to the objectives of specific means, such as fines. Further, several of the above-named objectives overlap. For example, deterrence aims to prevent new infringements, an objective also pursued by the clarification of competition rules.

Despite the absence of an authoritative and coherent answer to the question what the objectives of the system of case resolution mechanisms are, a careful analysis or the relevant legal provisions and literature indicates certain consensus around the following objectives:

1. bringing infringements to an end
2. punishing and deterring infringers
3. preventing infringements
4. clarifying competition rules

These objectives, it is submitted here, are sufficiently reliable to be used as a basis for the assessment undertaken in this study. The objective of bringing infringements to an end can be directly derived from Article 7 of Regulation 1/2003 as well as the Treaty. The objective of punishing and deterring infringers from further infringements can be inferred from Article 103 TFEU, but is made explicit in statements by both the Court and the Commission. There is not either any doubt that the system of case resolution mechanisms shall help to prevent further infringements, as made explicit by both the Court and the Commission. Lastly, clarifying competition rules is an objective referred to in the Commission’s policy that can be exemplified with reference to the numerous soft law instruments issued by the Commission.
To facilitate the understanding of these objectives and existing overlaps between them, reference needs to be made to different parameters along which the objectives can be classified: Firstly, a case resolution mechanism’s intended effect on the infringement in question; second, the effect on the infringer; third, the effect on other undertakings subject to Articles 101 and 102 TFEU; and fourth the effect on competition law as a legal system. As regards infringements, the infringement in question must be brought to an end. Regarding infringers, certain case resolution mechanisms include fines aimed at punishing and deterring infringements. As concerns other undertakings, the objective is to prevent new infringements and to clarify competition rules. In addition, the clarification of competition rules also serves the overall development and coherence of competition rules.

It is submitted here that remedying monetary damages caused by competition law infringements, as addressed by Harding and Joshua, is not an objective in the present context. To the extent that remedying damages refers to the re-establishment of competition in the relevant market, that objective is included in bringing an infringement to an end.\textsuperscript{282} It should be noted that public and private enforcement do not operate in separate worlds, but that these two types of enforcement instead complement each other. It is common that public enforcement is followed by private measures, so-called ‘follow-on actions’. However, even if public and private enforcement are co-dependent, they have separate objectives and should thus not be mixed up.\textsuperscript{283} Remediying damages is left to private parties, now supported by Directive 2014/104.\textsuperscript{284}

Below, each objective identified above is further described and analysed.

3.1.1 Bringing infringements to an end

Article 7(1) of Regulation 1/2003 empowers the Commission to order undertakings to bring an infringement to an end and to impose behavioural and structural remedies that are proportionate to end an infringement. More concretely, Article 7(1) states:

\textsuperscript{282} See section 3.1.1.
Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. (emphasis added) 285

It should be added that the objective of bringing infringements to an end can also be related to Article 9 decisions. Technically, Article 9 decisions do not aim to bring infringements to an end, given that an infringement is not found as part of an Article 9 decision. However, in practice, the purpose of Article 9 decisions is to bring suspected infringements to an end, given that commitments proposed by undertakings shall address the concerns held by the Commission.

With regard to Article 7 decisions, the wording of Article 7 makes clear that the remedies imposed by the Commission must have the purpose of bringing the infringement to an end. As Ritter correctly points out this raises the question of what ‘bringing an infringement to an end’ means more concretely. 286 Most obviously, the remedy shall stop the ongoing conduct. But, according to the Court of Justice, an infringement consists not only of the conduct at issue, but also of its possible effects. 287 The effects of an infringement do not necessarily cease because the illegal conduct has ceased. For example, in Akzo, ECS had lost certain customers to Akzo as a result of Akzo’s conduct. That situation was not automatically changed by Akzo’s termination of the conduct. Thus, the Court of Justice held that the remedy imposed by the Commission ‘allowed Akzo’s competitor [ECS] to re-establish the situation that existed before the dispute’. 288 The remedy may thus aim to re-establish the competitive situation that existed before the infringement was committed. Or, in other words, the remedy shall restore competition. 289

285 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 7(1).
287 Case C-119/97 Union française de l’express (Ufex), formerly Syndicat français de l’express international (SFEI), DHL International and Service CRIE v Commission of the European Communities and May Courier EU:C:1999:116, para 94; Ritter (n 286) 5.
In Akzo, the Court of Justice also considers that the behavioural remedy imposed by the Commission ‘is intended to prevent repetition of the infringement and to eliminate its consequences.’\textsuperscript{290} As Ritter rightly points out, the effectiveness of a behavioural remedy preventing the repetition of an infringement is limited because the undertaking may at any time resume its anti-competitive conduct.\textsuperscript{291} It can nevertheless be noted that such a mean may be pursued by the Commission, notably also by structural remedies.

To summarise, the objective ‘to bring an infringement to an end’ can actually be pursued by three different means: First, ending the infringement; second, ending the effects of the infringement, restoring competition and third (to a more limited extent) preventing new infringements. In this regard, it is important to observe that the objective of bringing infringements to an end can be pursued both in a backward-looking and a forward-looking manner. Remedies imposed by the Commission may both aim to end an infringement, but also to restore competition and to prevent infringements for the future.

\subsection{3.1.2 Punishing and deterring infringers}

Turning to the objective of punishing and deterring offenders, this objective relates primarily to the fines imposed as part of certain case resolution mechanisms. Fines are not only meant to punish infringing undertakings, but also to deter infringers (and other undertakings) from future infringements. Hence fines have a combined retributive and deterrent aim.\textsuperscript{292} The General Court confirms this in \textit{Marine Hoses}:

\begin{quote}
A fine of such an amount [of the fine] makes it possible effectively to penalise the applicants’ unlawful conduct, in a manner which is proportionate to the gravity of the infringement and is sufficiently deterrent.\textsuperscript{293}
\end{quote}

Fines shall be deterrent, but also proportionate to the gravity of the infringement, referring to a retributive aim of fines. Retributive fines are based on the seriousness of the offence and the culpability of the offender. Article 23(3) of Regulation 1/2003 holds that the Commission shall take into account the gravity and the length of the infringement when setting the fine. These considerations are subsequently reflected in the Fining Guidelines for infringements of Articles 101 and 102 TFEU, in particular in the mitigating

\textsuperscript{290} Case C-62/86 \textit{AKZO Chemie BV v Commission of the European Communities} (n 288) para 155.
\textsuperscript{291} Ritter (n 286) 7.
\textsuperscript{292} Simonsson (n 19) 360–61.
\textsuperscript{293} Case T-146/09 \textit{Parker ITR Srl and Parker-Hannifin Corp. v European Commission} (n 255) para 255.
and aggravating factors pertaining to the infringers’ culpability. Article 23(2) also states that the fine may not exceed 10 per cent of the turnover of the undertaking in the previous business year. There is thus a legal maximum for the fine concerning what is considered to be proportionate.

Further, in *Graphite Electrodes* the Court of Justice holds with regard to deterrence that:

> It should be noted that ‘deterrence’ is one of the factors to be taken into account in calculating the amount of the fine. It is settled case-law (...) that the fines imposed for infringements of Article 81 EC [now Article 101 TFEU] and laid down in Article 15(2) of Regulation No 17 [now Article 23 of Regulation 1/2003] are designed to punish the unlawful acts of the undertaking concerned and deter both the undertakings in question and other operators from infringing the rules of Community competition law in future.

The double aim of deterrence, preventing new infringements by both infringing undertakings (but also other undertakings) is also made explicit in the Commission’s Fining Guidelines:

> Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence).

Meanwhile, the logic behind the calculation of deterrent fines is, as already noted, distinct from the retributive considerations outlined above. With regard to EU competition law, in *Archer Daniels Midland*, the General Court explains how deterrent fines can be achieved:

> (...) if the fine were set at a level which merely negated the profits of the cartel, it would not be a deterrent. It is reasonable to assume that when making financial calculations and management decisions, undertakings take account rationally not only of the level of fines that they risk incurring in the event of an infringement but also the likelihood of the cartel being detected.
Thus, according to the General Court, deterrent fines should, depending on the risk of detection, be higher than the illegal gains from the competition law infringement. This is because undertakings are assumed to be profit-maximising:

A fine determined in accordance with the methodology set out in the [fining] Guidelines represents, in principle, a substantial percentage of the value of sales which the undertaking being penalised has achieved in the sector affected by the infringement. Thus, as a result of the fine, the undertaking in question will see its profits in that sector diminish significantly; it may even record losses. Even if that undertaking’s turnover in that sector represents only a small fraction of its worldwide turnover, it is not necessarily inconceivable that the decline in profits made in that sector, or even their transformation into losses, will have a deterrent effect, since a commercial undertaking generally operates in a given sector in order to generate a profit.300

The General Court thus recognises the economic reasoning behind the imposition of deterrent fines and also accepts the economic assumption underlying the calculation of fines, which is that undertakings are driven by profit.

A relevant question is whether the combined retributive and deterrent objective of fines cause any conflicts with regard to fines for infringements of Articles 101 and 102 TFEU? With regard to mixed theories of punishment, Hart holds that:

To counter this drive what is most needed is not the simple admission that instead of a single value or aim (Deterrence, Retribution, Reform, or any other) a plurality of different values and aims should be given as a conjunctive answer to some single question concerning the justification of punishment. What is needed is the realization that different principles (...) are relevant at different points in any morally acceptable account of punishment.301

Hart thus considers that theories of punishment should be mixed, but only in order to answer different questions. Yet, with regard to fines for infringements of Article 101 or 102 TFEU, it appears that both deterrence and retribution theory shall answer the same question, namely, how high the fine imposed on an infringer should be. Balasingham observes that the Commission has emphasised the retributive vis-à-vis the deterrence objective of fines to

301 Hart, Punishment and Responsibility: Essays in the Philosophy of Law (n 40) 3.
differing degrees at different times. Whether or not there is a conflict between the two depends on how the requirements of deterrence and retribution with regard to fines are interpreted. In theory, the magnitude of a retributive and a deterrent fine respectively could differ. But, as noted above, there is a legal limit to a fine that can be imposed by the Commission. In this sense, Article 23 of Regulation 1/2003 is designed in such a way that it allows the Commission to follow both objectives, all whilst setting a limit to the benefit of retribution. However, even if a fine would hypothetically ‘only’ reach a retributive level, it is still possible for the fine as a whole to follow an objective of general deterrence, as submitted in the following section.

3.1.3 Preventing infringements

The objectives of the system of case resolution mechanisms concerning other undertakings subject to competition law relate to the general prevention of infringements. New infringements shall be prevented by general deterrence emanating from fines, as the Court of Justice states that fines shall ‘deter both the undertakings in question and other operators from infringing the rules of Community competition law in future.’ General deterrence is said be achieved if the undertakings that are potential infringers estimate that it would not make a profit from the infringement if discovered. Deterrence theory is thus based on the assumption that the undertakings involved assess the risk of detection and anticipate any fine that might be issued as a result before taking action. As shown in the previous section, the General Court has expressly acknowledged that assumption, as for instance illustrated in Archer Daniels Midland cited above. In the context of corporate wrongdoing in an area such as competition law, it appears logical to assume that undertakings, wishing to maximise profits, would make such a rational calculation before acting.

Conversely, there are also other factors that may impact the act of infringing, both with regard to actors’ motives and the circumstances surrounding

---

302 Balasingham (n 45) 46.
303 Critically, see: Hodges (n 23).
304 Case C-289/04 P Showa Denko KK v Commission of the European Communities (n 294) para 16.
306 Case T-329/01 Archer Daniels Midland Co. v Commission of the European Communities (n 260) para 141.
infringements and law enforcement. Andenaes distinguishes three types of preventative effects of punishment:

(... it may have a deterrent effect, it may strengthen moral inhibitions (a moralizing effect), and it may stimulate habitual law-abiding conduct.

This broad concept of the preventative effects of fines is also acknowledged in the doctrine regarding EU competition law enforcement. Thus, when the General Court Designates the deterrent effect of fines as a factor preventing undertakings from committing infringements of competition law, it takes a narrow approach to prevention. Yet, just because the Commission and the Court do not clearly state that the intention of fines is to stretch beyond prevention by fear, does not mean that such effects do not exist. Indeed, for some law-compliant undertakings, the mere existence of a law prohibiting certain behaviour may be enough to prevent them from infringing that law, either because they comply with the law out of habit or because they believe that the action in question is actually wrong. Others may comply only if the law is also enforced, for fear of the consequences of breaking the law, which may be both financial and/or reputational. Further, the imposition of fines may have a positive effect when it confirms law-abiding undertakings in their behaviour.

For the assessment of objectives carried out in chapter 4, it is relevant to point out that the general deterrent effect of fines, being dependent on undertaking’s perceptions and preferences, cannot be calculated in an exact manner. This also means that the objective of deterring infringements at a general level is not directly dependent on the imposition of specifically deterrent fines against individual undertakings. Rather, the cumulative factors that may affect undertakings when considering whether or not to infringe Article 101 or 102 TFEU must be examined.

311 Case T-329/01 Archer Daniels Midland Co. v Commission of the European Communities (n 260) para 141.
3.1.4 Clarifying competition rules

The clarification of competition rules could in principle be understood as part of the objective of preventing competition law infringements. However, such a narrow categorisation would ignore the broader functions of the clarification of competition rules. Thus, it is considered as a separate objective.

The clarification of competition rules is important so that all undertakings subject to Articles 101 and 102 TFEU can assess their own behaviour with regard to compliance with competition rules.\textsuperscript{314} Individual Commission decisions form a part of the overall system of Commission guidance. This is relevant since Regulation 1/2003 introduced a system of self-assessment where undertakings are now no longer able to notify agreements that may violate Article 101(1) TFEU to the Commission and rely on the Commission’s preliminary assessment of potential infringement. Guidance may also be provided by the Commission through, for example, soft law notices or guidelines.\textsuperscript{315} However, an important differentiation must be made between general guidance and case-specific guidance such as that provided by Commission decisions concerning infringements of competition law. General guidance issued by the Commission in the form of soft law instruments aims to cover as many situations as possible, rather than addressing specific circumstances. Also, it is important to bear in mind that the Court may not agree with the statements made by the Commission in its guidance. An example is the Court of Justice’s ruling in \textit{Expedia}, which can be interpreted as rejecting the Commission’s interpretation of Article 101 TFEU expressed in the \textit{de minimis} Notice with regard to ‘by object’ infringements.\textsuperscript{316}

Furthermore, clarifying what behaviour is covered by competition law shall serve the overall coherence of the legal system of competition law. Therefore, there is a connection between the objective of clarifying competition rules and the principle of legal certainty. Certain case resolution mechanisms fulfil an

\textsuperscript{314} European Commission, ‘Fines for Breaking Competition Law’ (n 279).

\textsuperscript{315} See for example: Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28); Commission Notice on immunity from fines and reduction of fines in cartel cases (n 27).

important function in developing competition law in particular where novel behaviours appear or where the Commission introduces a new theory of harm.

3.2 General enforcement objectives

The question following the above assessment of the objectives to be achieved by the system of case resolution mechanisms, is whether the Commission, pursues any relevant objectives that aim at how the enforcement of Articles 101 and 102 TFEU should be conducted? Indeed, the preamble of Regulation 1/2003 specifies certain objectives in this regard: The very first Recital states that ‘Articles [101 and 102] of the Treaty must be applied effectively and uniformly in the Community [now the Union].’ (emphasis added) The third Recital points to another objective, even if it is not made explicit. It is held that the old enforcement regime under Regulation 17/62 ‘prevents the Commission from concentrating its resources’. This refers to the objective of efficiency. Effectiveness and efficiency need to be distinguished from one another. While effectiveness ‘concerns the realisation of given objectives’, efficiency concerns ‘the deployment of resources in the realisation of objectives’. Uniform application is a more concrete objective and indicates that even if several authorities enforce EU competition law, uniform application should still be upheld. Thus, the general enforcement objectives as can be discerned from Regulation 1/2003 are: (1) effectiveness; (2) efficiency; and (3) uniform application.

However, of these three objectives, only effectiveness and efficiency are relevant to this study. Uniform application means that cases with the same merits should be assessed in the same manner, no matter which authority is enforcing EU competition law. This objective presents a particular challenge in EU competition law enforcement since there is a large number of instances that are empowered to enforce Articles 101 and 102 TFEU. Not only the Commission and the Court are able to do so, but also the NCAs and national courts. Regulation 1/2003 therefore includes a number of provisions that are aimed at fulfilling this objective. However, this study is concerned with case resolution mechanisms used by the Commission only and the coordination of enforcement concerns the relations between competition authorities with each

---

317 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) recital 1.
318 ibid recital 3.
320 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) arts 5 and 6.
321 ibid arts 11-16.
other rather than those with undertakings. Therefore, the objective of uniform application lies outside the scope of this study.

The objectives of effectiveness and efficiency are further defined below.

3.2.1 Effectiveness

Effectiveness is an over-used term nowadays and it is therefore worth repeating that this study refers to effectiveness as ‘the realisation of given objectives’.\textsuperscript{322} In contrast to all other objectives presented in this chapter, the effectiveness objective does not relate to a goal to be achieved directly by the application of the different case resolution mechanisms, but rather stipulates how the other objectives shall be fulfilled. What must be clarified in this context is when the objective of effectiveness can be considered to be fulfilled. Effectiveness could be examined at a micro level with regard to the fulfilment of each objective in each case where the Commission applies one of the case resolution mechanisms examined in this study. Alternatively, the overall macro fulfilment of objectives by the system of case resolution mechanisms could be put in focus. As this study takes an overall macro perspective of the system of case resolution mechanisms employed by the Commission, the objective of effectiveness is also considered, where possible, from a macro perspective.

3.2.2 Efficiency

The terms effectiveness and efficiency are often confused or used interchangeably. Efficiency, in the context of this study, refers to ‘the deployment of resources in the realisation of objectives’,\textsuperscript{323} or in other words resource effectiveness. The objective of efficiency can be justified by the need to spend the Commission’s sparse resources in the most efficient manner achieving the maximum effect possible. Enforcement that aims to investigate every infringement of competition law would in all likelihood consume an unacceptable amount of resources. A prioritisation must be made, which is where efficiency enters into the equation: as much effective enforcement as possible should be achieved with the limited resources available.\textsuperscript{324}

With regard to Regulation 1/2003 and the framework of competition law enforcement it establishes, efficiency can be traced in several contexts. Firstly, efficiency is achieved by sharing the burden of enforcement. Since both the

\textsuperscript{322} Yeung, Securing Compliance: A Principled Approach (n 22) 31.
\textsuperscript{323} ibid.
\textsuperscript{324} ibid 30–31.
Commission and NCAs enforce EU competition law, the work that was previously carried out mainly by the Commission, is now divided between the Commission and the NCAs. This means that the Commission’s enforcement can prioritise the most important cases. For example, the Commission may decide to leave certain cases to NCAs while pursuing other cases in its own enforcement.

Secondly, and addressing case resolution mechanisms more directly, Regulation 1/2003 aims to make the resolution of suspected infringements by the Commission more efficient by introducing mechanisms that allow a more expedient resolution of cases, such as Article 9 decisions. Furthermore, the abolishment of the notification system was justified by the need to generally free resources that the Commission could use to pursue more infringements of Articles 101 and 102 TFEU.

3.3 Conclusions

The aim of this chapter has been to identify and analyse objectives pursued by the system of case resolution mechanisms used by the Commission to deal with suspected infringements of Articles 101 and 102 TFEU. Concluding, the objectives pursued by the Commission in its system of case resolution mechanisms are: to bring infringements to an end, to punish and deter infringers, to prevent infringements and to clarify competition rules. These case resolution mechanisms shall be employed in an effective and efficient manner.

Having identified and analysed the objectives of the Commission’s system of case resolution mechanisms, it is pertinent to further consider these objectives at an overarching level. Firstly, it must be considered how these objectives relate to one another and to different case resolution mechanisms. Secondly, these objectives can be analysed with regard to the overarching objective of securing compliance. In other words, how do the above objectives aim to secure compliance?

325 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 5.
327 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 11.
328 Gauer and others (n 326) 5.
329 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) recital 3.
Concerning objectives’ relation to the different case resolution mechanisms, these different mechanisms pursue different sets of objectives. All mechanisms do not pursue all of the objectives identified. While it is evident that certain mechanisms are mainly geared towards one objective, it is also possible that one mechanism pursues more than one objective. Hence, the different groups of objectives relate to each other in a distinctive way within each case resolution mechanism. In this regard, the Commission may also reveal its preference regarding fulfilling certain objectives over others in its choice of case resolution mechanism. Once the different case resolution mechanisms are applied to specific cases, the attainment of objectives may sometimes be restrained where constitutional restraints might otherwise be infringed.330

Moreover, once these objectives are related to different case resolution mechanisms, it becomes obvious that the means employed within the different mechanisms for achieving the different objectives do not only relate to a single objective. For example, fines relate to both the objective of punishment and shall deter infringers as well as third parties. Guidance issued to clarify competition rules also aims to prevent further infringements. In addition, certain objectives may be pursued by several means: remedies imposed to bring infringements to an end and fines may both aim to prevent further infringements.

Thus, as will be further shown in the following chapter, to what extent the different objectives can be fulfilled by the Commission’s resolution of a case depends both on what case resolution mechanism is chosen in what individual case and how that case resolution mechanism is utilised.

Furthermore, considering the overall objective of securing compliance that shall be achieved by the Commission in EU competition law enforcement, it can be observed that different objectives aim to contribute to securing compliance in different ways. As will be remembered, a traditional dichotomy distinguishing competition law from regulation is in this study considered as too narrow to reflect the actual application of competition law enforcement. In particular, the distinction between competition law enforcement as an instrument used to prohibit infringements ex post and regulation as prescribing certain behaviour ex ante is not sustainable, if analysing the objectives identified in this chapter. For example, the objective of bringing infringements to an end does not only target past behaviour, but also future behaviour. Remedies may indeed seek to restore competition or to prevent future infringements. Punishment and deterrence are objectives that are both backward-looking and forward-looking in time. Further, the clarification of competition rules aims both to develop competition rules and to prevent future

330 See section 2.3.
infringements. Thus, it appears short-sighted to view the resolution of a case as a one-off intervention to be used in case of misconduct. Rather, the impact of the resolution of a case after the fact also demands consideration. Such considerations must be taken both with regard to undertaking subject to enforcement by the Commission and other undertakings. As already pointed out in the introduction, compliance should not only be viewed as an event, but also as a process that takes place over time. \textsuperscript{331}

In the following chapter, the objectives identified here are further assessed in relation to the case resolution mechanisms meant to achieve these objectives. Moreover, the following chapter shows the considerable variety of means by which the Commission aims to secure compliance with competition rules, drawing a considerably broader picture of how competition rules can be enforced than would be expected following a classic dichotomy between competition law and regulation.

\textsuperscript{331} See section 1.3.4.
4 Assessing the Case Resolution Mechanisms

This chapter aims to assess to what extent the case resolution mechanisms used by the Commission reflect, pursue and reach their objectives. That assessment relates to three case resolution mechanisms used by the Commission when it suspects an infringement of Article 101 or 102 TFEU: Article 7 decisions, cartel settlements and Article 9 decisions.

As already explained above, all case resolution mechanisms cannot be expected to pursue all objectives. Rather, the objectives set out above shall be reached by the system of case resolution mechanisms in a cumulative manner. Therefore, to reach the aim set out above, the assessment in the sections below needs to be carried out in two steps. Firstly, the objectives to be achieved by that mechanism must be defined. Second, it is assessed to what extent the case resolution mechanism in question reflects, pursues and reaches those objectives. Before being able to assess whether an objective is actually reached by a case resolution mechanism, it must be considered whether that objective is reflected in the legal framework under which a certain case resolution mechanism operates. Furthermore, studying select cases from the Commission’s decisional practice, makes it possible to observe whether and how the Commission pursues a case resolution mechanism’s objectives. With regard to the assessment of whether a certain case resolution mechanism actually achieves its objectives, it is necessary to point out that each objective cannot, within the scope of this study, be measured quantitively to ascertain whether it is actually fulfilled by a certain case resolution mechanism. This limitation is due both to the nature of certain objectives and to the existing data and research findings that could be used in this study. What type of assessment that can be carried out is further elaborated with regard to each mechanism below.

Accordingly, this chapter is structured as follows: Sections 4.1, 4.2 and 4.3 assess Article 7 decisions, cartel settlements and Article 9 decisions respectively. Section 4.4 concludes.

---

332 See section 1.4.3.
4.1 Article 7 Decisions

Beginning the assessment with the ‘standard’ case resolution mechanism used by the Commission, a decision according to Article 7(1) of Regulation 1/2003 requires the termination of an infringement of Article 101 or 102 TFEU. The Commission may also adopt an Article 7 decision where a past infringement is concerned. In that case, the Commission must have a ‘legitimate interest’ for doing so. More concretely, Article 7(1) states:

Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. (…)333

Article 7 decisions are assigned the difficult task of fulfilling almost all objectives set out in chapter 3 above. In view of the wording of Article 7 of Regulation 1/2003, such a decision shall bring an infringement to an end and shall clarify competition rules in the sense that it explains what conduct is not permissible in relation to Article 101 or 102 TFEU. Furthermore, most commonly, the Commission, with reference to Article 23(2) of Regulation 1/2003, also imposes a fine within the scope of the Article 7 decision. That fine shall punish and deter the infringing undertaking and prevent other undertakings from committing infractions of competition law. As the Commission must conduct a complete investigation of the infringement at hand and its decision shall withstand judicial review by the Court, Article 7 decisions cannot be said to directly pursue the efficiency objective.334 However, one of the explicit objectives of Regulation 1/2003 was to introduce more efficient enforcement of Articles 101 and 102 TFEU overall, an objective that should have led to an increase in the number of cases resolved. The sections below assess Article 7 decisions in relation to each objective one by one.

333 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 7(1).
334 This is in contrast to Article 9 decisions. See the Court’s reasoning with regard to the efficiency objective of Article 9 decisions: Case C-441/07 P European Commission v Alrosa Company Ltd (n 232) para 35.
4.1.1 Bringing infringements to an end

The first objective set out in chapter 3 above is to bring infringements to an end. Article 7 of Regulation 1/2003 holds that the Commission may bring infringements to an end by two means: it may order the undertaking in question to bring the infringement to an end. Further, to ensure that the infringement is ended, the Commission can impose behavioural or structural remedies.335

As shown in chapter 3, the objective of bringing infringements to an end can actually be said be pursued by three separate means: bringing the infringing conduct to an end, restoring competition and preventing a repetition of the infringement.336 The most common ‘remedy’ used by the Commission is a cease-and-desist order, simply ordering the undertaking(s) to stop their behaviour and refrain from taking up the behaviour again.337 However, as is apparent from Article 7, the Commission may also impose more specific behavioural or structural remedies if these comply with the principle of proportionality. Remedies are not meant to be a punishment for the undertaking in question, but a measure which removes the infringement as well as its effects and thereby restores competition.338

Article 7 decisions are assessed below in relation to the objective of bringing infringements to an end in four steps: First, the legal framework within which Article 7 decisions are to achieve the objective of bringing infringements to an end is examined. Second, the means pursued by select remedies actually imposed by the Commission in Article 7 decisions are assessed. Third, the Commission’s practice regarding periodic penalty payments according to Article 24 of Regulation 1/2003 forcing undertakings to bring infringements to an end is considered. Fourth, the Microsoft case339 is used as an illustration of the Commission’s options and limitations in bringing infringements to an end.

335 With regard to the use of the term ‘remedy’, the following should be noted: in Article 7 decisions the term ‘remedy’ is used to designate measures imposed on undertakings to bring infringements of Articles 101 and 102 TFEU to an end. With regard to Article 9 decisions, the terms ‘commitment’ and ‘remedy’ are generally used interchangeably to designate the measures made binding on an undertaking to address the Commission’s concerns.

336 See section 3.1.

337 In Colomo’s database, it is possible to search for the outcome ‘prohibition’. See: Ibáñez Colomo, ‘Database of Cases’ (n 147); See also: Harding and Joshua (n 281) 287–88; Komninos (n 281) 7.

338 Case C-49/92 P Commission of the European Communities v Anic Partecipazioni SpA (n 196) para 81.

4.1.1.1 The Commission’s power to impose remedies

The Commission may use both behavioural and structural remedies to bring an infringement to an end. A cease-and-desist order imposed by the Commission, leaves it in the hands of the infringing undertaking to decide how the infringement should be brought to an end. However, if the undertaking does not bring the infringement to an end, the Commission may impose periodic penalty payments to compel the undertaking to bring the infringement to an end.

Further, with regard to more specific remedies, Article 7(1) of Regulation 1/2003 states:

(...) For this purpose, [the Commission] may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.

Regulation 1/2003 does not provide an exact definition of behavioural and structural remedies, but it is possible to deduce certain aspects from the Commission’s and the Court’s practice. An early example of a behavioural remedy can be found in the Commercial Solvents case where the Commission ordered the undertaking in question to resume its supplies to a former customer. Structural remedies typically consist of the divestiture of a part of the undertaking in question, for example, the sale of a subsidiary, a factory or infrastructure, such as an electricity network. While behavioural remedies are aimed mainly at ending past conduct and its effects, structural remedies place greater emphasis on preventing future infringements. The structural remedy is supposed to make further infringements of the same kind impossible.

When imposing a specific remedy, the Commission must take into account the delimitations of its power to design such a remedy as set out in Article 7 of Regulation 1/2003 and the Court’s case law. According to Article 7, the

---

342 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) recital 12; Hjelmeng (n 159) 1080.
Commission may only impose a structural remedy where a potential behavioural remedy would not be as effective as a structural remedy.\(^{343}\) However, where an equally effective behavioural remedy would be more burdensome than a structural remedy, the latter may be preferred.\(^{344}\) Thus, choosing between several equally effective remedies, the Commission is in most cases required to choose the behavioural remedy. But, \(e\ contrario\) this means that where a structural remedy is considered more effective, the Commission may choose that remedy. Somewhat puzzling, Recital 12 of Regulation 1/2003 adds with regard to structural remedies that:

Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.\(^{345}\)

It is not clear how this sentence should be interpreted, and the limited literature available on the subject does not seem to agree on one interpretation either. Maier-Rigaud distinguishes a remedy that alters the undertaking’s structure as it existed before the infringement as opposed to a remedy that breaks up a structure that in itself infringes competition law, for example, an anti-competitive joint venture.\(^{346}\) Gauer and Kjølbye, however, make a distinction between structural remedies ordering the divestiture of an entire business unit and structural remedies ordering the divestiture of some of the undertaking’s assets.\(^{347}\) None of these interpretations can be confirmed due to the absence of case law, but for the purposes of this study, suffice it to say that it is considerably more burdensome for the Commission to impose structural than behavioural remedies.

The preference of behavioural remedies among several equally effective remedies may be explained by an underlying assumption that behavioural

---

\(^{343}\) Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) recital 12.

\(^{344}\) ibid art 7; See also: Whish and Bailey (n 101) 262.

\(^{345}\) Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) recital 12.


remedies will be less intrusive in their very nature. Behavioural remedies usually ‘only’ intervene in the undertaking’s freedom to conduct business. In some cases, however, behavioural remedies may intervene in the intellectual property rights of an undertaking, for example where remedies order an undertaking to grant access to a product or service. A behavioural remedy always includes an underlying risk of repetition. A simple order to stop an infringement is relatively toothless if the Commission is not able to reinforce that order. After all, undertakings might simply ignore the order of the Commission if there is nothing at stake for them. Structural remedies usually intervene in the property rights of an undertaking, which can be considered a more intrusive intervention than possible interventions in the undertaking’s freedom to conduct a business.

Moreover, the Commission explicitly needs to consider the principle of proportionality when imposing remedies under Article 7 of Regulation 1/2003. In this regard, it is important to distinguish between situations where there is only one possible remedy for bringing the infringement to an end and those where there are several possible remedies. If there is only one effective remedy for ending the infringement, that remedy will automatically be considered proportionate. If there are several equally effective remedies to choose from, the Commission needs to choose, in accordance with the principle of proportionality, the least restrictive remedy available.

In addition, where there are several possible remedies, the Commission must observe the undertaking’s freedom to conduct a business and the freedom of contract. In practice, this means that, unless it can be shown that a cease-and-desist order would not be suitable to bring the infringement to an end, the Commission is limited to imposing such an order to stop an infringement. This can be substantiated by the General Court’s finding in Automec with regard to

---

349 Charter of Fundamental Rights of the European Union (n 17) art 16; See further: Case C-283/11 Sky Österreich GmbH v Österreichischer Rundfunk EU:C:2013:28, paras 45-50.
350 This was for example the case in: Case T-201/04 Microsoft Corp v Commission of the European Communities EU:T:2007:289.
351 An illustrative example can be found in the ARA case, see ARA Foreclosure (n 150) para 144.
352 The right to property is protected in: Charter of Fundamental Rights of the European Union (n 17) art 17.
353 Case C-441/07 P European Commission v Alrosa Company Ltd (n 232) paras 38-41.
354 Joined cases C-241/91 P and C-242/91 P Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities (Magill) (n 230) para 91.
the remedy imposed by the Commission in order to bring an infringement of Article 101 TFEU to an end, that:

In particular, there cannot be held to be any justification for such a restriction on freedom of contract where several remedies exist for bringing an infringement to an end. (...) Consequently, the Commission undoubtedly has the power to find that an infringement exists and to order the parties concerned to bring it to an end, but it is not for the Commission to impose upon the parties its own choice from among all the various potential courses of action which are in conformity with the Treaty.355

Further, in Magill, a case regarding an infringement of Article 102 TFEU, the Court of Justice holds:

As the Court of First Instance rightly found, the imposition of that obligation with the possibility of making authorization of publication dependent on certain conditions, including payment of royalties was the only way of bringing the infringement to an end.356

Thus, where a cease-and-desist order may be used to bring the infringement to an end, the Commission cannot impose its own choice of a more specific remedy on the undertaking. Conversely, where a cease-and-desist order would not be suitable to bring the infringement to an end, the least restrictive remedy of a more specific nature may be imposed. Likewise, if a certain remedy represents the only way of bringing the infringement to an end (as in Magill), it is within the Commission’s powers to order such a remedy.

Moreover, it should be mentioned in this context that the Court of Justice held in Commercial Solvents that the Commission may require of undertakings that they suggest the remedy they considered most effective.357 Indeed, in the ARA

---

355 Case T-24/90 Automec Srl v Commission of the European Communities (n 159) para 52.
356 Joined cases C-241/91 P and C-242/91 P Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities (Magill) (n 230) para 91.
357 Joined cases 6/73 and 7/73 Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities (n 340) para 45; It can be noted that Article 3(3) of Regulation 17/62 on which the judgement in Commercial Solvents was based has now been replaced by Article 7 of Regulation 1/2003, which no longer includes a Commission power to request undertaking recommendations regarding remedies. However, where it is unclear how an undertaking should comply with a cease-and-desist order issued by the Commission, it appears sensible to have an informal dialogue between the Commission and the undertaking concerning remedies. See further: Giorgio Monti, ‘Behavioural Remedies for Antitrust Infringements - Opportunities and Limitations’ in Philip Lowe, Mel Marquis and Giorgio Monti (eds), European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law (Hart 2016) 197-98.
case the Commission imposed a structural remedy for the first time within the ambit of an Article 7 decision. In that case, the undertaking subject to the decision, ARA, suggested the remedy to the Commission in exchange for a reduction of the fine. The ARA case is extensively analysed further below, in particular with regard to the remedy imposed within the scope of the Article 7 decision. However, for the purposes of the assessment in the following sections, it can be considered as an exceptional case.

In sum, the requirements imposed on the Commission when designing remedies that are both effective and proportionate are extensive. These requirements make it burdensome to design a remedy that will reach the objective of actually stopping the prohibited conduct. As noted above, prohibition decisions are most often coupled with fines, to ensure that the undertaking in question is punished for the infringement and deterred from repeated infringements, or even the continuation of the current infringement. Thus, whether prohibition decisions actually bring infringements to an end is in many cases dependent on the effect of the imposed fine.

4.1.1.2 The means pursued by remedies

Since the coming into force of Regulation 1/2003, the Commission has imposed remedies beyond a cease-and-desist order in only four Article 7 decisions, of which one (CISAC) was annulled by the General Court. In addition, in early 2004, the Commission adopted its prohibition decision including specific behavioural remedies in the Microsoft case. That case is interesting to study with regard to the objective of bringing infringements to an end, in particular considering the extensive enforcement action carried out after the Commission took its initial decision. Even though this decision was one of the last decisions adopted under the old regime of Regulation 17/62, the powers of the Commission did not change in a crucial manner with regard to the imposition of remedies in Regulation 1/2003. Thus, Microsoft is also further analysed below.

358 ARA Foreclosure (n 150) para 161.
359 See section 5.6.2.
360 See also section 4.1.1.3
362 Microsoft (n 339).
363 See section 4.1.1.4.
Taking these five decisions imposing specific remedies into account, the Commission has, in the majority of cases resolved by Article 7 decision, left it to the undertaking to decide how to bring the infringement to an end. In the absence of periodic penalty payments imposed to end an infringement, it is difficult to assess whether those cease-and-desist orders were followed by undertakings. Nevertheless, with regard to the cases where a specific remedy was imposed, it is at least possible to assess whether that remedy was aimed at bringing an infringement to an end, at ending the effects of the infringement and/or at preventing repetition of an infringement.

In Microsoft, the Commission considered that Microsoft had infringed Article 102 TFEU on two counts: First, by refusing to make information concerning work group server interoperability available. Second, by tying Microsoft Windows to Windows Media Player. As a remedy for the first infringement, the Commission obliged Microsoft to provide access to the interoperability information on certain conditions. That remedy was aimed at bringing the infringement to an end and at allowing other undertakings to compete with Microsoft in the relevant market for work group servers, restoring competition. Regarding the second infringement, Microsoft was obliged to provide a version of Windows that Media Player was not tied to. That remedy was aimed at bringing the infringement to an end and restoring competition, although the latter was dependent on whether customers would actually buy the version of Windows without Media Player on it. However, there was little incentive to do so, as Microsoft could simultaneously continue to offer Windows and Media Player together without a price differentiation. Therefore, in practical terms, that remedy appears to have stopped short of the objective of restoring competition.

The Commission’s decision in CISAC was subsequently annulled, but not with regard to the remedy imposed and is therefore still of interest for the present analysis. The case concerned a number of reciprocal representation agreements between collecting societies that the Commission considered an infringement of Article 101 TFEU. The remedy imposed on CISAC and its member societies was to review the reciprocal agreements concluded between them and to provide the Commission with copies of these reviewed agreements. This remedy aimed at bringing the conduct the Commission considered illegal to an end. Since the infringement concerned certain contract

364 Microsoft (n 339) art 2.
365 ibid art 5.
366 Heinemann, ‘Behavioural Antitrust’ (n 102) 224.
367 CISAC (n 361) art 1.
368 ibid art 4.
clauses, it can be assumed that the Commission expected that competition would in effect be restored by ensuring that the relevant clauses were revised.

In *MasterCard*, the Commission considered that certain interchange fees adopted in the MasterCard payment system were contrary to Article 101 TFEU. The Commission subsequently ordered MasterCard to abolish the relevant interchange fees and to inform its participating banks and other institutions as well as the Commission of the changes made. MasterCard was also required to publish relevant information on the internet. The remedies imposed were mainly aimed at bringing the infringement and its effects to an end. However, the extensive duty of information imposed by the Commission can be interpreted as aiming to reach further, namely to ensure that all parties concerned gained knowledge of the infringement and the steps taken to bring that infringement to an end. Knowledge of such steps can lead to care being taken by, for example, customer banks to ensure that competition in the relevant market is re-instated and to produce resistance, should the infringement be repeated. Furthermore, an information remedy can be said to aim at the reputational concerns of the infringing undertaking and may provide peer pressure to ensure compliance in the long run.

In *Google Search*, the Commission concluded that Google infringed Article 102 TFEU, chiefly by displaying its comparison shopping service in a manner that differed from how competing services were displayed. At first glance, the remedy the Commission imposed on Google appears to be a cease-and-desist order coupled with a reporting duty to the Commission. However, the text of the decision sets out detailed criteria for the measures to be adopted by Google to comply with the Commission’s decision. Amongst other things, the Commission obliged Google to treat competing services in the same way as its own service with regard to ‘(…) visibility, triggering, ranking or graphical format of a search result in Google's general search results pages (…)’.

Such a remedy aimed not only to remove the infringement, but also to remove the effects of it, thus restoring competition in the relevant market. It could be argued that the remedy went beyond the objective of bringing the infringement to an end, dictating to Google the conditions under which it was permitted to operate its own service as well as the conditions it should offer to competitors. However, as it is up to Google to design the detailed

---

369 *MasterCard, EuroCommerce and Commercial Cards* (n 361) art 1.
370 ibid arts 3-4.
371 ibid art 1.
372 See section 1.3.4.
373 *Google Search (Shopping)* (n 151) arts 3-4.
374 ibid para 700.
375 ibid para 700(c).
implementation of the remedy, it is difficult to analyse the remedy in detail without considering Google’s implementation of the remedy, which would go beyond the scope of this study.\textsuperscript{376}

In \textit{ARA}, the Commission did not design the remedy entirely on its own, but received cooperation from ARA, who also acknowledged the proportionality of the remedy.\textsuperscript{377} The remedy as such should therefore not be compared to the remedies imposed in the other cases discussed here. However, it is still relevant to consider the objective pursued by the Commission in making that remedy binding. \textit{ARA} infringed Article 102 TFEU by refusing access to part of a waste collection structure in Austria to a competing undertaking.\textsuperscript{378} The remedy consisted of the divestiture of part of that waste collection structure.\textsuperscript{379} The Commission’s justification for that far-reaching remedy is instructive:

The divestiture of the part of the household collection infrastructure which ARA owns is necessary to ensure that the infringement will not be repeated. (…) While, in practice, [refusal of access to the infrastructure] has not been an issue at the beginning of 2015, when a number of new competitors entered the market, the divestiture of the part of the household collection infrastructure ARA owns would remove ARA’s possibility to refuse in the future access to the part of the household collection infrastructure it owns.\textsuperscript{380}

Thus, the remedy imposed in the \textit{ARA} case appears to have been designed solely to prevent a repetition of the conduct in question. While it is true that ARA had circumvented a previous obligation by the Commission to grant access to its waste collection infrastructure, the remedy does not appear to be aimed at ensuring that the infringement or its effects are brought to an end. Indeed, the Commission acknowledged in its decision that the infringement had already been ended.\textsuperscript{381} The remedy is thus not directly related to the infringement found by the Commission. It is therefore questionable whether the remedy would have withheld Court scrutiny had the Commission designed it on its own.\textsuperscript{382}

Considering the five cases and the respective remedies analysed in this section, it appears that the Commission mostly aims at bringing infringements to an end and restoring competition. The remedies analysed above seem to have been designed on a case-by-case basis and there is no visible ‘pattern’ regarding the design of remedies \textit{vis-à-vis} the objectives to be reached.

\textsuperscript{376} The \textit{Google} case is further analysed in section 5.6.1.
\textsuperscript{377} \textit{ARA Foreclosure} (n 150) para 148.
\textsuperscript{378} ibid art 1.
\textsuperscript{379} ibid arts 3-4.
\textsuperscript{380} ibid paras 140-41.
\textsuperscript{381} ibid para 138.
\textsuperscript{382} See further section 5.6.2.
However, there are too few existing cases to be able to draw any more far-reaching conclusions as regards the question of to what extent the Commission pursues the objective of bringing infringements to an end by means of remedies.

4.1.1.3 Evidence of whether undertakings actually bring infringements to an end

The Commission may impose periodic penalty payments according to Article 24 of Regulation 1/2003 *inter alia* to force undertakings to stop an infringement subject to an Article 7 decision or to comply with commitments made binding by an Article 9 decision. For that purpose, the Commission may impose a sum of up to 5 per cent of the average daily turnover of the undertaking in the preceding business year per day of non-compliance with the relevant previous decision. Studying whether and to what extent the Commission imposes periodic penalty payments on undertakings to force them to bring infringements to an end is thus one way of inquiring whether this objective is actually reached by Article 7 decision, especially where the Commission aims to bring an infringement to an end by a cease-and-desist order.

There is only one case where the Commission has imposed a periodic penalty payment on an undertaking for non-compliance with a remedy in the Commission’s database: the first Microsoft case. In that case, the Commission required Microsoft to make certain server interoperability information available to competitors under reasonable conditions. Microsoft, despite confirmation of that obligation by the General Court, did not comply with the obligation and was fined a total of EUR 899 million by the Commission.

There are several possible explanations for why the Commission rarely imposes periodical penalties on undertakings, which do not bring infringements to an end. Either, undertakings actually comply with the Commission’s orders once they have been found to be in breach of Article 101 or 102 TFEU. Or, it is difficult to detect such breaches and/or the Commission does not make it a priority to monitor undertakings in this manner. It may also be that the Commission relies to a large degree on complaints with regard to the compliance of undertakings previously found in infringement of Article 101 or 102 TFEU.

Hence, while the Commission has certain instruments at its disposal to ensure that infringements are actually brought to an end, the absence of regular use

---

383 This search was carried out with help of: European Commission, ‘Case Search’ (n 121).
of periodic penalty payments does not allow any conclusions to be made concerning the question of whether or not undertakings actually do bring infringements to an end or not.

4.1.1.4 The Microsoft Case

The Microsoft case is a useful example further illustrating both the options available to the Commission as well as the limitations with regard to bringing infringements to an end.

The Commission adopted its original prohibition decision according to Article 3 of Regulation 17/62 (the equivalent of, after amendment, Article 7 of Regulation 1/2003) on 24 March 2004 (the 2004 Decision). It would take over eight years, until 2012, to fully conclude this case. In the 2004 decision, the Commission found that Microsoft had abused its dominant position in two separate ways, namely by:

- refusing to supply the Interoperability Information and allow its use for the purpose of developing and distributing work group server operating system products, from October 1998 until the date of this Decision;
- making the availability of the Windows Client PC Operating System conditional on the simultaneous acquisition of Windows Media Player from May 1999 until the date of this Decision.

As will be remembered, to ensure that these two infringements were brought to an end, the Commission imposed two remedies on Microsoft. As regards (a), the Commission obliged Microsoft to make interoperability information for the work group server available on reasonable and non-discriminatory terms. As regards (b), Microsoft was obliged to offer a variant of Windows which did not include Media Player.

Procedure-wise, Microsoft appealed the Commission’s prohibition decision to the Court of First Instance (now the General Court). That case was decided in 2007. Microsoft also made an application to the President of the Court of First Instance to suspend the Commission’s decision as regards the obligation on Microsoft to bring the infringements to an end and to adopt remedies while...

---

385 Whole books have been written on this case. See for example: Luca Rubini, *Microsoft on Trial: Legal and Economic Analysis of a Transatlantic Antitrust Case* (Edward Elgar 2010).
386 Microsoft (n 339).
388 The remedy also contained further details. See: Microsoft (n 339) art 5.
389 ibid art 6.
390 Case T-201/04 *Microsoft Corp. v Commission of the European Communities* (n 350).
the appeal was pending. That application was rejected on 22 December 2004.  

The issue of making interoperability information available was subject to further enforcement action by the Commission, as Microsoft did not make that information available as had been specified by the Commission. Notwithstanding the pending appeal to suspend parts of the Commission’s decision, the Commission proceeded to compel Microsoft to supply the required interoperability information by threatening periodic penalty payments.  

On 10 November 2005, the Commission brought that threat into action by adopting a decision to impose a periodic penalty payment of EUR 2 million per day from 15 December 2005 in case of non-compliance with the obligation to make the interoperability information on work group servers available. The issue of interpreting the terms making interoperability information available and achieving compliance with that remedy continued for a number of years. The point that Microsoft and the Commission disagreed on was what ‘reasonable and non-discriminatory terms’ for the interoperability information would be. Specifically, this concerned the innovation contained in the protocols and the pricing attached to those protocols. This shows that a broadly formulated remedy by the Commission may give rise to problems in enforcing that remedy, making it more difficult to bring an infringement to an end. A challenge faced by the Commission in this regard is defining a remedy within the confines of Article 7 of Regulation 1/2003 without any assistance from the undertaking involved. Lacking expert knowledge about the practical workings of a certain market, it is very difficult for the Commission to define a proper remedy that can easily be implemented by the undertaking in question and will actually remove the infringement in question in a satisfactory manner.

In parallel with the Commission’s efforts to make Microsoft comply with its 2004 decision, it also employed a new mechanism for ensuring such compliance.

---

391 Case T-201/04 R Order of the President of the Court of First Instance of 22 December 2004 in Microsoft Corp v Commission of the European Communities EU:T:2004:372, para 41.
393 ibid art 1.
compliance with the help of a third party, a monitoring trustee. Article 7 of the Commission’s 2004 Decision read:

Within 30 days of the date of notification of this Decision, Microsoft Corporation shall submit a proposal to the Commission for the establishment of a suitable mechanism assisting the Commission in monitoring Microsoft Corporations compliance with this Decision. That mechanism shall include a monitoring trustee who shall be independent from Microsoft Corporation. In case the Commission considers Microsoft Corporation’s proposed monitoring mechanism not suitable it retains the right to impose such a mechanism by way of a decision.396

As with the discussions regarding interoperability, the Commission was not satisfied with Microsoft’s initial proposals as regards the monitoring mechanism that should be set up. The Commission finally made its own proposal regarding a mechanism that it found suitable. Microsoft responded to that proposal and the Commission finally produced a revised monitoring mechanism that included the appointment of a monitoring trustee.397

However, in its appeal to the General Court, Microsoft also claimed that Article 7 of the Commission’s 2004 Decision, pertaining to the monitoring trustee, should be annulled. While the remainder of Microsoft’s appeal was dismissed, the General Court partially annulled the 2004 Decision, holding that the Commission had gone beyond its competences by bestowing far-reaching investigative powers on a third party and by requiring Microsoft to pay for the monitoring of its compliance with the Commission’s decision.398

The Commission subsequently amended the duties of the monitoring trustee and paid for the expenses incurred until finally deciding to replace the trustee with periodic checks of Microsoft’s compliance.399 Since the Microsoft case, the Commission has not used trustees for the monitoring of compliance with remedies imposed under Article 7 decisions. However, monitoring trustees have become a common feature of Article 9 decisions.400 Thus, it is not only the design and implementation of remedies that may pose difficulties for the Commission, but also the monitoring of continued compliance with behavioural remedies.

396 Microsoft (n 339) art 7.
397 Microsoft (Decision regarding trustees (establishment)) (Case COMP/37.792) Commission Decision C(2005) 2988 final, not published.
398 Case T-201/04 Microsoft Corp. v Commission of the European Communities (n 350) paras 1268-74.
399 Microsoft (Decision regarding trustees (repeal)) (n 387) recitals 11-16.
The Microsoft case, while being unusual with regard to the level of enforcement action carried out by the Commission after the 2004 Decision was adopted, illustrates an important point: imposing only cease-and-desist remedies to bring infringements to an end may appear unsatisfactory as it is difficult to ensure compliance. However, it is not certain that the imposition of specific behavioural remedies will lead to a better result with regard to bringing an infringement to an end.

4.1.2 Punishing and deterring infringers

In this section, the second major objective, to punish and deter infringers, is assessed. In EU competition law enforcement, the only means of punishing infringers is through the imposition of fines. The Commission may impose fines of up to ‘10% of the total turnover in the preceding business year’ on an undertaking or an association of undertakings which have infringed Article 101 and/or 102 TFEU. These fines may be imposed on undertakings, not individual infringers.

As established above, fines have two objectives; punishment being one and deterrence the other. From the perspective of deterrence theory, the achievement of punishment and deterrence hinges on the magnitude of the fine imposed. If the fines are too low, undertakings will continue or repeat infringements. If they are too high, potentially beneficial measures may be deterred. Therefore, the calculation of fines is discussed extensively below. Beyond deterrence, fines for infringements of Articles 101 and 102 TFEU also have a retributive aim. This aim requires that the magnitude of the fine is proportionate to the seriousness of the infringement.

In the following section, the Commission’s Fining Guidelines are described, being a point of reference for subsequent assessment. Then, it is considered to what extent the Fining Guidelines reflect the retribution and deterrence objectives of fines. Further, the question of whether the imposition of deterrent fines may be hampered by constraints imposed by the principle of proportionality is analysed. With regard to the calculation of deterrent fines, it is considered what difficulties are attached to the calculation of such fines. Retroactive calculations by economists regarding the fines imposed by the Commission are further surveyed to establish the whether these fines act as a

---

401 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 23(2).
402 See section 3.1.2.
403 See section 3.1.2.
404 See section 1.3.2.2.
405 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28).
deterrent. Additionally, the frequency of recidivism among infringers of competition law is also considered as an indicator of how well specific deterrence by means of fines is working.

4.1.2.1 **The Commission’s Fining Guidelines**

The Commission’s Fining Guidelines set out the methodology used by the Commission to calculate fines according to Article 23(2)(a) of Regulation 1/2003. The Commission first sets a basic amount for a fine. This amount is based on the value of the sales of the products concerned in the last full year of participation in the illegal conduct. The Commission sets the basic amount of the fine at up to 30 per cent of the sales value, and depending on the gravity of the infringement, the basic amount may be higher or lower on that scale. This amount will then be multiplied by the number of years that the undertaking has been involved in the infringement. Periods of less than six months are counted as half a year and periods of longer than six months are counted as a whole year. Moreover, an ‘entry penalty’ of 15-25 per cent of the sales value is added to the basic amount in the case of horizontal price fixing, market sharing, output limitation agreements and other especially harmful infringements.

Secondly, the Commission may adjust the basic amount up or down depending on certain factors. Aggravating factors are (1) continued or repeated infringement after a finding of infringement of Article 101 or 102 TFEU; (2) refusal to cooperate with the Commission; or (3) being the ringleader in the infringement. Mitigating factors that may be taken into account include (1) the undertaking terminated the infringement as soon as the Commission intervened (this does not apply to cartels); (2) the undertaking committed the infringement negligently, instead of intentionally; (3) the undertaking cooperated with the Commission beyond its legal obligation and outside the scope of the Leniency Notice; and (4) the conduct of the undertaking has been authorised or encouraged by national authorities or by legislation.

Lastly, the Commission may grant a further reduction of the fine if the fine would ‘irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.’ The Commission may

---

406 ibid.
407 ibid para 13.
408 ibid para 21-22.
409 ibid para 24.
410 ibid para 25.
411 ibid para 28.
412 ibid para 29.
413 ibid para 35.
also increase the fine further to ensure that the fine has a deterrent effect.\textsuperscript{414} The final fine may never exceed 10 per cent of the turnover of the preceding year as set out in Regulation 1/2003.\textsuperscript{415}

4.1.2.2 The Fining Guidelines and retribution theory

Unlike deterrence theory, retribution theory does not include an arithmetical means of calculating a retributive fine. Rather, the punishment that is ‘deserved’ for a certain deed is generally a matter of assessment that may evolve over time.\textsuperscript{416} What punishment is ‘deserved’ may be related to two main criteria, the harm caused by the infringement and the culpability of the infringer.\textsuperscript{417} Both of these elements are present in the Fining Guidelines: With regard to harm the Guidelines state:

The basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement. (emphasis added)\textsuperscript{418}

That the degree of gravity of the infringement relates to the harm caused by the infringement is expressed by the Commission in naming the criteria decisive for the proportion of the value of sales taken into consideration in the basic amount as:

(…) the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.\textsuperscript{419}

With regard to the culpability of the infringing undertaking, paragraphs 28-29 of the Fining Guidelines list a number of mitigating and aggravating circumstances. For example, a fine may be decreased if an undertaking submits evidence that the infringement was committed negligently.\textsuperscript{420} In contrast, a fine may be increased if the undertaking has been the instigator of an infringement.\textsuperscript{421}

An element of the Commission’s approach to the calculation of fines, which may be argued is not in line with retributive theory, is the basis upon which a

\textsuperscript{414} ibid para 30.
\textsuperscript{415} ibid para 32.
\textsuperscript{416} Only consider how criminal punishments, especially the use of capital punishment, have changed over time.
\textsuperscript{417} See section 1.3.2.2.
\textsuperscript{418} Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28) para 19.
\textsuperscript{419} ibid para 22.
\textsuperscript{420} ibid para 28.
\textsuperscript{421} ibid para 29.
fine is calculated, namely the value of the sales of the undertaking in question. This concern mainly applies to infringements of Article 101 TFEU that by their very nature are committed by several undertakings together. Taking the value of the sales of an undertaking as the basis of a fine will inevitably lead to varying fines for similar infringements. For example, imagine a cartel between two undertakings, A and B, concerning product x. Where A and B sell x at different values, since fines are based on the value of sales, their fines will in all likelihood differ, even if no aggravating or mitigating circumstances apply in the case. As a result, it is possible to argue that the retributive aim is not reached where two undertakings that are part of the same infringement receive different punishments. However, it could also be argued that this type of differentiated punishments is in line with retributive theory, because they are directly related to an undertaking’s illegitimate gains from the infringement. This view is also supported by the General Court, which justifies the use of the value of sales as a basis for the calculation of fines.

That turnover figure is likely to give a fair indication of the liability of each undertaking on those markets, since it constitutes an objective criterion which gives a proper measure of the harm which the offending conduct represents for normal competition and it is therefore a good indicator of the capacity of each undertaking to cause damage.\footnote{Case T-446/05 Amann & Söhne GmbH & Co KG and Cousin Filterie SAS v European Commission EU:T:2010:165, para 188.}

Further, the Commission holds that the value of sales reflects ‘(…) the relative weight of each undertaking in the infringement.’\footnote{Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28) para 6.}

Another issue with regard to retribution theory is the 10 per cent limit of the fine in relation to the undertaking’s turnover of the previous business year.\footnote{ibid para 32.} In some cases, this limitation could lead to a fine that is lower than the full desert being imposed. However, it is submitted here that the 10 per cent limit is rather a reflection of the principle of proportionality, relating to undertaking’s size and consequently their ability to pay.\footnote{Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 23(2); Case T-352/09 Novácke chemické závody a.s. v European Commission (n 300) para 138.} The 10 per cent limit of the fine can also be construed as setting out the maximum desert considered proportionate with regard to an infringement of competition law. Reviewing the Commission’s Fining Guidelines, the method used to calculate fines includes the main criteria for fines in retributive theory – the harm caused by the infringement and the culpability. Thus, fines imposed under the
Commission’s Fining Guidelines can be expected to reach the retributive objective of imposing a proportionate punishment on the undertaking in question.

4.1.2.3 The Fining Guidelines and deterrence theory

Within the enforcement of competition law, it is commonly assumed that undertakings strive to maximise profits and are thus deterred by fines that exceed the gains of a competition law infringement, taking into consideration the probability of being caught.\textsuperscript{426} This assumption is the basis on which the following assessment of the Commission’s Fining Guidelines in relation to deterrence theory is carried out.

How a fine that acts as a deterrent should be calculated is subject to a sizeable amount of literature in economics. According to Landes, the fine should be based on the infringement’s expected ‘net harm to others’\textsuperscript{427} This includes not only the gain for the undertaking engaging in the unlawful behaviour, but also the deadweight loss\textsuperscript{428} imposed on society.\textsuperscript{429} Other scholars only use the illicit gains earned from the competition law infringement as a starting point.\textsuperscript{430} They justify this difference in starting points by the difficulty of calculating the harm caused to others. Also, Combe and Monnier argue that cartels, being illegal, can always be assumed to be harmful, and that basing fines on illicit gains creates a more cautious approach to the fines necessary to achieve a deterrent effect.\textsuperscript{431} After choosing their basis for the calculation of fines, economists seem to agree that this basis should be divided by the inverse of the probability of being caught to take account of the uncertainty of discovery.\textsuperscript{432}

In the Fining Guidelines, the basis for calculating fines is the value of the sales of the product(s) concerned by the infringement.\textsuperscript{433} This points to a method

\begin{itemize}
  \item \textsuperscript{426} Case T-329/01 Archer Daniels Midland Co. v Commission of the European Communities (n 260) para 141.
  \item \textsuperscript{428} Deadweight loss is the cost to society caused by the allocative inefficiency of, inter alia, cartels. See: ibid 457.
  \item \textsuperscript{429} Connor and Lande (n 427) fn 18.
  \item \textsuperscript{430} Combe and Monnier (n 3) 11–12.
  \item \textsuperscript{431} ibid 11.
  \item \textsuperscript{432} Richard A Posner, \textit{Antitrust Law} (2nd edn, University of Chicago Press 2001) 269; Connor and Lande (n 427) 433; Allain, Boyer and Ponsard (n 305) 32.
  \item \textsuperscript{433} Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28) para 19.
\end{itemize}
relating to the illicit gains made by the offender. As a result, this basis could be qualified as pursuing absolute deterrence, rather than optimal deterrence. However, it must be pointed out that optimal deterrence theory includes a weighing exercise between benefits and harm of an infringement of law that is not reflected in the mechanics of EU competition law enforcement: considerations of potential benefits of a competition law infringement are not made when calculating fines. Rather, potential benefits from a competition law infringement are taken into account at in the substantive assessment of whether or not an infringement of competition law has occurred, for example by applying Article 101(3) TFEU. Therefore, EU competition law takes potential benefits of conduct formally in violation of Article 101 or 102 TFEU into account, but at an earlier stage. Consequently, fines imposed for an infringement of Article 101 or 102 TFEU cannot be clearly qualified in line with either optimal or absolute deterrence theory.

After setting the basic amount of the fines, the Commission seeks to deter offenders by increasing that amount of the fine with a certain percentage to both deter undertakings from entering into competition law infringements and to ensure that the fine reflects the illegal gains. In basic terms, the method for calculating fines can therefore be said to reflect the main tenets of deterrence theory. Yet, there is no indication as to how the Commission calculates the appropriate amount by which to increase the fine. Indeed, it must be acknowledged here that it is probably in the interest of achieving a sufficiently deterrent effect of fines that the magnitude of fines is not completely foreseeable for undertakings, as fines would otherwise become a matter of simple calculation for undertakings.

However, there is an upper limit as to the fine that the Commission can impose on an undertaking, since it is constrained to imposing a maximum of 10 per cent of an undertaking’s turnover of the previous business year. As a result, it is not certain that the Commission is able to impose a fine that acts as a deterrent as the 10 per cent maximum restrains it freedom in this regard. This may for instance be the case when considering infringements which have been

---

435 See section 1.3.2.1.
437 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28) paras 25 and 30-31.
ongoing for many years and include a large proportion of the total sales of an undertaking.439

According to economic theory, a number of further factors may impact the deterrent effect of fines more generally. It can therefore be assessed to what extent these factors are taken into account by the Commission when calculating fines.

Firstly, the presence of a leniency programme, such as the one used by the Commission, shall increase the probability of being caught and fined for an infringement of EU competition law. A leniency programme creates a prisoner’s dilemma for undertakings involved in a cartel: it produces uncertainty as to whether one of the cartel members will turn in the others to a competition authority.440 However, a leniency programme by definition reduces or eliminates fines for certain actors.441 As a result, the deterrent effect of fines may decrease in the presence of leniency programmes.442 As Allain et al. point out, the introduction of a leniency programme is thus a trade-off: while increasing the probability of detection, they also decrease the cost of infringements. Careful design of the leniency programme is necessary to avoid a negative trade-off in the sense of decreasing deterrence.443 Of course, the Commission may also have taken this factor into account when introducing the Leniency Notice by increasing the general level of fines. This cannot be deducted from the wording of the Fining Guidelines, but it can be noted that the Leniency Notice and the Fining Guidelines were both last updated in 2006.444

Secondly, infringements of competition law may suffer from principal-agent problems.445 This means that in a situation where an employee acts on behalf of an undertaking, for example, by inducing the undertaking’s participation in

439 See also: Maarten Pieter Schinkel, ‘Effective Cartel Enforcement in Europe’ (2007) 30 World Competition 539, 564.
440 Regarding prisoner’s dilemmas, see: Motta (n 101) 544–45.
441 See: Commission Notice on immunity from fines and reduction of fines in cartel cases (n 27).
442 Schinkel (n 439) 562–63; Allain, Boyer and Ponssard (n 305) 36.
443 Allain, Boyer and Ponssard (n 305) 36.
444 Commission Notice on immunity from fines and reduction of fines in cartel cases (n 27); Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28).
a cartel, the preferences of the employee may take precedence over the preferences of the undertaking. The employee may be eager to reach a personal target and a cartel may help achieve this objective. However, the undertaking may have to pay a high price (in the form of a fine) in order to achieve an employee’s personal objective. In such cases, principal-agent problems may be offset by fining not only the undertaking, but also the individuals involved.\textsuperscript{446} Under the current framework of EU law, this is not possible, but several Member States use both sanctions for undertakings and for individuals.\textsuperscript{447}

Thirdly, the option to settle a case may decrease the deterrent effect of a fine, due to the imposition of lower fines.\textsuperscript{448} In EU competition law, two types of ‘settlements’ must be distinguished. Firstly, cartel settlements and secondly, Article 9 decisions. In cartel settlements, undertakings participating in the cartel receive a reduction of their fine even though they have infringed EU competition law, inevitably leading to decreased specific deterrence.\textsuperscript{449} This reduction is justified due to increased procedural efficiency, allowing the Commission to deal with more cases.\textsuperscript{450} If cartel settlements indeed contribute to raising the probability of detection, lower fines may be balanced out with regard to deterrence. In Article 9 decisions, no infringement of competition law is found. Furthermore, the remedies offered by the undertakings are based on the ‘concerns’ of the Commission and not on a full investigation of the relevant case.\textsuperscript{451} The consequences of these two forms of ‘settlements’ on the deterrent effect of fines imposed under Article 7 decisions are not considered by the Commission in its Fining Guidelines.

Fourthly, when undertakings have previously infringed competition law and are involved in a repeat infringement, the question is whether that circumstance should be considered an aggravating circumstance. Assuming


\textsuperscript{447} Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 23; For an example of a Member State where it is possible to sanction individuals, see German law: Gesetz über Ordnungswidrigkeiten (OWiG) §9; Gesetz gegen Wettbewerbsbeschränkungen (GWB) §81.


\textsuperscript{449} 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 (n 26) para 32.

\textsuperscript{450} See further section 4.2.

\textsuperscript{451} Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 9.
perfect deterrence, it is economically not justified to impose higher fines on repeat offenders, since this would lead to over-deterrence which could hinder desirable conduct. Conversely, if there is under-deterrence, using repeat offences as an aggravating circumstance may actually be beneficial, since this increases the deterrent effect of the fine.\textsuperscript{452} The Commission holds in its Fining Guidelines that certain repeat offences may be counted as aggravating circumstances resulting in a multiplication of the applicable fine with up to 100 per cent per infringement.\textsuperscript{453} In that regard, the Commission also takes infringements found by national competition authorities in the EU into account.\textsuperscript{454} Using recidivism as an aggravating factor refers to the retributionist view that repeat offenders are more culpable than first-time offenders. Thus, a certain conflict between the aims of retribution and deterrence pursued by the Commission’s fines can be identified here. However, this conflict only materialises in case fines are so high that they already act as a deterrent.

Fifthly, the costs incurred by the enforcement of competition law, that is by the investigation and punishment of an infringement, must be added to the fine. This is because the harm to others caused by the infringement includes not only the harm that results directly from the infringement, but also the cost of enforcing competition law.\textsuperscript{455} In the Fining Guidelines, there is no mention of the Commission taking note of such costs.

Lastly, the presence of private enforcement may have an impact on the deterrent effect of a fine. If damages and fines imposed by public enforcers add up to large amounts, this may lead to over-deterrence. While the Fining Guidelines do not take account of private enforcement, its effect on general deterrence is further considered below.\textsuperscript{456}

Thus, it is on the whole possible to regard the method presented in the Commission’s Fining Guidelines, using the sales of the affected products as a proxy, as being based on the methodology proposed in deterrence theory. However, it is unclear how the Commission calculates the increase of a fine that shall act as a deterrent. Nor does any consideration appear to be taken of the effects of settlements, leniency applications, the cost of enforcement or private enforcement on fines that are imposed as a deterrent in the Fining Guidelines. In defence of the Commission, at least certain factors, such as


\textsuperscript{453} For the definition of this term, see section 4.1.2.8.

\textsuperscript{454} Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28) para 28.


\textsuperscript{456} See section 4.1.3.2.
settlements, private enforcement and leniency may be accounted for by adjusting the general level of fines accordingly, something which would not be apparent in the Fining Guidelines.

4.1.2.4 The principle of proportionality as a limit to fines imposed as a deterrent

In economic theory, specific deterrence can be achieved in different ways, depending on the balance between the magnitude of the fines and the probability for the infringer of being detected. To save enforcement resources, the likelihood of getting caught may be set quite low, resulting in the necessity to impose high fines. However, within the EU legal and constitutional framework this may be at odds with the general principle of proportionality, requiring fines to be proportionate to the infringement in question.457

The General Court and the Court of Justice exercise unlimited jurisdiction over the setting of fines in EU competition law cases.458 Thus, the Court may amend a fine where it does not doubt the lawfulness of the Article 7 decision itself, for example where it finds that the infringement has not been proven for a certain period of time.459 The General Court has held that the Commission must comply with the rules for setting fines established in Regulation 1/2003 as well as in the Commission’s own Fining Guidelines.460 Furthermore, the Commission must give reasons to justify the amount of the fine.461 Nonetheless, it is up to the applicant to show to the Court that the Commission has not complied with these requirements. It seems that in this respect, the principle of proportionality is often invoked but seldom succeeds as an argument before the Court.462

With regard to setting the level of fines, the General Court has held that:

[I]t must be recalled that the Commission’s earlier decision-making practice does not serve as a legal framework for fines in competition matters (...). In the context of Regulation No 1/2003, the Commission possesses a wide margin of discretion when setting fines, in order that it may direct the conduct of

457 See section 2.3.2.
459 Tridimas (n 215) 172.
461 Case T-352/09 Novácke chemické závody a.s. v European Commission (n 300) para 50.
462 See, for example: ibid para 163; Case T-155/06 Tomra Systems ASA and Others v European Commission (n 460) para 321; Case C-89/11 P EON Energie AG v European Commission EU:C:2012:738, para 134.

103
undertakings towards compliance with the competition rules. Therefore, the fact that the Commission may have applied fines of a certain level in the past to certain types of infringement does not mean that it is stopped from raising that level, within the limits set out in Regulation No 1/2003, if that is necessary in order to ensure the implementation of Community competition policy. (...)

This line of reasoning, underlining the Commission’s wide discretion when calculating fines, is upheld with regard to more specific complaints concerning the Commission’s method of calculating fines. For example, in Amann & Söhne, the applicants complained that the Commission had infringed the principle of proportionality when calculating the fine imposed on that undertaking. All the arguments given were rejected by the General Court and it is possible to trace them back to the discretion of the Commission. Firstly, the applicants complained that the Commission had not considered the size of the relevant market, to which the General Court responded that:

Although market size may constitute a factor to be taken into account in establishing the gravity of the infringement, its importance varies according to the particular circumstances of the infringement concerned.

Secondly, the applicant complained that only the turnover and not the size of the undertakings was considered when the fines were set for different parties to the infringement. This was rejected because:

That turnover figure is likely to give a fair indication of the liability of each undertaking on those markets, since it constitutes an objective criterion which gives a proper measure of the harm which the offending conduct represents for normal competition and it is therefore a good indicator of the capacity of each undertaking to cause damage.

Thirdly, the complaint about a ‘flat-rate system’ introduced by the Fining Guidelines was rejected by the General Court, since:

As part of its review of the lawfulness of the Commission’s exercise of its discretion in the matter [of calculating fines], the Court must confine itself to

---

464 Case T-446/05 Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS v European Commission (n 422) para 163.
465 ibid para 164.
466 ibid para 176.
467 ibid para 165.
468 ibid para 188.
469 ibid para 166.
checking that the division of the cartel members into categories is consistent and objectively justified, and must not automatically substitute its own assessment for that of the Commission.\textsuperscript{470}

According to the General Court, the Commission has the discretion to choose how factors are weighted during the calculation of the fines in each individual case. Further, it has the discretion to choose the method used to calculate the fines, including the basis for that calculation, without being second-guessed by the Court. These freedoms set the standard of proof for the applicant claiming a breach of the principle of proportionality very high and make it easy for the Commission to stay within the limits of the principle of proportionality. Furthermore, the Court has consistently refused arguments claiming that a proportionate fine may be defined according to the fine imposed on other undertakings.\textsuperscript{471} Thus, it is submitted here that the Court considers the principle of proportionality on appeal against decisions of the Commission, but the review is in reality not particularly intense and very dependent on the strength of the arguments put forward by the applicants.

It appears thus that the Court considers that the statutory 10 per cent maximum of the fine is sufficient to ensure that the principle of proportionality is observed, unless there is a strong reason suggesting otherwise.\textsuperscript{472} Obviously, that maximum is set arbitrarily, but it provides a certain safeguard against disproportionate fines and undertaking bankruptcy which would be contrary to the aim of competition law enforcement.

In practice, according to the Commission’s own cartel statistics as of 31 December 2017, 7.25 per cent of undertakings involved in cartels have received a fine of 9 per cent or higher related to their annual turnover under the 2006 Fining Guidelines (excluding leniency applicants), suggesting that these undertakings may have benefitted from the 10 per cent maximum.\textsuperscript{473} This indicates that for a small number of undertakings involved in cartels, the principle of proportionality had an impact on their fine.

Thus, in both theory and practice, the principle of proportionality does not impose a strong constraint on the Commission when setting the amount of a fine.

\textsuperscript{470} ibid para 196.
\textsuperscript{471} Joined cases 100 to 103/80 \textit{SA Musique Diffusion française and others v Commission of the European Communities} EU:C:1983:158, paras 108-09; Case T-155/06 \textit{Tomra Systems ASA and Others v European Commission} (n 460).
\textsuperscript{472} See for example: Case T-352/09 \textit{Novácke chemické závody a.s. v European Commission} (n 300) para 139.
4.1.2.5 Assumptions in the calculation of fines imposed as a deterrent

Given that the Commission’s current method of calculating fines does not allow an inference of exactly how the Commission calculates fines that shall act as a deterrent, it is relevant to consider how the Commission could calculate such fines with reference to economic theory. This would be an exceptionally difficult task, as the survey of economist’s research regarding the assumptions and estimates necessary to calculate cartel fines, conducted below shows. The assumptions and estimates presented below are limited to those necessary to calculate the basic parameters of fines: the probability of detection and the harm to others or illicit gains achieved by the cartel.

The presentation of these factors serves two purposes: to illustrate the difficulties associated with calculating fines that act as a deterrent in practice and to outline the basic parameters used by economists in studies regarding the question of whether the Commission’s fines are sufficiently high to have a deterrent effect, presented in the following section. A caveat that should be made is that the studies cited below relate to cartels-type infringements of Article 101 TFEU only. This issue will be addressed separately below.474

With regard to the probability of detection, a large number of studies using different methods have been conducted. Naturally, it is not possible for one study to reach a definite conclusion regarding the probability of detection concerning competition law infringements. Cartels are secretive by nature and thus it is only possible to make an estimate in any one study. Different methods have been employed to estimate the detection rate: Some studies, such as the ones by Bryant and Eckhard475 or Miller,476 are based on data samples of detected and sentenced cartels. Other studies, such as those conducted by Feinberg477 or Deloitte,478 include surveys of legal professionals on the estimated detection rate. Studies concerning EU competition law enforcement have arrived at the following conclusions: A study from 2008 by Combe et al. concludes that the detection rate of cartels in the EU lies between 12.9 per cent

---

474 See section 4.1.2.7.
477 Feinberg (n 123).
and 13.2 per cent. They reach this conclusion based on the number of cartels detected by the Commission between 1969 and 2007, and by employing the ‘natural’ life cycle of cartels as a proxy for estimating detection rates. Ormosi examines cartels detected by the Commission between 1985 and 2009 and concludes that up to a fifth (20 per cent) of cartels were detected, although he computes differing detection probabilities over time. Ormosi applies a different method then Combe et al., using capture-recapture methodology originally developed in ecology. The calculation of the probability of detection in this method is based on ‘captured’ undertakings (first-time offenders) in relation to ‘recaptured’ undertakings (repeat offenders). It is important to note that both of these studies compute upper bounds for the probability of detection, since they are based on cartels that have actually been detected.

Besides the probability of detection, the other main factor in the calculation of fines aiming at optimal deterrence is the ‘harm to others’ incurred by the infringement in question. As already noted, some authors, such as Combe and Monnier, argue that it is too difficult to calculate the harm to others, and thus base their calculations on the illicit gains achieved by anti-competitive behaviour. Other studies, such as Connor and Lande’s as well as Veljanovski’s, nevertheless use harm as a benchmark. To calculate the illicit gains achieved by a cartel, it is necessary to ascertain three parameters: the overcharge resulting from the cartel, the competitive markup on the product in question and the price-elasticity of demand of the product in question. It is then possible to calculate the harm to others by adding the deadweight loss to the illicit gains.

Firstly, the overcharge resulting from cartels or other infringements of competition law must be calculated. Since the illicit gain of a cartel stems from the overcharge imposed on customers, it is important to know how much cartels typically overcharge their customers. Of course, every cartel may have a separate overcharge, but some kind of estimate can be helpful for the assessment of optimal fines. Conner and Lande have done extensive work in

---

480 ibid 8–13.
482 Further on methodology, see: ibid 550–56.
483 Combe, Monnier and Legal (n 479) 2.
485 Connor and Lande (n 427) 458.
this field and analysed, according to their own disclosure, 200 publications regarding cartel overcharges. They find that domestic cartels typically have an overcharge of 20 per cent, while international cartels overcharge their customers by 30 per cent. Combe and Monnier, in their study focusing on EU enforcement, come to the same conclusion. Smuda also examines overcharges by cartels specifically for the EU market. Using part of a sample collected by Connor, he computes a mean overcharge of 20.7 per cent and concludes that international cartels overcharge more than domestic cartels do. Interestingly, he also concludes that overcharges have not declined over time, while cartel fines in the EU have risen significantly.

Secondly, under perfect competition conditions, it is assumed that the price charged is equal to the marginal price. However, in reality, this will seldom be the case. Rather, undertakings sell their products with a competitive markup, the difference between marginal price and charged price without collusive behaviour. Combe and Monnier point out that, depending on the competitive markup, cartels may be more or less profitable, because a further price increase to already high competitive markups will not necessarily lead to higher profits (depending on demand elasticity). Thus, the competitive markup must be calculated individually for each cartelist when calculating illicit profits.

Thirdly, the own-price elasticity of demand on its own can also affect the illicit gains achieved by cartel members. Own-price elasticity of demand describes ‘the extent to which consumers switch [to another product] in response to the price rise.’ If consumers in the relevant market are price-sensitive, price

---


487 Combe and Monnier (n 3) 19.


490 ibid 15.

491 ibid 16.

492 Combe and Monnier (n 3) 15–16.

493 Whish and Bailey (n 101) 31.
increases may trigger decreased sales and thereby decreased gains for the cartelists. However, it is difficult to know how this factor should be considered, since it is connected to both the competitive markup and the deadweight loss.\textsuperscript{494} Connor and Lande, however, do not at all consider price elasticity of demand as a separate factor, but include it in the deadweight loss, a factor which is in turn not considered by Combe and Monnier.\textsuperscript{495}

When calculating the harm to others, it is considered that infringements of competition law will not only result in higher prices and possibly poorer quality in products for customers, but they will also lead to a \textit{deadweight loss} due to allocative inefficiencies. Connor and Lande examine literature on the deadweight loss typically incurred by cartels but find that the limited literature available comes to strongly varying results. Thus, they seek an alternative way of estimating deadweight loss connecting that loss to the own-price elasticity of demand.\textsuperscript{496} When prices are increased, some customers will be prevented from buying the product that they would like to buy and thus they switch to another product. Other customers may buy the product in question even at the increased price, but will then have less money to spend on other things. This creates an inefficient allocation of resources.\textsuperscript{497} According to the calculations of Connor and Lande, the deadweight loss of cartels is in the relatively wide range of 3-20 per cent of the cartel overcharge. In other words, for every EUR 100 in cartel overcharge there is an accompanying allocative efficiency of EUR 3-20.\textsuperscript{498}

Some of the factors related to illicit gains or harm to others in an individual case may be known to the Commission or may be calculated based on evidence available in the case. However, the Commission also indicates in the Fining Guidelines that this may not always be the case.\textsuperscript{499}

In sum, it can be observed that economists do not fully agree on the appropriate method of calculating fines that act as a deterrent. Further, the methods that are suggested build on a number of assumptions and estimates of necessary figures. Given the difficulties economic scholars have in determining the even the basic parameters for calculating deterrent fines, it can be concluded that calculating fines with reference to economic theory in pursuit of achieving deterrence would be associated with significant methodological difficulties for the Commission.

\begin{flushleft}
\textsuperscript{494} Combe and Monnier (n 3) 17–18.
\textsuperscript{495} Connor and Lande (n 427) 460.
\textsuperscript{496} ibid 457–60.
\textsuperscript{498} Connor and Lande (n 427) 460–61.
\textsuperscript{499} Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28) para 31.
\end{flushleft}
Nevertheless, based on the parameters set out above, scholars of economics study the question whether the Commission’s fines actually reach the magnitude necessary to act as a deterrent in retrospective calculations, that is, calculations based on fines previously imposed by the Commission in comparison to theoretically deterrent fines.

4.1.2.6 Empirical evidence of whether cartel fines are sufficiently high to act as a deterrent

In this section, empirical studies on the specific deterrent effect of the fines imposed by the Commission are examined. Conservative conclusions are drawn from these studies to ensure that their limitations are taken into account. It is worth noting that all the studies reviewed represent economic research based on neo-classical economic theory, which assumes undertakings to be profit-maximisers.

It has been shown above that the Commission’s method for calculating fines conforms to the basic tenants of the current wisdom on how deterrent fines should be calculated and that applying economic theory to the calculation of fines poses significant practical problems. Nevertheless, the current section shall to a more exact degree inquire whether the fines imposed by the Commission actually reach the magnitude required for specific deterrence. Numerous retrospective calculations have been conducted to assess whether the fines of the Commission reach such a magnitude. Unsurprisingly, these studies come to different conclusions. Some studies agree that the fines are either too high or too low, but diverge as regards the size of the gap. Other studies come to diametrically different conclusions when assessing whether fines are too high or too low. There are many reasons for these differences, but at least some are likely methodology-related. For example, in order to assess whether the Commission’s fines actually act as a deterrent, it is necessary to first establish how high such fine should be and the method for establishing that benchmark can, as seen in the above section, easily vary. Furthermore, the samples used by the different studies vary, for example, with regard to the time period assessed.

Considering studies that take account of fines imposed after the adoption of the 2006 Fining Guidelines, Connor finds that the severity of the fines imposed by the Commission has increased due to the new 2006 Fining Guidelines. He considers that fines, at least in some cases, manage to disgorge

illicit cartel gains. However, as established above, deterrent fines need to be higher than the gains obtained by cartelists, especially to take into consideration the probability of detection.\textsuperscript{501} Unfortunately, Connor does not, in those studies, conduct a more specific analysis of the deterrent effect of the fines imposed by the Commission after 2006.\textsuperscript{502}

Combe and Monnier find in their study that the fines imposed by the Commission on cartels between 1975 and 2009 are insufficient to act as a deterrent.\textsuperscript{503} Allain et al. use the data set computed by Connor (cartels 1990-2009)\textsuperscript{504} and, comparing their methodology to that of Combe and Monnier, come to the opposite conclusion, that fines are too high in many cases.\textsuperscript{505} They claim that this difference can in part be explained by an improperly set benchmark for deterrent fines on Combe and Monnier’s part.\textsuperscript{506} Smuda, also using Connor’s data set as regards EU cartels convicted between 1990 and 2009\textsuperscript{507} however finds that with reference to the overcharges computed in his study, fines are too low compared to the fines that can be expected according to the 2006 Fining Guidelines.\textsuperscript{508} Lastly, a report by Mariniello examines cartel decisions between 2001 and 2012, and concludes that the fines are too low.\textsuperscript{509} Overall, the majority of studies find that the Commission’s fines are too low, notably also the study conducted by Mariniello, which refers to the period between 2001 and 2012.\textsuperscript{510}

It can be concluded here that whether or not the Commission’s fines are sufficiently high to act as a deterrent is far from clear after the survey of empirical studies carried out in this section. While a majority of the quantitative economic studies agree that the Commission’s fines are too low to have a specific deterrent effect, there are also divergent opinions. Moreover, the review of relevant parameters in the previous section and the results of the empirical studies surveyed here indicate certain disagreement between

\textsuperscript{501} See section 4.1.2.3.
\textsuperscript{502} Connor, ‘Has the European Commission Become More Severe in Punishing Cartels? : Effects of the 2006 Guidelines’ (n 112); Connor has updated his findings for cartels up to 2011 in a later paper, but the conclusions have not changed significantly. See: Connor, ‘Cartel Fine Severity and the European Commission: 2007-2011’ (n 123).
\textsuperscript{503} Combe and Monnier (n 3) 31–32.
\textsuperscript{504} Connor, ‘Price Fixing Overcharges’ (n 488).
\textsuperscript{505} Allain, Boyer and Ponssard (n 305) 31–32.
\textsuperscript{506} ibid 36.
\textsuperscript{507} Connor, ‘Price Fixing Overcharges’ (n 488).
\textsuperscript{508} Smuda (n 489) 18–21.
\textsuperscript{510} ibid 4; See also: Schinkel (n 439) 563.
economic scholars as to the appropriate methodology for determining whether the Commission’s fines reach a specific deterrent effect.

As much as there is uncertainty as to the proper calculation of fines for cartels, difficulties from in calculating fines for infringements of Article 102 TFEU appear to be even greater.

4.1.2.7 Calculating deterrent fines for non-cartel infringements

As noted, the studies cited above exclusively deal with cartels, that is to say with infringements of Article 101 TFEU. Naturally, the problem that arises here is that the present work aims to examine not only the deterrent effect of Commission’s enforcement against cartels, but also the enforcement of non-cartel infringements of Article 101 TFEU and Article 102 TFEU. This should be possible since the enforcement concerning both types of infringements is regulated by the same legislative instrument, Regulation 1/2003, and fines are calculated using the same Fining Guidelines. Unfortunately, the interest of economists seems to be concentrated on the enforcement and fining of cartels, while research regarding fines that have been imposed to act as a deterrent in non-cartel infringements of Article 101 TFEU and infringements of Article 102 TFEU is notably scarce. One explanation for this absence could be the comparatively fewer Commission decisions regarding these two infringement types, making them a less attractive object for empirical research.

One paper that actually addresses the calculation of fines for infringements of Article 102 TFEU illustrates another explanation why there are so few studies on that issue. Infringements of Article 102 TFEU are much more difficult to grasp in financial terms and fines that act as a deterrent are thus more difficult to compute. In that paper, Heimler and Mehta consider that the type of infringement committed in most of these cases is an exclusionary abuse, meaning that the aim of the abuse is to exclude competitors and potential entrants from the relevant market. This is different from a cartel, which usually aims to raise prices for its customers, allowing for a simpler calculation of the illicit gains. The difficulty thus becomes how to calculate the gains achieved by the dominant undertaking through the abuse.

The gain achieved by the abuse of a dominant position is usually not the profit made by charging higher prices to customers, but rather the extra profits made due to the increase in sales. In other words, an increase in the market share in the relevant market resulting from the exclusionary behaviour will lead to

---

511 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28).

increased profits for the dominant undertaking. Heimler and Mehta set up a duopoly model in which they compute those extra profits with the help of the Lerner index, which is a measure of the market power of the dominant undertaking. In that way they can show which profits the dominant undertaking is able to make depending on its own market share and the market share of its competitor. The result of their analysis is that undertakings with lower market shares are able to reap proportionally higher additional profits as a result of abusive behaviour. This is because dominant undertakings with very high market shares (95 per cent in Heimler and Mehta’s model) are not able to gain very much from increasing their market share by such a small percentage. The problem with the model set up by Heimler and Mehta is without doubt the fact that it is a duopoly model, which seldom reflects reality and thus provides a limited basis for a real-life calculation of fines. If several competitors were introduced into the proposed model, it would be necessary to change the calculation of the Lerner index, which inversely depends on the market share held by a dominant undertaking’s competitors. This paper clearly shows the difficulties in calculating fines that act as a deterrent for infringements of Article 102 TFEU.

As a result, it can be concluded here that if it is unclear whether the Commission’s fines in cartel cases act as a deterrent, it is even less certain whether other types of infringements of Articles 101 and 102 TFEU are punished by fines that act as a deterrent. On the one hand, these types of infringements are easier to detect, meaning that the calculation of fines suffers less from unknown detection rates. On the other hand, the illicit gain from these infringements appears to be more difficult to calculate, at least with regard to infringements of Article 102 TFEU as illustrated by Heimler and Mehta above.

### 4.1.2.8 Recidivism and the deterrent effect of fines

If fines do not achieve specific deterrence and undertakings consider that they can continue to profit from infringements of competition law, repeat infringements may occur. To prevent further infringements, the Commission’s Fining Guidelines allow increasing fines against so-called recidivists. Such an increase in a fine can partially be aimed at ensuring specific deterrence against an undertaking which was not deterred by the sanction it received after the first infringement. Further, it can be noted that an increase in the fines for recidivists also indicates a greater culpability of that undertaking. Two questions can be asked with regard to recidivism. First, are fine increases such as those allowed by the Fining Guidelines suitable to reach the aim of specific

---

514 Heimler and Mehta (n 512) 114–15.
deterrence? Second, how many recidivists are there among infringers of Articles 101 and 102 TFEU and does the proportion of recidivists provide any indication of how well specific deterrence works in the context of the Commission’s resolution of cases?

As regards the first question, the Commission’s Fining Guidelines specify that the Commission may increase a fine concerning a repeat infringement by up to 100 per cent. For this purpose, a repeat infringement is defined as follows:

(... where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 or 82 (...)\textsuperscript{515}

This definition is further concretised by the General Court in \textit{Michelin}:\textsuperscript{516}

The concept of recidivism must be understood as referring to cases where an undertaking has committed fresh infringements after having been penalised for similar infringements (...)

According to the case-law, since EU competition law recognises that different companies belonging to the same group form an economic entity and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not decide independently upon their own conduct on the market, with the result that the Commission may impose a fine on the parent company for the practices of group companies, the Commission is entitled to find recidivism where one group company commits an infringement of the same type as that for which another was previously punished (...).\textsuperscript{517}

The General Court clarified two elements of the definition of recidivism in \textit{Michelin}: first, that a repeat infringement consists of two similar infringements committed in sequence, and second, that a repeat infringer is defined in accordance with the concept of ‘undertaking’ used in EU competition law.

As regards the definition of a ‘similar infringement’, the Court has unfortunately not made an explicit definition of that term. However, a careful reading of the General Court’s wording in \textit{Michelin} suggests that ‘similar’ refers to the \textit{type of conduct} which constitutes an infringement. In that case,

\textsuperscript{515} Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28) para 28.
\textsuperscript{516} Case T-203/01 \textit{Manufacture française des pneumatiques Michelin v Commission of the European Communities} EU:T:2003:250, paras 284-90.
the General Court considered that both a previous infringement and the infringement in question concerned rebates in the context of an infringement of Article 102 TFEU.\textsuperscript{518} Further, in \textit{BPB} the General Court referred to ‘a similar infringement of the same Treaty provision’\textsuperscript{519} as a repeat infringement. In \textit{Outokumpu}, taking into account the conduct in two separate cases, the General Court stated:

> In this case, it is clear from Articles 1 and 4 of Decision 90/417 that Outokumpu had been warned that, in concluding price agreements and sharing markets and customers with its competitors, it had infringed Community competition law and had to abstain from repetition of such conduct. Nevertheless, it is clear from Article 1 of the contested decision that the applicants subsequently participated in an almost identical infringement.\textsuperscript{520}

It is possible to conclude from the case law that a similar infringement is defined by the \textit{type of conduct} in question, rather than the legal provision on which the finding of an infringement is based. Articles 101 and 102 differ substantially with regard to the conduct penalised, meaning that two infringements, one concerning each provision, would not be defined as repeat infringements. Furthermore, even different conducts contrary to Article 101 or 102 TFEU may differ substantially, for example, between vertical restraints and cartel behaviour at a horizontal level. Thus, even two infringements of within one prohibition may not be considered as ‘similar infringements’ with reference to the \textit{type of conduct}.\textsuperscript{521} However, the Court appears to conduct the assessment of what a ‘similar infringement’ is on case-by-case basis, rather than with the help of a specific formula or criteria.

Concerning the temporal occurrence of recidivism, the General Court has held that ‘a fresh infringement’ means that the infringement in question must refer to a period in time following the previous infringement, even if the ‘new’ infringement is found and penalised later in time.\textsuperscript{522}

\begin{footnotesize}
\begin{enumerate}
\item Case T-203/01 \textit{Manufacture française des pneumatiques Michelin v Commission of the European Communities} (n 516) para 286.
\end{enumerate}
\end{footnotesize}
It is also only logical that the same concept of ‘undertaking’ is used throughout EU competition law, meaning that recidivism can even be found where two different subsidiaries belonging to the same parent company commit similar infringements.  

Furthermore, it should be mentioned that recidivism can only be found in cases where the Commission or an NCA has previously found an infringement of Article 101 or 102 TFEU. Conversely where the Commission has imposed an Article 9 decision and consequently not found an infringement, but only suspected an infringement, the undertaking cannot be considered a recidivist. An infringer who has not previously been found guilty of an infringement cannot be subject to an increased fine with reference to recidivism.

What can be concluded from the above is that the definition of ‘recidivism’ for the purposes of the Commission’s Fining Guidelines is rather narrow, notably being limited to similar types of infringements found by the Commission or an NCA. The question that must then be asked is whether this narrow definition poses a problem if the aim is specific deterrence? As already explained, if an undertaking has previously been found to have infringed Article 101 or 102 TFEU and been fined for that infringement, it can be assumed that the previous fine may not have been a sufficient deterrent. Consequently, the fine for a repeat offender should be increased. However, the Commission’s Fining Guidelines only allow an increase of the fine on account of recidivism under strictly defined circumstances that disregard both dissimilar infringements of competition law and potential infringements that were resolved by Article 9 decision. Thus, it is unlikely that aggravating circumstances pertaining to recidivism allows the Commission to increase fines to achieve specific deterrence in all cases. However, it should be pointed out that the Fining Guidelines generally allow the Commission to increase fines to achieve a deterrent effect. The aggravating factor pertaining to recidivism contained in the Fining Guidelines therefore appears to primarily serve the aim of retribution, rather than that of deterrence.

As regards the second question raised above, there are a number of studies determining the rate of recidivism amongst undertakings subject to Article 7 decisions. One broader study on worldwide cartels during the years 1990-2009 has been conducted by Connor. With regard to the frequency of recidivism, Connor finds that 18.4 per cent of all undertakings fined in his sample of 1,548

worldwide cartelists are recidivists. An older sample of detected cartelists between 1990 and 1995 yielded 11.3 per cent recidivists.\textsuperscript{524} Wils, in response to Connor, points out that the definition of recidivism used by Connor is not the same as the definition used by the Commission. He conducts an independent study, collecting evidence of recidivism in EU cartels from 2006 to 2010\textsuperscript{525} and finds a recidivism rate of 12 per cent for this type of infringements in the period under analysis.\textsuperscript{526} Overall, it can be observed that the percentages are very close. Accepting that Connor’s recidivism rate may be somewhat overstated due to definition differences, the rates found by Connor and Wils would probably be even closer.\textsuperscript{527}

There is also a more recent study by Marvão considering cartels in the EU from 1996 until October 2014. The study conducted by Marvão, which takes a significantly longer period of time into consideration than Wils, finds a recidivism rate of 17 per cent, closer to the recidivism rate found by Connor.\textsuperscript{528}

Geradin and Sadrak examine infringements of both Articles 101 and 102 TFEU between 2000 and 2017. In 25 of the 130 cases examined, there is at least one undertaking guilty of recidivism involved in an infringement. This results in a recidivism rate of 19.23 per cent.\textsuperscript{529} However, it should be noted that counting the number of cases involved in recidivism is not the same as counting the number of parties infringing competition law, as infringements of Article 101 TFEU, by their very nature, involve two or more parties.

Obviously, the recidivism rates listed above only answer part of the question whether the Commission’s fines reach a specific deterrence. It is clear that there are a number of undertakings that have not been deterred by the Commission’s previous decision(s). Conversely, findings concerning recidivism rates do not answer the question how well specific deterrence resulting from the Commission’s fines functions. To make inferences on this question it would be necessary to compare the behaviour of undertakings that have been subject to Commission fines and undertakings that have not been subject to such fines.\textsuperscript{530} Given that there are no studies making such a

\textsuperscript{525} Wils, ‘Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis’ (n 146) 9 and 20.
\textsuperscript{526} ibid 20.
\textsuperscript{527} ibid 9.
\textsuperscript{528} Catarina Marvão, ‘The EU Leniency Programme and Recidivism’ (2016) 48 Review of Industrial Organization 1, 10.
\textsuperscript{530} Hörnle (n 42) 21.
comparison, the only conclusion that can be drawn is thus that the Commission’s current fines are not fully deterrent against all undertakings on which such fines are imposed. This conclusion tends to confirm that fines imposed by the Commission do not currently reach the magnitude required for specific deterrence. At the same time, it is unlikely that a recidivism rate of 0 per cent would be achievable or even desirable. At the same time, there is not a generally agreed recidivism rate at which fines can be considered to reach a satisfactory level of specific deterrence.

4.1.2.9 Reflections on punishment and deterrence

It is suitable here to briefly reflect on the findings of the above sections pertaining to punishment and deterrence achieved by the Commission’s fines. The analyses of the Commission’s Fining Guidelines through the lenses of retribution and deterrence theories of punishment show that the Fining Guidelines contain elements of both theories, indeed reflecting the double aim of fines identified in chapter 3.531

However, as the above analysis shows, actually calculating fines that act as a deterrent is complicated if conceived as a precise figure that can be calculated arithmetically. Yet, from the reasoning of the General Court in Archer Daniels Midland, it certainly appears that fines imposed by the Commission should reach a level that conforms to the benchmark suggested in neo-classical economics:

(...) if the fine were set at a level which merely negated the profits of the cartel, it would not be a deterrent. It is reasonable to assume that when making financial calculations and management decisions, undertakings take account rationally not only of the level of fines that they risk incurring in the event of an infringement but also the likelihood of the cartel being detected.532

The Commission’s Fining Guidelines set out a methodology that make it possible to calculate a fine that acts as a specific deterrent,533 but there is at least some empirical evidence that the actual fines imposed by the Commission do not actually reach the necessary magnitude to act as a deterrent. At the same time, a closer assessment of that empirical evidence shows that a number of assumptions are made when calculating theoretically deterrent fines and that there is disagreement among economists as to the proper calculation of deterrent fines. From a jurist’s point of view it can thus

531 See section 3.1.2.
532 Case T-329/01 Archer Daniels Midland Co. v Commission of the European Communities (n 260) para 141.
533 Also compare: Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28) 31 para 31.
be concluded that aiming to calculate fines in an economically ‘correct’ fashion is a challenging goal to actually reach.

Two conclusions can be drawn from this finding: First, an approach to the calculation of fines based on retribution can be achieved more easily by the current Fining Guidelines than the aim based on deterrence, as retribution does not pertain to a figure that can be arithmetically calculated. Second, the difficulties faced when trying to arithmetically calculate fines that achieve the objective of specific deterrence, does not mean that fines cannot aim to prevent (further) infringements. As will be remembered, deterrence, as a theory of punishment, can be traced back to Beccaria and Bentham, predating considerations of economists as to how fines should be calculated.534 Indeed, the following sections explore deterrence and other means of preventing infringements of Articles 101 and 102 TFEU more broadly.

4.1.3 Preventing infringements

The third major objective of Article 7 decisions, as identified above, is preventing infringements. As concluded in Chapter 3, the Commission’s resolution of cases aims to prevent infringements of Articles 101 and 102 TFEU, by two means, guidance and deterrence. This section is devoted to general deterrence, prevention by fear, whereas guidance is addressed in the subsequent section.535 Furthermore, it will be recalled that remedies made binding to bring an infringement to an end may also pursue the prevention of further infringements as a mean.536 However, that prevention of new infringements is only related to the individual undertakings subject to such remedies, not undertakings in general, as addressed in the current section.

The present section not only assesses to what extent Article 7 decisions pursue the objective of preventing infringements of competition law, but also takes a broader view on the sources of general deterrence and the prevention of infringements of law more generally: First, the conditions under which Article 7 decisions, in particular the fines imposed as part of such decisions, can achieve general deterrence are considered. Second, sources of general deterrence beyond the fines imposed by the Commission are examined. Third, other factors contributing to the prevention of competition law infringements are examined.

534 See section 1.3.2.1.
535 See section 4.1.4.
536 See section 3.1.1.
4.1.3.1 General deterrence and fines

As already observed, whether fines will have a general deterrent effect, that is, be effective in preventing infringements by other potential infringers beyond the individual infringer on whom the fine is imposed, depends very much on an undertaking’s perceptions. \(^{537}\) In contrast to fines aiming to act as a specific deterrent as those examined above, fines that shall act as a general deterrent cannot be assessed with reference to an arithmetical figure.\(^{538}\) It is thus likely that a certain proportion of undertakings are indeed deterred from committing competition law infringements by the Commission’s fines while others are not. However, what is uncertain is how large these respective portions of undertakings are. Christie illustrates this point as follows:

> It is obvious that punishment directs action. We know. We do not touch a red-hot oven […] but to apply our daily experience of pain avoidance to a general debate on deterrence, we would have to raise questions of the deterrence value of a red-hot oven of 200 C versus one on 300 C.\(^{539}\)

In other words, in the absence of 100 per cent certainty of punishment, it is difficult to ascertain whether undertakings perceive fines to be sufficiently high to act as a general deterrent. Consequently, it is also difficult to adjust the degree to which general deterrence is emanated by fines.

If undertakings take fines into account when considering whether to commit an infringement, they can make a reasonable estimate of the maximum fine that might be imposed, given the 10 per cent maximum enshrined in Article 23(2) of Regulation 1/2003. However, it is very difficult to estimate the probability of discovery, both for the undertaking and for the competition authority.\(^{540}\) Thus, deterrence depends on undertakings’ perceptions as to the probability of discovery and the fine that might be paid, rather than the objective values of these factors.\(^{541}\) As already observed above, the fact that the Fining Guidelines do not allow the prospective calculation of the fine that would be imposed to an exact degree is to the advantage of achieving deterrence, as it preserves uncertainty as to whether an infringement would be profitable or not.\(^{542}\)

Further, deterrence requires in principle long-term thinking on the part of undertakings. In EU competition law, the imposition of a fine is temporally

---

537 Simpson and others (n 109) 28; Bottoms and Hirsch (n 313) 104–05.
538 See section 4.1.2.3.
540 See section 4.1.2.5.
541 Bottoms and Hirsch (n 313) 99.
542 Harding (n 438) 646–47.
far removed from the moment of infringement, especially given the long procedures before the Commission.543 Indeed, the gain made from infringing the law is much more immediate than the far-off probability that the illegal behaviour will be detected.544 This perception is even stronger for the individual agents acting on behalf of undertakings and who may even have changed their employment by the time the infringement is detected, negating any consequences for the agent on count of the infringement, at least within the context of the Commission’s enforcement of competition law.

One way of assessing the general deterrent effect of competition authorities’ enforcement is to survey undertakings and lawyers or other advisors on competition law as regards the behaviour of undertakings with regard to competition law. Surveys may of course suffer as concerns their reliability due to what answers are considered socially acceptable, especially with regard to undertakings which may fear more rigid competition law enforcement if a study were to indicate low deterrence rates. However, such a bias is less likely, claim Baarsma et al., for lawyers or other external advisers who cannot be held liable for infringements of competition law committed by undertakings that they have advised.545 Baarsma et al. survey 97 advisers on competition law in the Netherlands. They find that for every cartel that has been fined by the Dutch competition authority, about 5 cartels have been deterred.546 Gordon and Squires have carried out a similar study as regards competition law enforcement in the UK. They also find that, according to the lawyers surveyed, for every cartel that was detected and prohibited, five potential cartels were abandoned or the agreements significantly modified. Their results for deterred commercial agreements and potential abuses of dominant positions show that seven potential infringements were deterred for every infringement found.547

When surveying undertakings, the deterrence ratio is even higher with 16 cartels deterred by one enforcement action.548 To what extent the findings of these domestic studies can be applied to the EU level is not entirely clear. However, as Articles 101 and 102 TFEU are enforced in parallel with national competition rules and Article 3 of Regulation 1/2003 allows only little deviation in the application of national rules, it cannot be excluded that respondent answers were also impacted by the deterrent effect of the Commission’s enforcement. While these studies allow the conclusion that a

543 See section 4.3.4.
544 Paternoster (n 44) 773.
548 ibid 423.
certain general deterrent effect of competition law enforcement does exist, they are not suitable to estimate absolute numbers of how many prohibited practices remain undeterred in comparison to those deterred.

More general empirical evidence shows that the effectiveness of general deterrence has little to do with the magnitude of fines. In this regard, Simpson et al. have conducted a meta-study on deterrence against corporate crime. They find that there is a certain deterrent effect resulting directly from the bare normative prohibition of certain acts (typically a law).\textsuperscript{549} Furthermore, they find that enforcement through fines has a certain deterrent effect on financial corporate crime, where they include competition law infringements.\textsuperscript{550} However, the deterrent effects found are rather weak in both cases and more data is needed to draw more detailed conclusions of broader validity.\textsuperscript{551} In particular, what remains unclear is how general deterrence can be enhanced. Empirical evidence from other areas of law shows that increasing the probability of detection appears to increase the general deterrent effect, but, conversely, increasing the level of fines has been shown to have little to no effect on infringements.\textsuperscript{552} Moreover, Simpson et al. find that there is surprisingly little empirical work assessing the deterrent effects of different measures on corporate crime, thus making it difficult to design optimal enforcement instruments.\textsuperscript{553}

There are thus a number of constraints; both theoretical and practical, making the general deterrent effect of fines uncertain.

\subsection*{4.1.3.2 Other sources of general deterrence}

Even though the general deterrent effect of fines is difficult to measure as such, a certain deterrent effect undoubtedly exists. The general deterrent effect of fines may also ‘add up’ where there are several other institutions or bodies enforcing the same legal rules. There are at least two other sources of general deterrence with regard to infringements of EU competition law.

Firstly, the enforcement of Articles 101 and 102 TFEU is, since the coming into force of Regulation 1/2003, also undertaken by Member States’ NCAs. This potentially raises the probability of detection and thus the general deterrent effect of EU competition law enforcement overall. The study carried out by the Commission on the occasion of the ten-year anniversary of

\textsuperscript{549} Simpson and others (n 109) 28.
\textsuperscript{550} ibid 28–30; See further: Bottoms and Hirsch (n 313) 104–105.
\textsuperscript{551} Simpson and others (n 109) 31; Natalie Schell-Busey and others, ‘What Works?’ (2016) 15 Criminology & Public Policy 387, 397.
\textsuperscript{553} Simpson and others (n 109) 8.
Regulation 1/2003 showed that the great majority of infringements of Articles 101 and 102 TFEU are indeed found by NCAs.\textsuperscript{554} However, the report also identified weaknesses in the enforcement carried out by NCAs, in particular with regard powers to impose sanctions.\textsuperscript{555} Further, it is important to bear in mind that parallel enforcement of competition law infringements in jurisdictions outside the EU is a possibility.

Secondly, private enforcement, though not as strong in the EU as in the USA, has grown in importance in recent years, also raising the potential cost of competition law infringements. Previously, the Commission considered that private enforcement was in a state of ‘total underdevelopment’ in the EU.\textsuperscript{556} But, the recent adoption and implementation of Directive 2014/104 has introduced a change of the status quo in this regard.\textsuperscript{557} Due to the relative strength of public enforcement in the EU, so-called follow-on actions that base their claims on the finding of an infringement by a competition authority, appear to be common.\textsuperscript{558} Therefore, how competition authorities, such as the Commission, choose to resolve cases has an important impact on whether private actors can pursue damages claims. Article 7 decisions form a better base for a follow-on claim than cartel settlements (due to a more streamlined decision) or Article 9 decisions (because no infringement is found).\textsuperscript{559} Consequently, the finding of an infringement by the Commission may also increase the overall cost of infringing competition law. With regard to the nature of the damages awarded in the EU, these are of a compensatory rather

than a punitive nature.\footnote{Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (n 284) art 3.} Fines imposed by public authorities and damages paid to private parties thus have different aims, but both contribute to the overall sum paid by the undertaking in question as a result of the infringement and thus both add to the deterrent effect achieved against competition law infringements.\footnote{In this regard, it is possible to argue that damages would account for skimming off illegitimate gains, while fines would account for the deterrent effect. See: Andreas Heinemann, ‘The Setting of Fines: Efficiency and Due Process’ in Carl Baudenbacher (ed), \textit{Current Developments in European and International Competition Law} (Helbing Lichtenhahn 2011) 143.}

Taking all the above factors into account, it is possible that the monetary cost of infringing Articles 101 and 102 TFEU, seen at an overall level, reaches a level that induces fear and thus acts as a general deterrent.\footnote{Indeed, Whish and Bailey find it hard to believe that fines would not act as a deterrent considering EU enforcement, NCA enforcement and private enforcement cumulatively. See: Whish and Bailey (n 101) 524.}

\subsection*{4.1.3.3 Other sources of prevention}

Beyond general deterrence, Article 7 decisions may have other preventative effects related to stimulating morals, habitual law-abiding behaviour or social pressures.

That remedies imposed by an Article 7 decision may aim to prevent further infringements has already been mentioned. However, it should also be remembered that specific remedies explicitly aiming to prevent further infringements are rather seldom imposed by the Commission.\footnote{See section 4.1.1.1.}

More generally, Article 7 decisions may have a moralising effect if the behaviour being punished is generally condemned by society. Even though there are examples of legislation that has influenced perceptions of society,\footnote{Consider for example drink-driving or smoking inside restaurants in certain countries. See also: Gordon Hawkins, ‘Punishment and Deterrence: The Educative, Moralizing, and Habituative Effects’ [1969] Wisconsin Law Review 550, 563.} it is difficult to force society to adopt certain values by the sheer force of the law. Rather, the moral condemnation induced by punishment will be strong where a certain type of behaviour is generally considered to be immoral by society.\footnote{ibid 558.} Indeed, there may be undertakings which consider the thought of an infringement of law so immoral that they refrain from such infringements,
even if they would benefit from them.\textsuperscript{566} However, there is some empirical evidence that associates infringements of competition law with a low level of condemnation, suggesting that the moralising effect of competition law enforcement is also low.\textsuperscript{567} Indeed, it can be observed that, historically, cartels have previously been lawful or even encouraged and utilised by some governments well into the 20\textsuperscript{th} century.\textsuperscript{568} What is today an infringement of competition law has thus been standard business conduct in the past. In the absence of a strong moralising effect of the law itself, it is possible that the past lawfulness of behaviour now considered an infringement of competition law makes it more difficult to achieve moral condemnation and thus the prevention of such infringements in the present.\textsuperscript{569}

Further, undertakings may refrain from law infringements, not (only) because of a fear of fines, but also because they fear for their reputation. Undertakings may, for example, be subject to moral censuring by shareholders and customers as a result of an infringement of competition law. Shareholders may sell their shares, causing the undertaking to drop in value and customers may stop buying from the undertaking in question. Studying this issue, Aguzzoni et al. survey stock market responses for 91 cases where the Commission found infringements of Articles 101 and/or 102 TFEU between 1979 and 2009.\textsuperscript{570} They track the average abnormal returns of stocks in a 31-day event window consisting of the day of certain events and 20 days before and 10 days after that event. A dawn raid led to an average drop of 2.89 per cent of an undertaking’s stock market value. A Commission decision finding an infringement led to an average stock value drop of 3.57 per cent. At the same time, judgments by the Court, whether they be positive or negative, had no significant effect on stock values of the undertakings concerned.\textsuperscript{571} A similar study has been conducted by Günster et al., but their sample covers a slightly different period of time (1974-2004) and a larger number of cases (118 cases).\textsuperscript{572}

\begin{footnotesize}
\begin{enumerate}
\item[566] See section 1.3.4.
\item[568] Consider for example only the legalisation of cartels by the German Reichsgericht in: \textit{Sächsischer Holzstoff} (n 177); See further: Walter Eucken, \textit{Die Grundlagen der Nationalökonomie} (4th edn, Springer 1965) 64–65.
\item[569] Hawkins (n 564) 558; Andenaes (n 309) 966–67.
\item[571] ibid 308ff.
\item[572] Günster, Van Dijk and A (n 126) 8–10.
\end{enumerate}
\end{footnotesize}
and 20 days after a dawn raid and 20 days before and 3 days after a Commission decision and court appeals. The differences between these two studies may thus also be explained by different event windows being applied around the significant dates. Günster et al. find an average stock value drop of 4.7 per cent as a result of a dawn raid and a drop of 2 per cent as a result of a Commission decision. Contrary to Agguzzoni et al., Günster et al. find significant positive stock value reactions where appeals have been successful and negative reactions where appeals have been unsuccessful. Interestingly, Günster et al. also find that the stock market drops are greater where the dawn raid in question received more media coverage. This points to the conclusion that the deterrent effect of competition law enforcement could be increased if it received more attention in the media. Overall, there appears to be a certain effect of competition law enforcement on stock values.

Apart from the findings of the studies cited above, it would be interesting to know how consumers react to disclosures of competition law infringement in contrast to shareholders who have a financial interest in the performance of the undertaking concerned. Hypothetically, where products or undertakings well known to consumers are concerned, the negative effect of a widely publicised finding of an infringement could be significant. Generally, empirical evidence on the issue indicates that consumers’ reactions to publicity by regulatory authorities against undertakings are often weak, although empirical evidence studying EU competition law enforcement specifically appears to be scarce.

It is possible to conclude that the prevention of competition law infringements is a complex task, whereas general deterrence induced by fines imposed the Commission’s enforcement is only one piece of the entire puzzle. In addition, certain undertakings may be deterred by the prospect of fines imposed not only by the Commission, but also fines imposed by NCAs as well as by damages from private enforcement. Furthermore, competition law infringements may not only be prevented due to a fear of fines or damages, but also due to moral condemnation or a fear of a loss of reputation. However, there is a lack of research considering the overall effect of these alternative sources of prevention. It can be concluded that the Commission’s current case resolution mechanisms mainly rely on only one means of preventing infringements of Articles 101 and 102 TFEU, namely fines. Thus, drawing

573 ibid 12.
574 ibid 14ff.
575 ibid 14–18.
576 ibid 23.
concrete conclusions as regards the question of the extent to which competition law infringements are currently prevented seen as a whole, does not appear meaningful.

4.1.4 Clarifying competition rules

Continuing to the last objective of Article 7 decisions, this study now turns to the objective of clarifying competition rules, so as to prevent undertakings from infringements as well as to further the development and coherence of competition rules in general. In this section, it is assessed to what extent Article 7 decisions reflect and pursue the objective of clarifying competition rules, also taking into account other instruments of guidance used by the Commission.

Article 7 decisions provide case-specific, negative guidance to undertakings, since they stipulate what behaviour is illegal under certain circumstances.\(^{578}\) The case-specificity of Article 7 decisions in the context of guidance is both an asset and a limitation. On the one hand, Article 7 decisions elaborate on the lawfulness of specific behaviour that is unlikely to be provided in general guidance. On the other hand, cases can easily be distinguished from one another so that the interpretation of EU law used in one case will seldom be fully applicable to another case.\(^{579}\) A further advantage of Article 7 decisions is their relative timeliness. Relevant issues may be taken up as close to the occurrence of the behaviour in question as possible.\(^{580}\) The Commission may also use Article 7 decisions to make relatively swift changes to its competition policy, since it is not bound by policy in earlier decisions, for example, with regard to the level of fines.\(^{581}\) Thus, while Article 7 decisions may provide undertakings with clarifications in a timely manner, they are not fully applicable to other cases and may only provide partial clarification.

With regard to the further development of competition rules, Article 7 decisions fulfil an important role. As will be shown below, the guiding value of cartel settlements and Article 9 decisions is limited, meaning that extensive contributions in legal reasoning developing competition rules can mainly be expected in the form of Article 7 decisions.\(^{582}\) Further, these are also most

\(^{578}\) Distinctions between different types of guidance are considered further below, see Table 2.

\(^{579}\) See further section 6.8.2.

\(^{580}\) It can also be noted that the Commission sometimes takes considerable time to publish the text of its decisions, usually due to confidentiality issues, delaying the guidance to be provided by Article 7 decisions.

\(^{581}\) Joined cases 100 to 103/80 \textit{SA Musique Diffusion française and others v Commission of the European Communities} (n 471) para 109.

\(^{582}\) See sections 4.2 and 4.3.3.
likely to lead to a Court appeal, and may thus lead to further authoritative development of competition rules.

Taking a slightly broader, historical view on the guidance provided by Article 7 decisions, it will be recalled that Regulation 17/62 used a very different approach to enforcement than the one employed today.\(^{583}\) This approach was based on pre-notification and clearance of any conduct that could be contrary to Article 101 TFEU.\(^{584}\) In consequence, parallel to the \textit{ex post} enforcement activity, the Commission was also forced to screen large numbers of applications for \textit{ex ante} clearance. As set out in the preamble to Regulation 1/2003, this approach had become unviable, because the time needed by the Commission to screen all applications was considered to inhibit the Commission’s ability to carry out its other enforcement activities.\(^{585}\) Thus, Regulation 1/2003 abolished the possibility to notify agreements that could potentially be contrary to Article 101 TFEU. A question that can be asked in this context is what gap, if any, is left in the Commission’s guidance provided to undertakings in case-specific questions due to the removal of the former exemption decisions?

The guidance provided by Article 7 decisions differs from that of the former exemption decisions regarding Article 101(3) TFEU. These could elaborate on both permissible and forbidden behaviour, but only regarding Article 101 TFEU. In reality, exemption decisions almost always related to permissible behaviour. A further difference is that undertakings were able to actively seek such guidance from the Commission, whereas guidance provided by way of an Article 7 decision depends on the Commission’s case prioritisation. The Commission has retained the possibility to provide \textit{positive, case-specific} guidance to undertakings in the form of Article 10 decisions and Guidance Letters.\(^{586}\) However, the Commission has so far never made use of these provisions.

In the light of the limits of Article 7 decisions in pursuing the objective of clarifying competition rules, it is pertinent to ask whether other Commission guidance can make up for those limitations. Indeed, the Commission has also issued general guidance, for example, in the form of guidance and notices.\(^{587}\)

\(^{583}\) Regulation 17/62 First Regulation implementing Articles 85 and 86 of the Treaty (n 169).
\(^{584}\) ibid art 2.
\(^{585}\) Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) recital 3.
\(^{586}\) ibid art 10; Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (n 29).
\(^{587}\) Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/8; Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (n 143); Commission
It can be called into question whether it would be possible for this general guidance to make up for the loss of certain case-specific guidance that is the result of the new approach under Regulation 1/2003. General guidance is often meant to cover a large number of situations to make the guidance relevant for many undertakings. At the same time, the Commission is unlikely to impose too many limits on its own, wide, discretion in enforcing competition law. The result is often a very general wording in soft law instruments which may or may not help undertakings understand the correct application of competition law.588 Thus, general guidance does not fulfil the same aim as case-specific guidance, but is rather complementary to such guidance.

Ideally, prohibition decisions fulfil the clarification objective that the Commission has set for itself, but the inherent limitations of case-specific guidance must be accepted. Article 7 decisions fulfil an important role, especially with regard to guidance on more recent developments in competition law or regarding novel behaviour. However, in the absence of case-specific guidance elaborating permissible behaviour, there is a certain gap in the guidance provided by the Commission, a point that will be addressed in more detail below.589 Also, Article 7 decisions cannot fulfil their clarifying function if the Commission does not use this case resolution mechanism in cases where guidance is needed because they address novel behaviour or a novel theory of harm.590

4.1.5 Efficiency in the resolution of cases

Article 7 decisions, in contrast to cartel settlements and Article 9 decisions do not have as their aim to create an especially efficient procedure. However, it is important to remember that more efficient enforcement was an overall objective of the reform of the Commission’s enforcement of Articles 101 and 102 TFEU.591 Thus, it was expected that, under Regulation 1/2003, the Commission would be able to pursue and conclude more cases as compared to the situation under Regulation 17/62.592 This result should have been achieved in part by removing the notification procedure and in part by introducing case resolution mechanisms specifically geared toward procedural

Notice on immunity from fines and reduction of fines in cartel cases (n 27); Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28).

588 Petit (n 166) 59.
589 See section 5.5.
590 See section 4.3.3.1.
591 See section 3.2.2.
592 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) recital 3.
efficiency. The fulfilment of the efficiency objective can be measured quantitatively by looking at the number of cases resolved by the Commission over time.

The figure below differentiates between different case resolution mechanisms, namely Article 7 decisions, Article 9 decisions, cartel settlements and hybrid settlements. Hybrid settlements are listed separately here because these cases contain both ‘ordinary’ Article 7 decisions and cartel settlement, making them difficult to categorise otherwise. It is important to remember that Article 9 decisions were only introduced with Regulation 1/2003, which came into force in 2004, and the cartel settlements were introduced with the amendment of Regulation 773/2004 in 2008.

---

593 See section 4.3.4.
594 Before the entry into force of Regulation 1/2003 in 2004, the equivalent provision was found in: Regulation 17/62 First Regulation implementing Articles 85 and 86 of the Treaty (n 169) art 3.
596 See further, section 4.2.3.
As is visible from the figure above, while there is a diversification among the case resolution mechanisms used by the Commission as the opportunity to use these different mechanisms became available, there is no clear increase in the number of cases resolved.

Thus, as Wils also admits, the Commission has not been able to live up to the expectation that the introduction of Regulation 1/2003 would lead to a significantly higher output of decisions.\textsuperscript{598} Rather, the Commission seems to

have a relatively stable output seen over the better part of the last two decades. Wils names several reasons why this might be the case:

1. The Commission may need more resources for mergers or state aid, thus fewer resources can be devoted to the enforcement of Articles 101 and 102 TFEU;
2. The Commission spends some of the saved resources by coordinating national enforcement;
3. The Commission chooses more complex cases;
4. The Commission uses more time to investigate cases and draw up decisions, avoiding successful appeals.\textsuperscript{599}

These explanations are difficult to verify and Wils himself does not attempt to do so.\textsuperscript{600} Regarding the fourth reason, Wils considers an improvement of the quality of reasoning in decisions could have been brought about by more internal quality control, as introduced with the appointment of a Chief Economic Officer in 2003.\textsuperscript{601} If that is a correct assessment, this would point to the conclusion that the Commission is using at least some of the resources it gained by abolishing the notification system to ensure that its decisions withstand judicial review by the Court. Further, Ibáñez Colomo points to the increased number of sector inquiries as a potential replacement for sector-specific information previously gained from notifications.\textsuperscript{602} Thus, there is some evidence that the Commission relocated some of the resources gained by the abolition of the notification procedure.

While the Commission’s case output does not reveal any increased efficiency in the resolution of cases, possible efficiencies may be utilised in other parts of the Commission’s enforcement of Articles 101 and 102 TFEU.

4.2 Cartel Settlements

Having assessed Article 7 decisions in relation to the relevant objectives set out in chapter 3, the assessment carried out in this study now turns to cartel settlements.

\textsuperscript{599} ibid.
\textsuperscript{600} ibid 293, fn*.
\textsuperscript{601} ibid 300.
In short, a cartel settlement requires the undertaking(s) in question to acknowledge the infringement detected by the Commission in exchange for a 10 per cent reduction of the fine. A settlement is conducted according to a simplified procedure and results in a decision according to Article 7 of Regulation 1/2003.603 Further, even though an appeal to the EU courts is still formally possible, appeals of settlements are almost non-existent compared to appeals of ‘ordinary’ Article 7 decisions, since an undertaking will seldom find reason to appeal a decision where it has acknowledged the infringement in question.604 In the Commission’s Settlement Notice, the aim of cartel settlements is described as follows:

[...]he settlement procedure may allow the Commission to handle more cases with the same resources, thereby fostering the public interest in the Commission's delivery of effective and timely punishment, while increasing overall deterrence.605

Cartel settlements, in contrast to Article 7 decisions, do thus not aim to fulfil all the objectives set out in chapter 3, but focus on certain objectives only. Most importantly, settlements aim to achieve efficiency gains. This is meant to lead to an increased output of cartel cases, increasing general deterrence as the probability of detection increases.

While the Commission still has to follow the procedure set out for the adoption of Article 7 decisions, this process may be shortened considerably after the opening of proceedings; that is once the Commission adopts a statement of objections (SO) in cartel cases. At the stage where the Commission adopts a SO, it has already invested considerable resources in the investigation of the case. However, time can be saved by the simplified procedure after the SO has been sent (limited access to documents, language waiver, no hearing).606 At that point, the Commission may initiate settlement proceedings with the
undertaking. The Commission is then able to set a number of deadlines for the undertaking which may considerably shorten the time between the adoption of the SO and an Article 7 decision. Importantly, the settlement procedure requires that the undertaking in question makes submissions that reflect the content of the SO, essentially admitting to the infringement as described by the Commission in the SO. Thus, by limiting certain procedural rights, setting deadlines and requiring an admission of the behaviour set out in the SO, the Commission may indeed achieve more rapid Article 7 procedures by way of settlements.

The Commission sacrifices a part of the fine to conclude the case more expeditiously. On closer observation, however, the Commission makes another sacrifice with regard to its own objectives. The shortened procedure usually results in an Article 7 decision that is less extensive concerning the infringement committed and its qualification under Article 101 TFEU. This somewhat diminishes the guiding value of Article 7 decisions following a settlement. Even if a settlement still includes the finding of an infringement of Article 101 TFEU, it may be less useful to undertakings seeking more detailed guidance. Thus, in principle cartel settlements provide the same type of guidance as Article 7 decisions, but in a less detailed manner and less authoritatively, since a Court judgement reviewing the decision is usually lacking.

Because settlements also lead to Article 7 decisions, the sections below focus on the specificities of the settlement procedure only, rather than repeating the full assessment of the effects of Article 7 decisions carried out above. The design of the settlement procedure poses three challenges to the Commission when aiming to fulfil the objectives identified in chapter 3 above: First, do fines reflect and pursue the objectives to punish and deter infringers despite the reduction of the fine? Second, does the settlement procedure reach the efficiency aim set out for it? Third, may the use of settlements lead to encroaching on any of the constitutional restraints that frame the Commission’s case resolution mechanisms?

---

607 Commission Regulation 773/2004/EC, of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (n 9) art 10a(1).
608 ibid art 10a(3).
4.2.1 Punishing and deterring infringers in the context of cartel settlements

The marked difference between Article 7 decisions and settlements is that undertakings settling with the Commission receive a reduction of their fine of 10 per cent. The question is whether cartel settlements, despite this reduction still reflect and pursue the objective of punishing and deterring undertakings?

Fines imposed on undertakings as a result of cartel settlements still follow the Commission’s ordinary Fining Guidelines. The Fining Guidelines consider the undertaking’s culpability as a factor in the calculation of the fines. This is expressed by a number of mitigating and aggravating factors. One of the mitigating factors is cooperation with the Commission beyond the Leniency Notice or its legal obligation to do so. Analogue to that mitigating factor, undertakings that cooperate with the Commission as part of a settlement may be considered less culpable and thus worthy of a reduction of the fine. Therefore, while the main justification for the 10 per cent fine reduction is utilitarian, the Commission is focused on procedural efficiencies, it is also possible to justify the fine reduction from a retributive point of view.

Another question is that of the deterrent effect of the fine. As discussed above, settlements may indeed reduce deterrence since they decrease the fine expected by undertakings. Conversely, the Commission considers that settlement procedures may increase deterrence since the Commission can handle more cases, increasing the probability of detection. Deterrence thus hinges on the efficiency of the settlement procedure and on whether the number of closed cases has actually increased since the introduction of that procedure.

Under those circumstances, whether fines imposed on individual undertakings taking part in a cartel settlement would have a specific deterrent effect on them is difficult to assess. The question that would need to be answered is whether the undertaking would be deterred from further competition law infringements despite a lower fine. In the absence of empirical studies on this specific question, no answer can be given within the framework of this study and

---

610 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 (n 26) para 32.
611 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28) para 29.
613 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 (n 26) para 1.
reference can only be made to the discussion of specific deterrence in the relevant section above. 614 Ideally, preventing further infringements should not be a matter of specific deterrence as the undertaking, by recognising the infringement, should have understood that its actions were wrong and should not be repeated for that reason. 615

4.2.2 Efficiency in the cartel settlement procedure

Whether or not settlements lead to a lesser or greater deterrent effect of fines hinges on whether the procedure is able to fulfil its objective of shortening the procedure leading up to an Article 7 decision and results in more Article 7 decisions overall.

In this regard, Laitenberger and Hüschelrath study the duration of cartel proceedings between 2000 and 2014, with a sample containing 82 cartel cases. The settlement procedure was only first used in 2010 and this allows them to make a comparison regarding how the length of the procedure has developed since the introduction of the settlement procedure. They find that overall, settlement cases take on average 13.5 months less to decide than cases where the ordinary procedure is followed. Most of this reduction in time is indeed gained after the SO has been sent. In a related publication, Hellwig, Hüschelrath and Laitenberger further conclude that the main time-saving aspect related to settlements is achieved through the absence of appeals against Commission decisions subject to settlements. 616

However, Hüschelrath and Laitenberger find that in comparison, ordinary Article 7 decisions now take more time to decide than they did before the introduction of the settlement procedure. Studying the characteristics of the cartel case settled, it appears that the cases selected for settlement are less complex (shorter cartel duration, no parallel US investigation, fewer cartel participants) than cases that are not settled. 617 This appears to be a sensible choice given the objectives of the settlement procedure, but it is also likely to have an impact on the duration of the procedure. Thus, only looking at the figures, it appears that the cartel settlement procedure is effective in shortening the time that the procedure before the Commission takes. However, it is not certain that this time-saving aspect can wholly be attributed to the settlement procedure rather than other cartel characteristics.

614 See section 4.1.2.6.
615 See further section 5.3.
616 Hellwig, Hüschelrath and Laitenberger (n 146) 81.
617 Hüschelrath and Laitenberger (n 146) 471–72.

136
The more rapid conclusion of cases should logically mean that more cases would have been concluded since the introduction of cartel settlements in 2010. Looking at the Commission’s own statistics, this does not, however, appear to be the case, as is visible from the figure below.618

Reviewing these statistics, it must be remembered that Regulation 1/2003 came into force on 1 May 2004 and the settlement procedure was first used to resolve a case in 2010.619 Since 2010, the number of cartel cases closed by the Commission does not appear to have risen significantly. There may of course be a number of reasons for this. The introduction of any new procedure can be expected to suffer from certain teething problems, so that the full potential may not yet have been reached. Alternatively, the Commission may use the resources saved by settlements for other purposes, such as intensified enforcement overall, more emphasis on *ex officio* discovery of cases, for example by carrying our sector inquiries or better quality of reasoning in its ordinary decisions.620

4.2.3 Constitutional restraints and hybrid settlements

Theoretically, settlements should be subject to full judicial review with constitutional restraints, just like ‘ordinary’ Article 7 decisions. An

---

618 European Commission, ‘Cartel Statistics’ (n 473).
619 Hellwig, Hüschelrath and Laitenberger (n 146) 63.
620 See further section 4.1.5.
unanswered question in this regard is how strict the review of the Court would be in these cases, since the undertaking in question has admitted the infringement in order to obtain the reduction of the fine. However, there has as yet been no judgment issued by the Court on this matter. This can be explained by the fact that the settlement procedure is essentially a consensual mechanism, meaning that an undertaking seldom finds reason to complain about the outcome.

However, some limitations imposed by constitutional restraints characteristic to cartels and settlements do exist. Since cartels, by their very nature include several undertakings, the Commission must observe the principle of equal treatment with respect to undertakings subject to the same case in cartel investigations.621 The Commission must ask all undertakings that are parties to the same cartel case whether they would be interested in a cartel settlement if it considers a cartel settlement suitable in that case.622 While the Commission generally retains a wide discretion in whether to settle a case or not, it must treat all parties to a case equal with regard to that choice.623 Indeed, the Commission also acknowledges in the Settlement Notice that when deciding whether or not to settle a case, the number of parties involved and conflicting positions as regards the attribution of liability are two factors, among others, that the Commission considers whether to settle a case.624

Further, two cases concerning constitutional restraints stemming from the Commission’s use of ‘hybrid settlements’ can be noted. These are cases where only some, but not all, parties to a cartel have participated in the settlement procedure.

In the first case, *Timab*, one undertaking had opted out of the settlement procedure at a late stage, when it had already received an estimate of the fine from the Commission. The fine subsequently imposed by the Commission under the standard procedure was significantly higher than the fine previously envisaged. The undertaking complained that it was being penalised for its opting-out of the settlement. The General Court initially stated that even if the

621 Joined cases C-628/10 P and C-14/11 P *Alliance One International Inc. and Standard Commercial Tobacco Co. Inc. v European Commission and European Commission v Alliance One International Inc. and Others* (n 267) para 57.
623 Case T-456/10 *Timab Industries and Cie financière et de participations Roullier (CFPR) v European Commission* (n 11) para 72.
624 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 (n 26) para 5.
Commission adopts several decisions pertaining to one cartel, it must observe the principle of equal treatment. The General Court subsequently held, and the Court of Justice has since confirmed, that the settlement procedure is to be seen as entirely separate from the standard procedure followed to reach ordinary prohibition decisions. Thus, the fact that the Commission, after a full investigation of the case, imposed a higher fine than previously envisaged was deemed legal by the Court.

The second case, *Icap*, concerned an undertaking which had not participated in the settlement procedure at all. The Commission went on to settle with the other parties to the case in a decision that was adopted some time before the decision against the applicant, *Icap*, was adopted. In that prior decision, the Commission described the facts of the case including the participation of *Icap* as a facilitator of the cartel. The General Court found that, although no legal qualification as to *Icap*’s guilt could be made, the statements made by the Commission were enough to infringe the principle of presumption of innocence. The General Court also stated, after confirming the status of the principle of presumption of innocence as a principle of primary law, the following:

> Accordingly, the requirements relating to compliance with the principle of presumption of innocence cannot be distorted by considerations linked to the safeguarding of the objectives of rapidity and efficiency of the settlement procedure, no matter how laudable those objectives may be. On the contrary, it is for the Commission to apply its settlement procedure in a manner that is compatible with the requirements of Article 48 of the Charter of Fundamental Rights.

The General Court thus held that compliance with a constitutional restraint, such as the presumption of innocence could not be subordinate to the efficiency objective pursued by cartel settlements.

Thus, the Commission’s conduct in a settlement procedure mainly seems to be questioned in cases of hybrid settlements, where the procedural rights of non-settling parties must be observed. Cartel cases and specifically settlements place certain restrictions on the Commission with regard to the

---

625 Case T-456/10 *Timab Industries and Cie financière et de participations Roullier (CFPR) v European Commission* (n 11) para 72.
626 ibid paras 96-107; Confirmed by: Case C-411/15 P *Timab Industries and CFPR v European Commission* (n 604) para 196.
627 Case T-180/15 *Icap plc and Others v European Commission* (n 227) paras 7-10.
628 ibid paras 258-59.
629 ibid para 269.
630 ibid para 265.
631 ibid para 266.
observance of constitutional restraints. Where undertakings are parties to the same case, they must be treated equally with regard to the choice of case resolution mechanism as well as the conduct in that same procedure. However, in the case of hybrid settlements, the procedures according to Article 7 of Regulation 1/2003 and to Article 10a of Regulation 773/2004 must be treated as separate procedures. This means, for the purposes of the principle of equal treatment, that non-settling undertakings can be distinguished from settling undertakings. Yet, that does not mean that the Commission may violate the individual protection afforded to an undertaking through constitutional restraints, such as the presumption of innocence, only because it is subject to another procedure. In relation to the relevant objectives, constitutional restraints do not prevent the Commission from punishing an infringing undertaking to the full extent suitable in view of the infringement in case of a switch of procedures. However, the efficiency objective of settlements may be impeded if so-called hybrid settlements are conducted.

4.3 Article 9 decisions

This study now turns to the assessment of the third case resolution mechanism, Article 9 decisions. Article 9 of Regulation 1/2003 provides that the Commission may accept commitments when it intends to adopt a decision pursuant to Article 7 of Regulation 1/2003. Formally, infringements are not brought to an end through Article 9 decisions, but rather the Commission’s preliminary assessment serves as a basis for the commitments that are finally made binding. Commitments can be behavioural or structural remedies that dispel the concerns of the Commission in a particular case. A decision according to Article 9 of Regulation 1/2003 does not formally find an infringement of EU competition law, nor does it find that no infringement has taken place.\(^\text{632}\) By making commitments binding on an undertaking using an Article 9 decision, the Commission finds that there is no further ground for action in that case. The Commission has the option of making commitments binding for a certain time only or giving them unlimited duration.

An important part in the Article 9 procedure is market testing required by Article 27(4) of Regulation 1/2003. The market test serves to collect comments on the proposed commitments by, for example, competitors, suppliers and customers of the undertaking in question. The Commission announces market tests publicly and interested parties are granted at least one

month in which to comment on the proposed commitments to ascertain whether third parties believe that these commitments actually remove the potential infringement. Depending on the comments received after the market test, the Commission may adopt an Article 9 decision making the commitments binding, ask the undertaking to revise the commitments or abandon the commitments procedure to pursue an Article 7 decision, as was done in CISAC and Google.

The Commission can make both behavioural and/or structural remedies binding within the scope of Article 9 decisions. From a policy point of view, the Commission could be assumed to prefer structural remedies. Structural remedies are easier to monitor, since they usually consist of a divestiture. However, the Commission has most often imposed behavioural remedies, such as those in Microsoft (tying). A Commission survey of the commitments made binding until 2016 shows that structural remedies have only been imposed in 26 per cent of the commitment decisions. In Microsoft (tying), the need to monitor behavioural remedies is reflected most clearly, as Microsoft was subsequently fined by the Commission for non-compliance with the remedy. Beyond monitoring concerns, it should be remembered that different cases raise different concerns which in turn require the adoption of different types of remedies. In other words, the adoption of a structural remedy is unlikely to be possible in every case.

The circumstances in which the Commission may use Article 9 decisions are limited in two different ways: Firstly, the undertaking in question must offer commitments to the Commission, meaning that both the Commission and the undertaking must consent to such a decision. Article 9 mixes the public law nature of EU competition law enforcement with a ‘contractual’ component: the Commission and the undertaking must negotiate and mutually agree on a way to resolve the case. This means that the Commission cannot force an

---

633 See further: Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (n 192) paras 129-33.
635 See further: Whish and Bailey (n 101) 268–69.
636 German Electricity Wholesale Market and German Electricity Balancing Market (n 341).
637 European Union, Commitment Decisions in Antitrust Cases (n 210) 6.
638 ibid.
640 For illustrations, see: Ibáñez Colomo, ‘On the Application of Competition Law as Regulation: Elements for a Theory’ (n 74) 302–06.
undertaking to offer commitments. Nor can undertakings force the Commission to accept commitments. However, the Commission may be able to pressure an undertaking to offer commitments by threatening the imposition of fines, since the Commission may revert to an Article 7 procedure if it does not consider that the commitments offered meet its concerns. It is also important to understand that the Commission still decides to make the offered commitments binding at the end of the procedure, so that the undertaking’s ability to negotiate with the Commission ends once that decision is adopted.

Secondly, the Commission may not adopt an Article 9 decision in just any case which might be subject to an Article 7 decision. Recital 13 of Regulation 1/2003 states that an Article 9 decision may not be adopted if the Commission ‘intends to impose a fine.’ According to the Best Practices Notice, this is the case where ‘the Commission considers that the nature of the infringement calls for the imposition of a fine’. As Petit points out, a literal interpretation of this limitation would eliminate an incentive for undertakings to offer commitments, namely the threat of a fine.

Instead, subsequent clarifications and commentary suggest a differentiated interpretation of Recital 13. The Commission has clarified in a note to the OECD that:

Pursuant to Recital 13 of Regulation (EC) No 1/2003, commitment decisions are not an option in cases where the Commission intends to impose a fine, as is the case with the most serious restrictions. Accordingly, the Commission does not apply the commitment procedure to the most serious infringements such as cartels where there is no commitment possible to solve the competition problem. (emphasis added)

---

642 Case C-441/07 P European Commission v Alrosa Company Ltd (n 232) para 94.
643 Case T-491/07 RENV Groupement des cartes bancaires (CB) v European Commission EU:T:2016:379, para 461; Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (n 192) para 125.
645 Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (n 192) para 116.
647 European Union, Commitment Decisions in Antitrust Cases (n 210) para 6.
Indeed, that Article 9 decisions are not to be used in cartel cases has already been stated in the Best Practices Notice, but the connection between Recital 13, the seriousness of infringements and cartel cases is not made as clear in that Notice.\textsuperscript{648} It thus appears that ‘cases where the Commission intends to impose a fine’ is congruent with ‘the most serious infringements’, in particular cartels. This does not, however, mean that all infringements of Article 101 TFEU are banned from Article 9 decisions. There are also non-cartel infringements of Article 101 TFEU which have been resolved using an Article 9 decision, such as the \textit{e-Books} case against Apple and several book publishers.\textsuperscript{649} Another example of this is the Article 9 decision adopted by the Commission in \textit{Sky Team}, a case which concerned potential anti-competitive cooperation between different airlines.\textsuperscript{650} These cases involved restrictions in a vertical contract relationship and an ‘open business arrangement’ respectively rather than a secret cartel and it was thus possible to close them using an Article 9 decision.\textsuperscript{651}

Furthermore, with regard to non-cartel infringements of Article 101 TFEU and infringements of 102 TFEU, which can principally be resolved by an Article 9 decision, the limitation imposed by Recital 13 appears to be different from that regarding cartels. Wils and Gippini-Fournier, both Commission officials, seem to suggest that Recital 13 prevents the Commission from initiating an Article 9 procedure ‘at a stage where the Commission has already reached a considered view whether the infringement warrants the imposition of a fine.’\textsuperscript{652} In other words, Recital 13 can be interpreted as preventing the Commission from initiating an Article 9 procedure at an advanced stage of the investigation, a limitation which must be considered as rather vague and difficult to verify for an outside observer.

As regards the objectives pursued by Article 9 decisions specifically, these are mainly aimed at removing a potential infringement of EU competition law

\textsuperscript{648} Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (n 192) para 116.


\textsuperscript{650} \textit{BA/AA/IB} (n 634).

\textsuperscript{651} Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (n 192) para 116.

Commitment decisions are not based on full investigations and do not reach definitive conclusions on the facts of a case or the application of the law. In addition, commitment decisions involve less procedural steps (and therefore less resources) than a final decision under Article 7 (e.g. Preliminary Assessment instead Statement of Objections; no access to the file is expressly foreseen, no hearing; usually a shorter decision). As a result, the ‘commitment path’ can bring a swifter change to the market, without necessarily being less effective.\(^{653}\)

The Article 9 procedure thus exhibits certain peculiarities which also affect the fulfilment of the objectives set out in chapter 3. Priority is given to bringing the potential infringement to an end in a swift and constructive manner. That being so, the objectives of bringing suspected infringements to an end and efficiency are the objectives explicitly pursued by Article 9 decisions. In certain cases, commitments may also aim to prevent further infringements. Conversely, this also means that the objectives of punishing and deterring infringers and preventing infringements by general deterrence as well as clarifying competition rules are not explicitly pursued by Article 9 decisions. However, intended or not, Article 9 decisions may affect the fulfilment of these objectives as well. The following questions with regard to the objectives of Article 9 decision are thus considered below: First, do Article 9 decisions reflect and pursue the objective of bringing suspected infringements to an end? Second, to what extent are the objectives of punishment, specific and general deterrence affected by Article 9 decisions? Third, to what extent do Article 9 decisions affect the objective of clarifying competition rules? Third, is the Article 9 procedure efficient?

4.3.1 Bringing suspected infringements to an end in the context of Article 9 decisions

As discussed above, there are considerable limits as to the remedies the Commission may impose under Article 7 decisions. As will be shown below, Article 9 decisions offer more freedom in this respect. Commitment decisions allow for remedies that are more specifically tailored to the suspected infringement. These remedies are, moreover, suggested by the party who has comprehensive knowledge about what would be an effective remedy for the

alleged infringement, namely the infringing undertaking itself. At its best, an Article 9 decision may address potential competition problems in a more targeted manner than what is possible for Article 7 decisions.654

For the purposes of this study, three issues are addressed below. First, the ability of the Commission to bring infringements to an end with regard to the remedies that can be made binding as part of an Article 9 decision; second, the negotiation of remedies as carried out to reach an Article 9 decision and third, the aims of remedies imposed as part of Article 9 decisions.

4.3.1.1 The Commission’s powers to make remedies binding

Article 7 decisions are constrained substantially by the requirement to comply with the principle of proportionality when imposing remedies on undertakings. The requirements of the freedom to conduct a business constraining the Commission in Article 7 decisions are not significantly affected here, because Article 9 decisions require undertakings to themselves suggest commitments. A relevant question is if and how the Commission’s ability to make remedies binding is constrained by the principle of proportionality also in Article 9 decisions. This particular question was at issue in the Alrosa case already shortly considered above.655 While Article 7 includes an explicit reference to the principle of proportionality with regard to the remedies imposed, Article 9 contains no such reference. In this regard, the Court of Justice held that Article 7 and 9 decisions:

(...) pursue different objectives, one of them aiming to put an end to the infringement that has been found to exist and the other aiming to address the Commission’s concerns following its preliminary assessment. There is therefore no reason why the measure which could possibly be imposed in the context of Article 7 of Regulation No 1/2003 should have to serve as a reference for the purpose of assessing the extent of the commitments accepted under Article 9 of the regulation, or why anything going beyond that measure should automatically be regarded as disproportionate (...)656

The Court of Justice thus considers that remedies imposed as part of an Article 7 decision cannot serve as a comparison for remedies made binding as part of Article 9 decisions. Consequently, the Court of Justice considers that the Commission’s duty with regard to the principle of proportionality in Article 9

---

655 See section 2.3.2.
656 Case C-441/07 P European Commission v Alrosa Company Ltd (n 232) paras 46-47.
decisions only covers a duty to check whether the commitments dispel the Commission’s concerns about the behaviour of the undertaking in question.  

There is thus only a weak constraint on the Commission with regard to what kind of commitments might be accepted. The Court of Justice justifies this by arguing that undertakings whose commitments are accepted avoid being found to have infringed EU competition law. This weak constraint is not seen as a problem by the Court of Justice as:

(...)[u]ndertakings which offer commitments on the basis of Article 9 of Regulation No 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination. On the other hand, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine.

Even though undertakings are entitled to certain procedural guarantees, such as a judicial review of commitment decisions, the Court of Justice has held that such a review, at least for the principle of proportionality, ‘relates solely to whether the Commission’s assessment [regarding the question whether the offered commitments address its concerns] is manifestly incorrect.’

In a case following Alrosa, the General Court carried out an assessment concerning the proportionality of a remedy, holding in Morningstar that:

(... it must be noted that the Commission’s assessment, (...) is a prospective assessment. It is called upon to make a decision which is a forecast and which leads it to assess how the market will behave once the commitments have been implemented. As has already been stated, the Commission did not commit a manifest error when it took the view that the final commitments are appropriate to address the concerns raised.

Thus, given the nature of the Commission’s investigation and the nature of remedies as a forward-looking measure in Article 9 procedures, the judicial control exercised over remedies is not as strict as that carried out in Article 7 decisions. As a result, the powers of the Commission to bring a suspected infringement and its effects to an end as well as to aim to prevent further infringements through specific remedies is considerably better in an Article 9 decision than an Article 7 decision, albeit with the need to sacrifice the finding of an infringement.

---

657 ibid para 42.
658 ibid para 48.
659 ibid para 48.
660 ibid para 42; See also Case T-76/14 Morningstar v Commission EU:T:2016:481.
661 Case T-76/14 Morningstar v Commission (n 660) para 73.
4.3.1.2 Negotiating remedies

While the Commission enjoys a broad margin of discretion when designing remedies, the commitments that are eventually made binding are susceptible to being suboptimal because of the state of the investigation at the time when the commitments are suggested.\(^{662}\) Article 9 decisions are taken at a stage where the Commission is not yet able to impose an Article 7 decision. Hence, the Commission has not usually carried out a full assessment of the actual infringement of competition rules that has taken place. The Commission’s ability to make an assessment of the suitability of the commitments to remedy the potential infringement is limited to the information available at that stage. As a result, the remedies may address an issue which is not actually a competition problem at all. This limitation is accepted as an inherent trade-off if deciding to engage in a procedure such as that set out for Article 9 decisions. Where the investigation by the Commission is incomplete, the risk for mistakes increases. If the Commission were to base Article 9 decisions on full investigations, it would be more difficult to achieve procedural efficiencies.

According to the Court of Justice in *Alrosa*, undertakings also consciously accept that the Commission may make remedies that go beyond what could be imposed as part of an Article 7 decision in exchange for the absence of a finding of an infringement and a fine.\(^{663}\) In the description of the Court of Justice, this sounds like a win-win situation, both sides benefit. It must be admitted, however, that there is a certain imbalance between the bargaining power held by the Commission vis-à-vis the undertaking. Even though the Commission and the undertaking mutually agree on the commitments, it is the Commission that makes commitments binding on the undertaking and it is the Commission which disposes greater bargaining power during the procedure. For instance, once an undertaking sets out on an Article 9 procedure, it no longer has the possibility of convincing the Commission to drop the case, thus the undertaking becomes ‘locked’ into the Article 9 procedure.\(^{664}\) The Commission, however, keeps all its options open as it may at any time decide

---


\(^{663}\) Case C-441/07 P European Commission v Alrosa Company Ltd (n 232) para 48.

to abandon the procedure and opt for an Article 7 procedure instead. Conversely, undertakings have superior knowledge about the conduct in question and may try to achieve a commitment that is as restrained as possible, by using so-called ‘salami tactics’. That is, undertakings may submit commitments that are the least onerous possible, to then submit more and more onerous commitments until the Commission is satisfied. As a result, remedies may either be too weak or too far-reaching to address the competition problem.

To try to ensure that the remedies suggested are suitable to address the Commission’s concerns, they are market tested. Comments on the market tests are made by third parties. In many cases these third parties will be competitors of the undertaking under investigation. The interest of these competitors may be to restrain the future behaviour of the undertaking which is being investigated as much as possible. While it is not certain how much weight the Commission places on market test results in its investigations, third parties have the possibility of exerting either a positive or negative influence on the commitments. As the responses in market tests are not made public, there is no way of checking how much third parties do or do not exert influence over the Commission in specific cases.

While it is theoretically possible for the Commission to make remedies binding that bring suspected infringement to an end, there are a number of factors which influence the remedies that are finally made binding. Unlike in Article 7 decisions, the Commission has a great deal of freedom in the remedies it can make binding in Article 9 decisions. The issue in Article 9 decisions is not so much the ability of the Commission to make remedies binding, but rather the identification of the correct remedies for the competition problem at hand and cooperating with the undertaking to design such a remedy. Since neither the Commission nor the undertaking involved usually have an incentive to appeal an Article 9 decision to the Court, there is seldom any judicial review (even at a low standard) of the remedies imposed by the Commission. While a case-by-case assessment of all Article 9 decisions with regard to the remedies imposed is not feasible within the scope of this study, it is instructive to consider what types of remedies would likely be suitable and proportionate in the setting of Article 9 decisions.

---

666 Wagner von Papp (n 641) 937.
4.3.1.3 Suitable and proportionate remedies in Article 9 decisions

In a note to the OECD, the Commission itself identifies certain types of remedies that it considers suitable in the context of Article 9 decisions:

Article 9 also requires that the necessary measures can be identified clearly and drafted in a self-executing, unambiguous manner. When too many details and regulation of the conduct are necessary, it might be more efficient to use Article 7 in order to impose a cease-and-desist and leave the undertaking determine its own conduct. Commitment decisions should not turn the Commission into a market regulator, or give the Commission a too prescriptive role.668

Thus, the commitments entered into shall be self-executing and unambiguous, but they shall not be so specific that the Commission is forced into a regulatory role. As illustrated by the Microsoft saga the imposition of ambiguous remedies poses significant problems in their enforcement and monitoring.669 Conversely, remedies that require detailed prescriptions may be burdensome and time-consuming to negotiate. These criteria limit the types of remedies that the Commission considers suitable for Article 9 decisions. Potentially, it also limits the kind of competition law infringements that can and should be addressed by Article 9 decisions. For example, cases concerning access to intellectual property rights might be too complicated to address using an Article 9 decision.

However, whether or not a suitable remedy can be found may not always be clear at the beginning of a procedure. The Commission may be reluctant to revert to an Article 7 procedure if it has already invested a great deal of resources in an Article 9 procedure and it may make binding commitments which are not as suitable as suggested at a theoretical level in the OECD paper cited above. In the worst case scenario, the Commission may be uncertain whether it can establish and prove an infringement of Article 101 or 102 TFEU up to the standard required by the Court and may thus prefer to accept an offer of commitments, even if the commitments do not fully correspond to the criteria set out above.

Indeed, there are examples of cases where the Commission does not appear to comply with its own prescriptions regarding the design of remedies. One such case is the Samsung case concerning UMTS standard-essential patents. The commitments in this case are extremely detailed, spanning over 30 pages.670

668 European Union, Commitment Decisions in Antitrust Cases (n 210) para 35.
669 See section 4.1.1.4.
regulating how licenses shall be granted on FRAND (fair, reasonable and non-discriminatory) terms and are completed by an annexed model letter for an invitation to negotiate.

A further issue that should be considered in the context of the types of remedies made binding as part Article 9 decisions is their proportionality. Given the Commission’s broad discretion with regard to accepting remedies and the unlikeliness of a Court appeal, their proportionality is at least in part dependent on the Commission’s self-restraint. In this context, Ibáñez Colomo argues convincingly that scholarly criticism regarding ‘regulatory’ remedies relates to concerns that the actions of the Commission go beyond what is necessary to bring infringements to an end. In other words, remedies, even if effective, may be disproportionate to the competition problem identified.

This problem can be exemplified by the Microsoft (tying) case. This case once again related to a potential abuse of a dominant position due to tying, this time between Windows and Internet Explorer. In the Article 9 decision adopted, Microsoft committed to showing a ‘browser choice screen’ to users during the installation process which allowed the user to choose between Explorer and other, competing browsers. While this remedy forced consumers to make a choice between browsers and thus avoided the fault inherent in the earlier remedy, it was also far-reaching as regards the obligation put on Microsoft to promote competing products. This remedy did not only bring an infringement and its effects to an end, but prescribed the conditions of competition between future internet browsers in a detailed manner. The remedy in Microsoft targeted the infringement (tying) directly, but was ineffective in restoring competition. The remedy in Microsoft (tying), meanwhile, was perhaps more effective, but arguably reached beyond the aim of bringing the potential infringement to an end.

From the above analysis, is possible to conclude that the Commission is obviously aware of the types of remedies that are suitable in the setting of Article 9 decisions. However, the Commission does not always follow its stated guidelines in remedies actually made binding in Article 9 decisions. As a result, remedies may in some instances be unsuitable, ineffective or disproportionate to the aim of bringing a suspected infringement to an end.

---

672 See also section 4.1.1.4.
673 Microsoft (tying) (n 639).
675 See section 4.1.1.2.
676 Heinemann, ‘Behavioural Antitrust’ (n 102) 229.
4.3.2 Punishing and deterring infringers in the context of Article 9 decisions

As already explained above, neither punishment nor specific or general deterrence are objectives pursued by Article 9 decisions. As such, the use of Article 9 decisions also shows that the Commission also considers that competition problems can be addressed without the force of punishment and deterrence.

However, it can also be argued that Article 9 decisions could have effects akin to punishment and deterrence. On the one hand, undertakings subject to Article 9 decisions may perceive remedies as a punishment. Remedies, the Court has held, are not meant to be punishments. But, as submitted above, remedies made binding as part of an Article 9 decision may be disproportionate, for instance due to failures in the negotiation process. In these cases, undertakings may perceive the remedy as a punishment. Conversely, Article 9 decisions may also be perceived as a way to escape punishment, especially if the remedies made binding consist of little more than a cease-and-desist order. In this regard, the Commission itself states in the already cited note to the OECD that:

A commitment under Article 9 to comply with the law [by cease-and-desist order] in the future should not be accepted. Solving this type of cases with a commitment decision is both useless, as the law applies anyway, and detrimental to effective enforcement.

Although the Commission does not spell out this point, if cease-and-desist remedies are accepted in Article 9 decisions, undertakings may get the impression that it is possible to escape enforcement of competition law unpunished, thus diminishing both specific and general deterrence. Rather, such cases should be resolved by Article 7 decision with an attached fine.

As a result, it is submitted here that Article 9 decisions, although they do not aim to punish or deter undertakings, may or may not have such an effect.

4.3.3 Clarifying competition in the context of Article 9 decisions

Since Article 9 decisions do not establish an infringement, they cannot provide the case-specific guidance provided by Article 7 decisions. Nonetheless, Article 9 decisions may still have an effect on the achievement of this objective. Firstly, as Article 9 decisions do not contain guidance on

---

677 Case C-49/92 P Commission of the European Communities v Anic Partecipazioni SpA (n 196) para 81.
678 See section 4.3.1.2.
679 European Union, Commitment Decisions in Antitrust Cases (n 210) para 34.
competition rules in the same way as Article 7 decisions do, there is a certain trade-off where the Commission chooses to use an Article 9 decision instead of an Article 7 decision with regard to the objective of clarifying competition rules. Secondly, undertakings may, despite the lack of finding of an infringement, relate to the Article 9 decisions that the Commission does adopt. These two issues are addressed in turn below. Furthermore, the problem that may occur where there is insufficient guidance on a specific issue is illustrated with reference to most favoured nation clauses.

4.3.3.1 The effects of favouring Article 9 decisions over Article 7 decisions

Where the Commission favours Article 9 decisions over Article 7 decisions, issues that require clarification may not be effectively addressed.

On the one hand, a low number of ‘standard’ Article 7 decisions does not automatically mean that the Commission does not fulfil the objective of clarifying competition rules. It could be that the Article 7 decisions adopted are carefully chosen to provide the needed clarifications. Clarification is primarily provided if the case at hand addresses a certain issue that was previously unsolved or an economic sector whose practices have not been explored with regard to competition law.680

On the other hand, there are areas of competition law where precedents may be difficult to establish under the scrutiny of the Court. In those cases, the Commission may find it advantageous to adopt an Article 9 decision, for the sake of coming to a decision at all. This has been criticised, inter alia because it hinders the development of competition law in new and contentious areas.681 If the Commission only adopts Article 7 decisions in cases which are uncontroversial from a substantive competition law point of view, the clarification objective is not achieved.682 Mariniello, for example, claims that the Commission has chosen to close several cases using Article 9 decisions whose subject areas are in need of a precedent. He names the issue of standard setting, FRAND standard licensing and new media cases such as the Apple e-Books case as contentious areas in EU competition law.683

680 See section 4.1.4.
682 See also section 4.1.4.
683 Mariniello, ‘Commitments or Prohibition? The EU Antitrust Dilemma’ (n 146) 2–3; On standard-setting and FRAND, see: Mariniello, ‘Standard-Setting Abuse: The Case for
4.3.3.2 The guiding effect of Article 9 decisions on undertakings

Moreover, undertakings may also, despite the absence of a finding of an infringement, in some way relate to the contents of existing Article 9 decisions. Hjelmeng points out that it is likely that undertakings align their behaviour to Article 9 decisions.\(^{684}\) Furthermore, as the Commission itself points out, NCAs may use Article 9 decisions as a template to resolve similar cases.\(^{685}\)

The alignment of the behaviour of an undertaking in Article 9 decisions appears especially likely in sectors where the Commission has adopted many Article 9 decisions. Considering all Article 9 decisions adopted by the Commission, there is an over-representation of certain sectors. For example, the sector that most frequently appears in Article 9 decisions adopted by the Commission is the energy sector.\(^ {686}\) Considering that energy markets frequently operate within a natural monopoly structure, these markets are prone to competition problems and therefore also subject to sector-specific regulation. That structure makes it possible and perhaps even desirable to impose specific behavioural and even structural remedies.\(^{687}\) Since it is more difficult to impose such remedies as part of an Article 7 decision, it is understandable that the Commission has preferred to adopt Article 9 decisions. However, as a result, legal uncertainty may be created, causing undertakings to be more careful about their actions than they need to be, resulting in business chilling.

Article 9 decisions may also create safe harbours in areas where the correct application of Article 101 or 102 is uncertain. Undertakings may then consider

---

\(^{684}\) Hjelmeng (n 159) 1029; European Union, Commitment Decisions in Antitrust Cases (n 210) 7; See also: de la Mano, Nazzini and Zenger (n 289) 342.


\(^{686}\) To be exact, 11 of 40 Article 9 decisions have a NACE code referring to ‘D-Electricity, gas, steam and air conditioning supply’. See: Ibáñez Colomo, ‘Database of Cases’ (n 147); See also: von Kalben (n 79) 170.

\(^{687}\) See further: Ibáñez Colomo, ‘On the Application of Competition Law as Regulation: Elements for a Theory’ (n 74) 268–76.
it safe to engage in anti-competitive behaviour that would actually be prohibited under Article 101 or 102 TFEU following a more thorough investigation.  

Thus, Article 9 decisions adopted by the Commission may create ‘case law’ outside the oversight of the Court, as Article 9 decisions may guide undertaking’s behaviour in ways not perhaps intended by the Commission.

**4.3.3.3 An illustration: Most favoured nation clauses**

The trade-off between Article 7 and Article 9 decisions where clarifications by the Commission are lacking can be effectively illustrated with reference to cases concerning most favoured nation (MFN) clauses. In addition, these cases also provide certain illustration of the problems that can occur where the Commission makes remedies more or less equivalent to cease-and-desist orders binding as commitments.  

The term ‘MFN clause’ originates from public international law designating a type of provision often used in international trade agreements, whereby a state undertakes an obligation towards another state to accord most-favoured-nation treatment. In the present context, MFN clauses usually oblige one party to the agreement to offer the same or similar favourable conditions to the other party, as those granted to third parties.

MFN clauses can be used in vertical distribution agreements between an upstream producer and downstream seller of a product or service. In particular, MFN clauses are used where the producer/service provider also sells the product or service. For example, in the *Booking* cases, hotels usually offered room-booking services directly to customers. Booking and similar comparison sites also provide room-booking services (with commission), but beyond that they provide customers with a comparison function and hotels with larger visibility among customers. If hotels were allowed to undercut the prices on comparison sites, they could free-ride on the benefits provided by comparison sites. This problem can be eliminated by an MFN clause.

---

688 Hjelmeng (n 159) 1029; de la Mano, Nazzini and Zenger (n 289) 342; Ibáñez Colomo, *The Shaping of EU Competition Law* (n 250) 288–89.

689 See section 4.3.2.

690 See, for example: General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948 ) 55 UNTS 187 (GATT 1947) art 1.


While MFN clauses may legitimately aim to prevent free riding, they may also have anti-competitive effects if they are applied in a broad manner. In this context it has become common to distinguish between narrow and wide MFNs. Narrow MFNs only require parity between the producer/service provider and the downstream seller in the sales channel employed by the seller. Wide MFNs, in contrast, also require price parity compared with other downstream sellers and include several sales channels (for example, both online and offline sales). MFN clauses can also be used for potentially innovative products or services, as the Amazon e-Books case shows. Wide MFN clauses may eliminate price competition between retailers and are also a way of controlling markets, especially for dominant or strong market actors that are more likely to be able to negotiate MFN clauses for themselves By way of MFN clauses dominant actors are guaranteed that they can always offer the lowest price on a given product, thus making it impossible for smaller undertakings to attract customers by undercutting prices.

The Commission has adopted two relevant decisions specifically dealing with the issue of MFN clauses: Apple e-Books and Amazon e-Books, both closed by an Article 9 decision. The e-Books cases show that, despite the intentions expressed by the Commission, there are Article 9 decisions which include little more than a declaration on the part of the infringing undertaking agreeing to cease-and-desist the problematic conduct.

In the Apple e-Books case, agreements between Apple and a number of e-Book publishers were at issue. Essentially, the agreements included MFN clauses that obliged e-Book publishers to offer Apple the same retail prices they offered to another e-Book retailer if this price was lower than the current retail prices offered to Apple. This case was closed through an Article 9 decision requiring Apple and the book publishers concerned to abolish the MFN clauses.

In the Amazon e-Books case, the Commission adopted an Article 9 decision in May 2017 on several different MFN clauses. Amazon shall, according to the commitments made binding:

As of the Effective Date, Amazon will cease to enforce or otherwise rely upon any Business Model Parity, Agency Commission Parity, Agency Price Parity,
According to the commitments, Amazon shall abolish all MFN clauses from its contracts with book publishers, not only as regards the pricing of e-Books, but also as regards a number of other features, such as the distribution model (for example, through a subscription or book club), e-Book features, commissions, rebates and selection. As is apparent, the commitment above simply requires Amazon to cease the problematic conduct. The commitments in that case further include the engagement of a monitoring trustee. As discussed in the analysis of the Microsoft case, the Commission’s options concerning the use of monitoring trustees in Article 7 decisions are limited. Conversely, as part of the commitments, this mechanism may be employed, because the undertaking agrees to such monitoring. The advantage of a monitoring trustee is that, besides easing the administrative burden on the Commission, the trustee is able to not only monitor initial compliance, but also compliance over time. This means that the presence of a monitoring trustee may prevent repetition of the same infringement. However, besides the monitoring trustee, the commitments made binding on Amazon do not go beyond a cease-and-desist remedy.

Besides the criticisms as regard the remedies imposed in the e-Books cases, these Article 9 decisions can also be criticised because there is uncertainty as regards the anti-competitiveness of MFN clauses and an Article 7 decision would have provided welcome clarification on this question.

Unfortunately, the Commission has not either satisfactory addressed the question of the lawfulness of MFN clauses in general guidance. The Commission has included MFN clauses in its sector inquiry concerning e-commerce. The final report finds that MFN clauses are being used by actors in the e-commerce market, though not overly common. As regards the...
lawfulness of MFN clauses, the Commission considers that they fall within the broad scope of the Vertical Block Exemption Regulation, as long as the actors in question fulfill the market share limits and the parity clauses do not present a hard-core restriction of competition. Otherwise, the clauses would need to be examined individually. The Commission’s line of reasoning regarding the potential restriction of competition and benefits for competition is rather short, only three paragraphs. It does not provide any conclusions as to the probable lawfulness of, for example, narrow versus broad MFN clauses.

The legal uncertainty on the issue of MFN clauses can be concretely illustrated by a case handled in parallel by four different NCAs, the *Booking* case. In that case, a number of NCAs accepted commitments (Sweden, France, Italy) that abolished wide MFN clauses employed by Booking and only permitted narrow MFN clauses for online sales by Booking and the hotels respectively. Conversely, the German NCA issued a prohibition decision as regards all types of MFN clauses used by Booking. The disagreement between the NCAs essentially boiled down to whether the narrow MFN clause, only requiring parity between Booking and the respective hotels, was in line with competition law or not. This disagreement had an unfortunate effect, because it sent mixed signals to undertakings as to the lawfulness of different MFN clauses.

It appears desirable, for the purposes of both legal certainty for undertakings and ensuring uniform enforcement of Article 101 TFEU within the EU, that the Commission adopts binding decision in a case concerning the lawfulness of MFN clauses. Such a decision would subsequently, by virtue of Article 3(2) of Regulation 1/2003, make it impossible for NCAs to further diverge on the issue, at least when applying Article 101 TFEU.

What the cases pertaining to MFN clauses show is that if Article 9 decisions are regularly used to resolve cases concerning controversial behaviour or theories of harm, there is a risk that the clarification objective is not fulfilled because of the Commission’s inadequate choice of case resolution.

---


706 See the decisions by the Swedish and German NCAs: Konkurrensverkets beslut av den 15 April 2015, *Bookingdotcom* (dnr. 596/2013) (n 692); BKartA, 22 December 2015, B9-121/13 (*Booking*) (n 692).

mechanism. Furthermore, regularly accepting remedies that can be equated to cease-and-desist orders are not desirable as part of Article 9 decisions, as they may diminish the deterrent effect of the Commission’s enforcement overall.

4.3.4 Efficiency in the Article 9 procedure

Besides imposing more tailored remedies, the second main objective pursued by Article 9 decisions is the efficient conduct of the procedure. In the words of the Court of Justice:

[Article 9 decisions are] a new mechanism introduced by Regulation No 1/2003 which is intended to ensure that the competition rules laid down in the EC Treaty are applied effectively, by means of the adoption of decisions making commitments, proposed by the parties and considered appropriate by the Commission, binding in order to provide a more rapid solution to the competition problems identified by the Commission, instead of proceeding by making a formal finding of an infringement. More particularly, Article 9 of the regulation is based on considerations of procedural economy, and enables undertakings to participate fully in the procedure, by putting forward the solutions which appear to them to be the most appropriate and capable of addressing the Commission’s concerns. (emphasis added)708

Commitments are accepted at a stage of the proceedings where the Commission is not yet able to impose a fine. The time used to resolve a case through an Article 9 decision should in theory be significantly shorter than the time spent on a case that is resolved through an Article 7 decision, and the resources invested should respectively be more limited.709 Admittedly, the negotiation of commitments including the market test can be expected to demand some time and resources, but in sum the individual case should still be resolved more efficiently. Commitments aim to stop possible infringements at an early stage while the Commission must be reasonably sure that the commitments offered remove its concerns regarding the possible infringement.710 Article 9 decisions will then at best remove any infringement of EU competition law at once. At worst, an Article 9 procedure may be a long and cumbersome process for finding the correct remedy for the suspected infringement, which would not be efficient at all.

To test these expectations empirically, Mariniello calculates the duration of the Commission’s Article 7 and Article 9 procedures for cases closed between

---

708 Case C-441/07 P European Commission v Alrosa Company Ltd (n 232) para 35.
710 Case C-441/07 P European Commission v Alrosa Company Ltd (n 232) para 42.
May 2004 and December 2013. On average, he finds that Article 9 decisions are adopted only slightly more expedient than Article 7 decisions. To be exact, the former take an average of 24.3 months while the latter take 28.5 months, thus differing by a mere 4.2 months. When looking at cases under Article 102 TFEU, it can be observed that commitment decisions actually take longer time to adopt than prohibition decisions. One problem with these statistics is that there are very few cases under Article 102 TFEU, making the available figures not statistically significant, as Mariniello points out. Another weakness of these statistics is that they are only based on the time the Commission takes to close cases. They do not reveal anything about the resources invested in Article 7 decisions versus Article 9 decisions. It is possible that Article 9 decisions require fewer resources, particularly in terms of human resources such as time spent by case handlers, thus making them more efficient than Article 7 decisions. However, there are no readily available studies on this issue, and in all likelihood the reliable data would be difficult to gather. Besides Mariniello, Marx has carried out a similar study as regards the length of time taken by the Commission to close cases through Article 7 and Article 9 decisions. His study examines cases closed between May 2004 and May 2014, a sample period only slightly longer than that used by Mariniello. However, Marx uses a somewhat different methodology compared to Mariniello as he calculates the length of the procedure in days instead of months which makes it difficult to compare results. Still, this author aims to compare their results by converting Marx’ results into months, dividing the average number of days taken to complete a case by 30. From that conversion, the following figure emerges:

711 Mariniello, ‘Commitments or Prohibition? The EU Antitrust Dilemma’ (n 146) 2.
712 ibid 5. Some additional statistical data was kindly made available by Mr. Mariniello via email and is on file with the author.
713 ibid.
714 But, it appears that research is being conducted on this issue. See: Florian Wagner von Papp, ‘How to Prevent Irreperable Harm to the Digital Economy’ (12th ASCOLA Conference, Stockholm, 15 June 2017) on file with the author.
Even with the crude conversion of Marx’s data made by this author, it is apparent from the figure above that the results are quite similar to those of Mariniello, regardless of the slightly different samples used by the two authors. Notably, the overall difference in the time taken to complete Article 7 and Article 9 decisions respectively is even smaller (just over two months).

---

Mariniello, ‘Commitments or Prohibition? The EU Antitrust Dilemma’ (n 146) 5. Some additional statistical data was kindly made available by Mr. Mariniello via email and is on file with the author.

Marx (n 146) 94–108.
in Marx’s study. As regards Article 102 cases, Marx likewise finds that Article 9 procedures take longer than Article 7 procedures, even if the time difference computed by him is smaller than that computed by Mariniello.

Thus, it does not appear that the Article 9 procedure reaches the efficiency objective set out for it. Both Marx and Mariniello theorise that the lack of efficiency of the Article 9 procedure may partially be due to an incorrect allocation of cases to that procedure by the Commission.717

Marx observes in the interpretation of the results from his study cited above, that cases where an Article 9 procedure was started late in the course of the resolution of a case, that is to say after a SO had already been sent, show extraordinary long durations. There is thus an indication that the Commission is not able to achieve the desired result from the Article 9 procedure where it decides to follow this procedure after it has already sent a SO.718 Indeed, the Commission, without naming a certain point during the procedure, writes in its OECD note that a late conversion of a case is likely to eliminate efficiency gains.719 Further, Marx theorises that the fact that a case is closed through an Article 9 decision may be unrelated to the actual objectives of that procedure.720 One such reason could be that the Commission feared that an Article 7 decision would not withstand judicial scrutiny. One example of a case where a SO was sent, to be thereafter concluded by an Article 9 decision, is Samsung. The Samsung case has already been mentioned above with regard to the complicated and detailed remedy made binding in that case.721 The fact that the case was converted to an Article 9 procedure late in the process and closed by a remedy which the Commission itself considers in principle unsuitable for commitment decision, indicate that other considerations than procedural efficiency or bringing a potential infringement to an end might have influenced the outcome of the case.722

Of course, the chain of events leading to a change of procedure may also be the opposite: the Commission and the undertaking may not be able to come to an agreement as regards commitments and the Commission may see itself forced to revert to an Article 7 procedure. This situation may occur where the case turns out to be unsuitable for an Article 9 decision or where the Commission and the undertaking simply cannot agree on suitable remedies. Google Search was one such a case. The Commission opened the case on 30

717 Mariniello, ‘Commitments or Prohibition? The EU Antitrust Dilemma’ (n 146)5-6; Marx (n 146) 165.
718 Marx (n 146) 164–65.
719 European Union, Commitment Decisions in Antitrust Cases (n 210) 8.
720 Marx (n 146) 165.
721 See section 4.3.1.3.
722 For the full table of cases with late conversions, see: Marx (n 146) 256.
November 2010 and adopted its preliminary assessment on 13 March 2013. Google subsequently proposed three different sets of commitments, the last one on 31 January 2014. After consultation with the complainants in the case, the Commission finally decided that it could not make the third set of commitments binding and sent a SO to Google. It appears that this reversion of the procedure was brought about by the inability of the Commission and Google to agree on suitable remedies. This circumstance could in turn be ascribed to the novel nature of this case. The Commission then officially reverted to the Article 7 procedure on 15 April 2015, sending a SO to Google on that date. Finally, on 27 June 2017, after 6.5 years of investigation, the Commission adopted its Article 7 decision in the Google Search case. Compared to the averages computed by Mariniello and Marx, this is an extraordinarily long duration for a case. Granted, the Google case is considered to be of a novel nature and unusually data-intensive. However, the fact that both the Article 9 and the Article 7 procedures were employed undoubtedly contributed to the duration of the case. This case illustrates that it is important to make a thoughtful decision when choosing which procedure to follow from the outset. Obviously, errors cannot always be avoided, but should be minimised.

4.4 Conclusions

The aim of the exercise carried out in this chapter has been to assess to what extent the case resolution mechanisms used by the Commission reflect, pursue and reach their objectives. Each case resolution mechanism aims to fulfil a specific set of objectives. Therefore the assessment carried out for each mechanism differs slightly depending on the relevant objectives. The assessment carried out also varied depending on the type of objective assessed and, where empirical assessments could be made, on the available findings, mainly from research in economics. The assessment in this chapter has thus been very much an exercise in ‘taking stock’ reviewing the current legal framework and the powers granted to the Commission within that framework.


724 See further section 5.6.1.

as well as a review of the available findings from economics. The picture which emerges of the case resolution mechanisms used by the Commission and the objectives they are (able) to achieve is consequently rather varied.

As the analysis carried out in the following two chapters heavily relies on the findings made in this chapter, it is appropriate to shortly summarise the findings made here before proceeding to a concluding analysis of the present chapter.

4.4.1 Summary of findings

Article 7 decisions are the case resolution mechanism pursuing the broadest set of objectives, namely bringing infringements to an end, punishing offenders, deterring new infringements and clarifying competition rules.

The Commission’s powers to stop infringements using specific remedies are limited by the freedom to conduct a business and the principle of proportionality in Article 7 decisions. In practice, this means that, the Commission is limited to imposing a cease-and-desist order in many cases. While infringements can also be ended by cease-and-desist orders, whether the prohibited conduct is actually ended depends on the effect of the fine imposed. Further, it is more difficult to verify that the conduct has effectively stopped.

Fines attached to Article 7 decisions shall both punish and deter infringers as well as deter other undertakings from future infringements. While the Commission’s Fining Guidelines in theory support both deterrent and retributive aims of fines, there are considerable difficulties attached to the calculation of fines that reach the magnitude required to act as a deterrent. The review of economic research conducted shows that there is certain disagreement between economists on how to calculate fines act as a specific deterrent. Further, such calculation models also rely heavily on assumptions and estimates. Thus, even if the fines currently imposed by the Commission may not achieve a magnitude sufficient to act as a deterrent, there are doubts about the practical possibility of calculating fines of such a magnitude in an exact manner.

With regard to the prevention of infringements, it should be recalled that this objective can also be pursued by clarifications of competition law and, with regard to undertakings that have previously infringed competition law, by remedies. However, considering general deterrence by fines, there is no doubt that such fines do emanate a certain deterrent effect. However, the empirical evidence supporting the assumption that general deterrence can be increased by increasing the magnitude of fines is rather weak. Conversely, there is evidence to show that the deterrent effect of law enforcement can be increased by increasing detection rates.
With regard to fines, general deterrence does not depend on the actual fine that would be imposed if an infringement were committed, but rather on undertaking’s perceptions as to the fine that would be imposed. In this context, it is necessary to remember that undertakings may not only face fines imposed by the Commission if found to have infringed EU competition rules, but also by other competition authorities. In addition, the cost of an infringement may further be raised by private damages.

Further, undertakings may be motivated to comply with the law by moral or social reasons. Thus, concentrating on the magnitude of fines imposed by the Commission to prevent infringements appears misdirected. Rather, a broader view considering overall enforcement of EU competition law as well as moral and social effects of law enforcement must be taken.

With regard to the clarification of the competition rules, Article 7 decisions play an important role explaining competition rules with regard to the Commission’s current interpretation of relevant EU competition law. Article 7 decisions may also have a preventative effect in explaining to undertakings how they may not act. It should however be emphasised that it is crucial that novel issues are sufficiently addressed by Article 7 decisions to achieve this objective.

The improvement of the efficiency of the Commission’s enforcement activity, especially increasing the number of potential infringements that could be investigated, was one of the main arguments for reforming the enforcement of EU competition law. Besides the abolition of the notification mechanism contained in Regulation 17/62, commitments and, subsequently, settlements are viewed as being among the most important tools for improving the overall efficiency of enforcement of Articles 101 and 102 TFEU. Unfortunately, there is no indication so far that these novel case resolution mechanisms have allowed the Commission to handle more cases or make more decisions than before. As discussed above, there may be good reasons and explanations this outcome, but the result is quite unequivocal.

Cartel settlements aim to achieve a rapid conclusion of cartel cases by way of a simplified procedure. The loss of a certain deterrent effect due to a reduction of fines should be offset by increased detection. Empirical evidence shows that cartel settlement procedures are conducted more time-efficient than ordinary Article 7 decisions in cartel cases. However, the Commission has not succeeded in visibly increasing the number of cartel cases concluded as a result. The Commission’s ability to use cartel settlements is somewhat limited by the principle of equal treatment that demands that all parties to one cartel must be treated equally, for example, when considering whether or not to settle a case. Where some parties do not want to settle the case, the Commission has sometimes utilised cartel settlements as ‘hybrids’, a procedure that results in
the need to take extra safeguards to ensure that no constitutional restraints are infringed.

Article 9 decisions aim primarily to achieve a more rapid resolution of cases and allow the cooperative design of specific remedies through a dialogue between the undertakings involved and the Commission. Thus, Article 9 decisions allow the Commission a larger margin of discretion as regards the remedies that are made binding. However, that large margin of discretion should be handled carefully, especially since the Court of Justice has in Alrosa confined itself to a low standard of review with regard to the application of the principle of proportionality to remedies made binding. The analysis carried out above shows that there is a certain imbalance between the negotiating positions held by the Commission and the undertaking involved in an Article 9 decision that could lead to disproportionate remedies. Further, the wide margin of discretion enjoyed by the Commission may also lead it to make remedies binding that it does in abstract not consider suitable for the purposes of Article 9 decisions.

Article 9 decisions do not aim to punish or deter undertakings from (further) infringements, but the adoption of an Article 9 decision may nevertheless have such an effect, for example where an undertaking considers a remedy as too far reaching. Conversely, Article 9 decisions may be seen as a tool to escape punishment if remedies do little more than a cease-and-desist order would have done.

The clarification of competition rules is not either an objective pursued by Article 9 decisions, but again, an effect on that objective cannot be excluded. On the one hand, where novel issues in need of clarification are addressed by Article 9 decisions, important clarifications may be lacking because Article 9 decisions do not find an infringement. On the other hand, undertakings may adapt their behaviour to Article 9 decisions and where the Commission adopts many Article 9 decisions within one economic sector there is a danger of creating unintentional safe harbours.

Lastly, it appears that the efficiency gains that should have been achieved by Article 9 decisions have, at least so far, not been realised. Article 9 decisions are not adopted significantly faster than Article 7 decisions.

4.4.2 Analysis

The introduction of Regulation 1/2003 and of the new case resolution mechanisms of Article 9 decisions and (subsequently) cartel settlements was
frequently justified by the need for more efficient enforcement, which would then also lead to more effective achievement of the other objectives.\footnote{727} However, a more palpable effect has arguably been the diversification of the mechanisms used to resolve cases of suspected infringements of Articles 101 and 102 TFEU. This diversification of case resolution mechanisms has also allowed the Commission to pursue the objective of securing compliance in a more varied manner. As already mentioned in the conclusion of chapter 3, several objectives include the aim to prevent future infringements.\footnote{728} To illustrate this argument, the different case resolution mechanisms can be viewed from two perspectives: One perspective is ‘enforcement-oriented’ whereas the other can be better understood as ‘regulation-oriented’, following a classic dichotomy. The first perspective is focused on securing compliance through the classical means of punishment and deterrence, securing compliance by fear. The second perspective is focused on securing compliance through negotiated forward-looking remedies and securing compliance through cooperation.

The enforcement perspective is most clearly represented by Article 7 decisions. The Commission may impose large fines on undertakings, but has only limited means to steer the future conduct of the undertaking. Instead, the large fine (and the possibility to impose further fines) shall ensure that the undertaking targeted by the decision does not continue to infringe Article 101 or 102 TFEU and infringe one of these provisions again. This enforcement shall also deter other actors from infringing competition law.

Cartel settlements can also be considered to be enforcement-oriented. Formally, they lead to an Article 7 decision, but in a more time-efficient procedure. However, an efficient cartel settlement also depends on the active cooperation by the undertaking(s) involved.

Article 9 decisions involve both a more cooperative and a forward-looking approach while at the same time aiming to increase the Commission’s efficiency. Undertakings have large influence over the outcome of an Article 9 decision by being able to propose remedies. At the same time, these remedies are likely to regulate the future conduct of that undertaking, giving it less freedom to conduct its business after the decision has been made. The main problems identified with this approach are that the remedies finally made binding may not be ideal to actually stop the problematic conduct and there is a lack of evidence concerning an enhancement of the efficiency of the Commission by way of this procedure.

\footnote{727} See, for example: Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) recitals 2-3.

\footnote{728} See section 3.3.
Considering the findings made in this chapter in sum, it is submitted here that the most interesting issue faced by the Commission appears to be the choice of what case resolution mechanism to utilise in a given case of a suspected infringement of Article 101 and 102 TFEU. While the Commission’s discretion of when to use each of the three mechanisms assessed here is somewhat restricted with regard to cartel settlements and Article 9 decisions, each case will usually yield two different mechanisms to choose from: in case of a cartel, an Article 7 decision or a cartel settlement and in other cases an Article 7 decision or an Article 9 decision. The objectives achieved in each case depend on the interaction between the set of objectives pursued by each mechanism, the extent to which these objectives can be achieved by the Commission and the characteristics of the individual case.

Notably, when Regulation 1/2003 was adopted, it was argued that the employment of Article 9 decisions should be an exceptional occasion, due to the lack of punishment and the lack of guidance provided by such decisions. While the frequent use of Article 9 decisions has led to the anticipated criticism, perhaps further fuelled by the weak judicial review preferred in *Alrosa*, that use of Article 9 decisions has also paved the way to the two-perspective enforcement of EU competition law illustrated above. Essentially, it can be concluded that the enforcement of Articles 101 and 102 TFEU no longer mainly relies on the principles of commanding and controlling undertaking compliance with competition law, but relies on a broader spectrum of means to secure compliance including forward-looking remedies and cooperative resolutions of cases. This opens the path to considering what findings concerning the enforcement of legal rules have been developed within regulatory enforcement theory.

For example, regulatory enforcement theory distinguishes between several enforcement styles that are roughly placed along a cooperation-coercion continuum. Each enforcement style has different strengths and weaknesses and there is, within regulatory enforcement theory, a discourse inquiring when enforcement authorities should use what style. That discussion is relevant in the context of this study because it can be connected to the issue of selecting the appropriate resolution mechanism in each particular case in order to ensure that the objectives outlined in chapter 3 are fulfilled.

---

730 See section 5.1.
732 See further section 6.2.1.
The risks and merits of an enforcement approach to competition law that draws on theories on regulation and regulatory enforcement will thus be explored in the next chapters.
5 Case Resolution Mechanisms through the Lenses of Regulatory Enforcement Styles

Viewing the different case resolution mechanisms through the lenses of regulatory enforcement styles, this chapter serves several aims: it introduces the regulatory enforcement perspective on case resolution mechanisms adopted throughout the remains of this study, it provides further insights into the workings of these mechanisms and it lays the groundwork for the analysis concerning responsive regulation carried out in chapter 6.

As explained in chapter 1, there is a difference between regulation and regulatory enforcement, and accordingly between classes of regulation and styles of regulatory enforcement. While the class of regulation denotes the regulatory approach adopted to target a specific issue, the style of regulatory enforcement denotes the way in which that regulation is enforced. For example, command-and-control regulation refers to a class of regulation that uses commands to prescribe certain conduct and an enforcement style that uses coercive instruments in case of non-compliance with the commands. Different classes of regulation can, but must not necessarily be associated with one particular style of regulatory enforcement. Different regulatory enforcement styles can be utilised in a mutually exclusive manner or as hybrids, viewing them as a ‘toolbox’ rather than as a choice between alternatives. It should be observed at the outset that there is no universally agreed terminology for different classes of regulation or styles of regulatory enforcement.

Below, relevant regulation classes and regulatory enforcement styles as understood in the present study are first introduced. Subsequently, this study attempts to categorise the case resolution mechanisms used to resolve infringements of Articles 101 and 102 TFEU in line with regulatory enforcement styles along a cooperation-coercion continuum. Further,

733 See section 1.3.3.
735 Morgan and Yeung (n 37) 79.
communication as an accessory to other regulatory enforcement styles is analysed. This abstract analysis of the regulatory enforcement carried out by the Commission is complemented and illustrated by several case analyses. More particularly, the trade-offs faced by the Commission in its choice of regulatory enforcement style are illustrated at the example of two cases, Google Search \(^{736}\) and ARA.\(^{737}\)

## 5.1 Regulation classes and enforcement styles

The most widely known class of regulation, command-and-control regulation, usually entails a coercive enforcement style, meaning that rules are enforced by a public authority, backed by the possibility to impose a punishment. The calculus behind this style of enforcement is that rational actors will be deterred from infringements if the latter are rendered economically unbefeficial.\(^{738}\) This coercive enforcement style can be criticised from various points of view, which is one of the reasons other styles of regulatory enforcement have emerged.\(^{739}\)

Instead of employing command regulation to steer behaviour, regulators may choose to use some kind of self-regulation. Self-regulation can take many forms, which makes it difficult to define. Sinclair, for example, defines it as a form of regulation that ‘(...) re[lies] substantially on the goodwill and cooperation of individual firms for their compliance’.\(^{740}\) As a result, self-regulation ‘(...) can range from any rule imposed by a non-governmental actor to a rule created and enforced by the regulated entity itself’.\(^{741}\) A typical example of self-regulation is an industry-associations that regulates issues such as standards or certifications. The driving force behind self-regulation, besides the state, may be consensus within an industry or public pressure.\(^{742}\)

Where self-regulation is employed as a type of regulation, the state also leaves the question of the regulatory enforcement style in the hands of the institution(s) regulating the issue in question. Regulatory enforcement subsequently carried out within the area of self-regulation may take various styles, ranging from a coercive style of enforcement to no enforcement at all.

\(^{736}\) Google Search (Shopping) (n 151).

\(^{737}\) ARA Foreclosure (n 150).

\(^{738}\) See section 1.3.2.1.

\(^{739}\) Morgan and Yeung (n 37) 80–85.

\(^{740}\) Sinclair (n 734) 534.

\(^{741}\) Cary Coglianese and Evan Mendelson, ‘Meta-Regulation and Self-Regulation’ in Robert Baldwin, Martin Cave and Martin Lodge (eds), The Oxford Handbook of Regulation (Oxford University Press 2010) 147.

\(^{742}\) Morgan and Yeung (n 37) 92–96.
Self-regulation has attracted serious criticism, with claims that it is ineffective and mainly serves to ward off more stringent public regulation.\textsuperscript{743} As a response, a number of different co-regulation models which combine public regulation and self-regulation have been developed.\textsuperscript{744} One of these models is that of enforced self-regulation developed by Ayres and Braithwaite in their theory of responsive regulation.\textsuperscript{745} In their model, a regulatory agency requires undertakings to develop internal rules, self-regulation, to fulfil the objectives of the regulation at issue. These rules subsequently need to be approved by the authority. When carrying out its assessment, the authority may receive help from third-party stakeholders. An internal compliance group, also approved by the regulator, or the regulator itself, then monitors compliance with the rules that have been developed and approved for this purpose.\textsuperscript{746}

An enforcement authority may also seek to ‘persuade’ undertakings to act in a certain manner through communicative means, such as information, guidance and public campaigns. The aims of this communication may be manifold, as may the means employed.\textsuperscript{747} One might be to educate undertakings which are potentially ignorant of certain issues or to exercise social pressure on undertakings to behave in a certain manner. Further, authorities may attempt to pressure undertakings by mobilising public opinion. Such public campaigns aim to bring what is publicly considered to be right and moral behaviour in line with the contents of regulation.\textsuperscript{748} Where formal regulation is complex, authorities may also offer guidance to undertakings, collectively or individually, to help those willing to comply to do so successfully.\textsuperscript{749} Thus, communication may be used as a class of regulation, as a style of regulatory enforcement or as an accessory to another style of regulatory enforcement.\textsuperscript{750}

\textsuperscript{745} Ayres and Braithwaite (n 91).
\textsuperscript{747} Morgan and Yeung (n 37) 96.
\textsuperscript{750} See: Morgan and Yeung (n 37) 96-102.
It is worth pointing out once again that the relationship between regulation classes and regulatory enforcement styles is not static, but rather dynamic, frequently overlapping and with the occurrence of hybrid constructs. Articles 101 and 102 TFEU are worded as commands and enforced by the Commission. However, this does not mean that the enforcement of these commands must be carried out in a coercive style. In rough terms, Article 7 decisions represent a control style of enforcement while Article 9 decisions can be classified as a kind of enforced self-regulation. The Commission’s case resolution mechanisms can thus be said to take a toolbox approach.

Below, it is attempted to categorise the different case resolution mechanisms used by the Commission according to different regulatory enforcement styles.

5.2 Article 7 decisions

Article 7 decisions can be defined as the ‘control’ element of command-and-control regulation employed in the resolution of cases. However, control enforcement is a more multi-facetted enforcement style than meets the eye by the description given above. This can be illustrated by analysing Article 7 decisions more closely.

An Article 7 decision can be separated into three parts: The first part is the finding of an infringement. The second part is the prohibition and removal of the infringement and its effects. This can be accomplished by a cease-and-desist order and, where possible, more specific remedies. The third part consists of punishment in the form of fines. It is interesting to note that, structurally, the imposition of fines is subject to Article 23 of Regulation 1/2003 rather than Article 7 of the same regulation. Indeed, there is nothing in Regulation 1/2003 that forces the Commission to impose a fine on an undertaking if it does not wish to do so. This is also indicated by the use of the word ‘may’ in Article 23(2) of Regulation 1/2003. Thus, Article 7 decisions may be adopted both with and without a fine, making them more or less coercive depending on the alternative chosen.

An important feature of Article 7 decisions is that they are imposed by an administrative authority, the Commission. From a regulatory point of view, it is interesting to consider how the Commission can shape Article 7 decisions.

751 The multiple roles taken on by the Commission as an enforcer of competition law have been a subject of quite some legal debate with regard to due process rules, but will not be addressed further here. See in this regard: James Killick and Pascal Berghe, ‘This Is Not the Time to Be Tinkering with Regulation 1/2003: It Is Time for Fundamental Reform - Europe Should Have Change We Can Believe In’ (2010) 6 Competition Law Review 259; Ian S Forrester, ‘Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures’ (2009) 34 European Law Review 817; Andersson (n 233).
given its’s broad discretion as an enforcer of Articles 101 and 102 TFEU. The combination of investigatory and decision-making powers conferred on the Commission allows considerable discretion in devising interaction with the undertaking(s) under investigation. Illustrating two extremes, the interaction may either be adversarial, or accommodating and cooperative. In the adversarial version, the Commission carries out its investigation, guaranteeing the required procedural rights of the undertaking, but not engaging into any type of negotiation that could have an impact on the outcome of the case. In the cooperative version, the Commission may, for instance during state-of-play meetings, engage in some form of dialogue. Such dialogue may inter alia concern the nature of the infringement, its extent, the blameworthiness of the undertaking, appropriate remedies or the appropriate fine for the infringement.\textsuperscript{752}

In regulatory literature the process of dialogue, negotiation or bargaining between regulator and regulate is sometimes referred to as ‘regulatory conversations’. Regulatory scholars have observed the existence and content of such conversations in a number of contexts. Conversations may take place at several stages of regulation and for many different reasons.\textsuperscript{753} In the enforcement process, conversations may be perceived as more effective in achieving future compliance with rules, because they appeal to the regulated undertaking’s willingness to comply and avoid alienating the undertaking. Conversations put the emphasis on establishing a relationship between regulator and undertaking being regulated instead of pitting them against each other. Further, conversations may aim at saving resources, for instance by avoiding court appeals and future enforcement costs due to non-compliance. Conversations may also be used where there is little support or a certain ambivalence towards the rules being breached or the enforcement action taken by the regulator, either by the general public or businesses.\textsuperscript{754}

However, conversations also hold certain dangers, summarised by Black as ‘capture,\textsuperscript{755} inconsistency and inequity, emptying the law of any meaningful

\textsuperscript{752} With regard to remedies, such negotiations apparently already occurred under Regulation 17/62, see: \textit{Deutsche Post II} (Case COMP/36.915) Commission Decision of 25 July 2001 [2001] OJ L 331/40, para 78; For a more recent case, see: \textit{ARA Foreclosure} (n 150); See further: Monti, ‘Behavioural Remedies for Antitrust Infringements - Opportunities and Limitations’ (n 357) 198–99.


\textsuperscript{754} Hawkins (n 73) 3–5; Julia Black, ‘Regulatory Conversations’ (2002) 29 Journal of Law and Society 163, 88–89.

\textsuperscript{755} The term ‘capture’ refers here to a situation where an enforcer is ‘so imbued with the standards and culture of the organisation that they “turn a blind eye” to breaches in legislation and specific regulations’. See: Fiona Haines, \textit{Corporate Regulation: Beyond ‘Punish or Persuade’} (Clarendon 1997) 116–117.
content, and undermining the regulation, and more particularly, its public interest and social objectives’. 756 In contrast, a more adversarial approach to regulatory enforcement is associated with higher costs, for example due to an increase in court appeals, but better adherence to legal standards of the law enforced and adherence to general principles of law. It is also argued that corporate wrongdoing should be, morally and legally, equated with individual wrongdoing, which is subject to criminal law. A cooperative enforcement approach may simply lead to a relaxation of what is considered to be compliant behaviour, rather than better compliance with the law. 757

The administrative, rather than judicial, nature of Article 7 decisions allows the Commission significant discretion in the type of relationship it wishes to create with the undertaking in question. It is illustrative to imagine the current nature of Article 7 decisions in comparison to a hypothetical situation where the Commission would need to prosecute undertakings before the General Court. In a judicial system, there would be a certain shift in the procedure to the benefit of the regulated undertaking. Focus would then be placed on the illegal conduct that can be proven to a Court and the fine that could be justified. While an Article 7 decision may also be appealed to the Court, the nature of an appeal procedure differs from that of an infringement procedure. For example, an appeal is limited to the points of appeal submitted by the claimant. 758 Also, the Court allows the Commission a broad margin of discretion on certain points of Article 7 decisions, such as the calculation of fines and, to a more limited extent, regarding so-called ‘complex economic assessments’. 759

Given the Commission’s broad discretion as an enforcer, regulatory conversations may be used to probe the undertaking’s inclination to engage in a cooperative resolution of a case. The analysis above allows us to see Article 7 decisions in different light than the initial definition as a coercive, control mechanism would suggest. In theory, the Commission could also decide to change its regulatory enforcement style within one and the same enforcement procedure, for instance beginning the procedure with a more cooperative attitude and advancing to a more adversarial attitude if it is not met with

756 Black, ‘Regulatory Conversations’ (n 754) 93.
759 See section: 4.1.2.4 and Case C-389/10 P KME Germany AG, KME France SAS and KME Italy SpA v European Commission EU:C:2011:816 paras 59-60.
Beyond the flexibility retained by the Commission as regards the shaping of an Article 7 procedure, the Commission also retains significant discretion regarding the outcome of this procedure. This discretion is clearest with regard to the setting of fines. While there is an upper maximum of the fine that the Commission may impose on an undertaking, there is no lower limit, or indeed an obligation to impose a fine at all. This reasoning implies that Article 7 decisions could be used for a variety of purposes pursued by the Commission.

5.3 Cartel settlements

Beyond Article 7 decisions, the Commission also employs a modified form of control enforcement including a cooperation element in cartel settlements. In such a case, the undertaking in question receives a reduction of the fine in exchange for certain cooperation during the investigation. As already explained, cartel settlements are also concluded by a decision according to Article 7 of Regulation 1/2003, but they are conducted according to a particular procedure, requiring both the Commission and the undertaking(s) in question to produce certain documents at a certain time and behave in a certain manner. The reduction of the fine issued in a settlement is set at 10 per cent, without any room for negotiation provided in the Settlement Notice on this point.

As explained above, the Commission has considerable leeway in the Article 7 procedure when it chooses its approach to the undertaking(s) in question. For settlements, the idea is that an agreement on an Article 7 decision will be reached in a cooperative spirit, but on terms previously set by the Commission. Implicitly, the undertaking is assumed to have understood its mistake in participating in a cartel, because it admits the infringement. However, the settlement procedure is very narrowly defined as regards what is required from both the undertaking and the Commission and leaves little room for negotiation or flexibility in the case of a disagreement. Cartel settlements thus entail in principle more cooperation in their form, but only if the undertaking is willing to cooperate in the exact way required by the settlement procedure.

---

760 This could be characterised as a responsive approach within one procedure, see: Christine Parker and Vibeke Lehmann Nielsen, ‘Testing Responsive Regulation in Regulatory Enforcement’ (2009) 3 Regulation & Governance 376, 378.
761 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 23(2).
762 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 (n 26) para 32.
Thus, the room for regulatory conversations as described above is considerably smaller within the ambit of cartel settlements. Some undertakings may perceive a cartel settlement as a cooperative procedure with mutual benefits if their perception of the infringement happens to concur with that of the Commission. If this is not the case, the undertaking may rather perceive a cartel settlement as a ‘straightjacket’ where the Commission tries to force its version of the infringement to a decision without the risk of a Court appeal. This perception may be intensified by the Commission’s emphasis on achieving procedural efficiencies by cartel settlements. However, that is not to say that the small space left for regulatory conversation is negative per se. As also noted above, regulatory conversations may lead to, inter alia, capture or inconsistent enforcement. A case resolution mechanism that operates within clear pre-defined limits has the advantage of providing legal certainty for undertakings in the sense that they know what to expect before agreeing to enter the procedure. Comparing Article 7 decisions and cartel settlements from a regulatory enforcement perspective, there is thus a tension between flexible enforcement and legal certainty.

In this context, it is possible to identify an interesting development as regards the Commission’s use of Article 7 decisions: the Commission has started resolving cases in a manner that is similar to cartel settlements, but conducted outside the confines of the procedure set out in Article 10a of Regulation 773/2004 and the Settlement Notice. The ARA case constitutes an example where a settlement-like procedure was carried out in a case pertaining to an infringement of Article 102 TFEU, also including a negotiated remedy. Further examples can be found in the Asus, Denon & Marantz, Phillips and Pioneer cases, pertaining to vertical restrictions. In these cases, Commission reduced fines by 40-50 per cent for cooperation that included the admission of the infringement, procedural waivers and cooperation on evidence. The ARA case is further analysed in the case analyses below.

---

763 ibid para 1.
764 See further sections 6.9.1 and 7.5.
765 ARA Foreclosure (n 150).
767 See section 5.6.2.
5.4 Article 9 decisions

Article 9 decisions share many similarities with enforced self-regulation, a type of co-regulation proposed by Ayres and Braithwaite, already introduced more generally above. However, Article 9 decisions operate on a case-by-case basis, rather than establishing regulation, across a specific economic sector. Instead of developing self-regulation subsequently made binding by an authority, commitments made binding as part of an Article 9 decision address specific competition concerns held by the Commission. The undertaking in question proposes commitments which are, if accepted, made binding by the Commission. Third party stakeholders also comment on the commitments in a market test. The monitoring of compliance with commitments is often left to a monitoring trustee. Enforced self-regulation, as illustrated by Article 9 decisions, combines elements of private self-regulation and public command regulation. Private elements are above all present in the proposal of remedies put forward by the undertaking, while public regulation is exercised through the adoption of an Article 9 decision by the Commission.

While there are clear similarities between Article 9 decisions and enforced self-regulation, Ayres and Braithwaite’s original model is targeted towards the introduction of regulation across the entire population of undertakings subject to a specific piece of legislation. The main difference concerning Article 9 decisions lies in the remedies’ substance, as they address specific concerns that are individual to the undertaking in question, rather than general issues deemed necessary to regulate across the board. As a result, the remedies made binding by the Commission individually in each case are difficult to compare across cases, unless cases are very similar. This also makes it difficult for the Commission to establish a practice or ‘benchmarks’ for suitable commitments. If there is no established practice concerning remedies, the risk for suboptimal remedies in relation to the competition problem at hand also increases.

With regard to the Commission’s conduct of the Article 9 procedure, concerns the lop-sided bargaining power between the undertaking and the Commission have already been pointed out. In contrast to settlements, the large discretion retained by the Commission does not allow undertakings to fully assess the advantages and disadvantages of entering the Article 9 procedure beforehand. On the one hand, the Article 9 procedure is expected to be conducted cooperatively between the Commission and the undertaking. Undertakings

---

768 Ayres and Braithwaite (n 91) 101ff.
769 See also section 4.1.1.4.
770 Ayres and Braithwaite (n 91) 106.
771 See section 4.3.1.2.
can be assumed to wish to address the concerns of the Commission because
they offer commitments to remedy these concerns. On the other hand, an
undertaking may feel compelled to do solely for fear of a finding of an
infringement and the imposition of a fine. In this case, is possible that an
undertaking will perceive an Article 9 decision as coercive, especially if it
feels compelled to offer commitments that go beyond what it considers
suitable in order to address the Commission’s concerns. Conversely, it is also
possible that the Commission accepts suboptimal remedies because it wants
to escape a possible appeal to the Court and the associated burden of adopting
a decision that would withstand court scrutiny. Thus, while Article 9 decisions
bear certain similarities with enforced self-regulation, this does not mean that
they are necessarily perceived by undertakings as less coercive than Article 7
decisions.

In comparison to Article 7 decisions and cartel settlements, it is important to
note that the Commission has a broad margin of discretion as regards the
remedies it may make binding in Article 9 decisions. This also means that
there is a great deal of room for regulatory conversation between the
Commission and undertakings that may indeed be difficult to delimit,
especially since the standard of judicial review carried out by the Court is very
low, only considering ‘manifestly incorrect’ remedies as unlawful. Thus,
where cartel settlements aim to cooperate within a strictly defined framework,
Article 9 decisions offer a great deal of flexibility for the Commission,
especially considering the lack of benchmarks defining acceptable remedies.

5.5 Guidance by the Commission

One of the Commission’s explicit aims when applying Articles 101 and 102
is to explain the relevant competition rules to undertakings so as to prevent
them from infringing these rules. This objective can be connected to
regulatory enforcement by communication. Communication can both be
utilised as a regulatory enforcement style or as an accessory to regulatory
enforcement of another style, for instance in control style enforcement.

Under the previous Regulation 17/62, undertakings were required to notify
agreements that could potentially infringe Article 101(1) TFEU. Undertakings
would then receive a Commission decision pertaining to whether that
agreement was in conformity with Article 101(3) TFEU. This mechanism can

772 Compare: Case C-441/07 P European Commission v Alrosa Company Ltd (n 232) para 48.
773 See section 4.3.1.1.
774 European Commission, ‘Fines for Breaking Competition Law’ (n 279) 1.
775 See section 5.1.
be characterised as a mandatory disclosure mechanism that allowed undertakings to receive concrete guidance from the Commission whether and under what conditions their agreement conformed with Article 101(3) TFEU. In addition, as already pointed out, the notification requirement allowed the Commission to *inter alia* monitor agreements and learn about business practices in different markets. However, Regulation 1/2003 has removed the notification system and thereby an instrument of regulatory enforcement by communication previously present in EU competition law enforcement. Instead, undertakings are expected to self-assess their behaviour with respect to compliance with both Articles 101 and 102 TFEU. Since competition law is a complex area of law, the Commission has sought to clarify competition rules by way of an increasing number of instruments providing guidance. Their aim is to provide undertakings with the necessary tools to comply with competition law, hopefully resulting in fewer competition law infringements.

Guidance issued by the Commission varies in nature and takes different points of view. It is possible to distinguish different types of guidance in the following way:

<table>
<thead>
<tr>
<th>General</th>
<th>Case-Specific</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Positive</strong></td>
<td><strong>Negative</strong></td>
</tr>
<tr>
<td>- Guidances and Notices</td>
<td>- Guidances and Notices</td>
</tr>
<tr>
<td>- Block exemptions</td>
<td>- Article 7 decisions</td>
</tr>
<tr>
<td>- Article 10 decisions</td>
<td>- Guidance Letters</td>
</tr>
<tr>
<td>- Article 7 decisions</td>
<td>- Guidance Letters</td>
</tr>
</tbody>
</table>

*Table 2 Types of guidance*

As is visible in the table above, the guidance provided by different instruments can be divided into general and case-specific guidance.

General guidance can both be used to guide and to clarify Commission policy. As general guidance can be adopted independently of the resolution of cases, it can be qualified as a style of regulatory enforcement that aims to persuade undertakings to comply with the law. However, as has already been argued,

---

776 Regulation 17/62 First Regulation implementing Articles 85 and 86 of the Treaty (n 169) arts 6 and 8; With regard to mandatory disclosure as a form of regulatory enforcement by communication, see: Karen Yeung, ‘Government by Publicity Management: Sunlight or Spin?’ [2005] Public Law 360, 366–67.

777 See section 2.2.1.
general and case-specific guidance complement each other, but the lack of one type of guidance cannot be substituted by the other type.\textsuperscript{778}

Case-specific guidance can be requested directly by undertakings, such as in the notification system maintained by Regulation 17/62 or in the present system where it is possible to request a Guidance Letter.\textsuperscript{779} Or, case-specific guidance may be deemed necessary by the Commission \textit{ex officio}, for example in the form of an Article 10 decision. A finding of inapplicability is diametrically opposed to all other case resolution mechanisms analysed in this study, as it does not find an infringement or address any concerns as to an infringement, but rather finds expressly that \textit{no} infringement has taken place. Therefore, an Article 10 decision primarily has a clarifying function, as is apparent from the Commission’s own Manual of Procedures.\textsuperscript{780} Furthermore, where the Commission finds that an infringement of Article 101 or 102 TFEU has been committed and explains why this is the case, guidance is provided as to why certain behaviour under certain circumstances constitutes an infringement of competition law. Where guidance is provided as a result of the resolution of a case, that guidance acts as an accessory to regulatory enforcement, rather than as a style of regulatory enforcement in its own right.

An example of how case-specific guidance acts as an accessory in regulatory enforcement \textit{vis-à-vis} undertaking’s behaviour can be provided with reference to case law from the Court. In \textit{AC-Treuhand I}, the General Court confirmed for the first time that ‘cartel facilitators’, undertakings that are not directly involved in a cartel but contribute significantly to its existence, can be caught by the prohibition in Article 101(1) TFEU.\textsuperscript{781} On account of the partial novelty of this finding, the Commission only imposed a symbolic fine on the facilitator in this cartel, AC-Treuhand.\textsuperscript{782} However, when the same undertaking was subsequently found to have facilitated another cartel, the Commission imposed a fine beyond a symbolic amount on AC-Treuhand.\textsuperscript{783} On appeal, the General Court held and the Court of Justice confirmed that AC-Treuhand had been expected to take note of the case law clarifying the application of Article 101(1) TFEU to cartel facilitators and could thus not claim application of the

\textsuperscript{778} See section 4.1.4.
\textsuperscript{779} Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (n 29).
\textsuperscript{781} Case T-99/04 \textit{AC-Treuhand AG v Commission of the European Communities} EU:T:2008:256, para 150.
principle that offences and penalties must be defined by law or that the Commission’s decision was not foreseeable.\textsuperscript{784} Subsequently, the same argument was used against another cartel facilitator, Icap, against whom the Commission had imposed a fine.\textsuperscript{785} In that case, the General Court underlined the responsibility of undertakings in their professional activities, stating that:

A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. Such persons can therefore be expected to take special care in evaluating the risk that such an activity entails (…)\textsuperscript{786}

On the condition that the Commission adopts Article 7 decisions or Article 10 decisions with relevant guiding value,\textsuperscript{787} this case-specific guidance fulfils an important function in directing undertaking’s behaviour. Such guidance shall guide undertaking’s conduct and persuade them to comply with competition law. However, such effects are dependent on the Commission’s resolution of cases and rather than forming its own style of regulatory enforcement.

5.6 Case Analyses

Having analysed the case resolution mechanisms employed by the Commission from a regulatory enforcement perspective, two illustrative case analyses are carried out below. Emphasis is placed on the flexibilities enjoyed by the Commission in Article 7 decisions by incorporating different elements of cartel settlements and Article 9 decisions in an Article 7 decision. This also illustrates the use of different styles of regulatory enforcement within one and the same case resolution mechanism. As can already be inferred from the analysis above, sometimes, the particular procedure set out for a ‘cooperative’ case resolution mechanism may be an obstacle to actual cooperation, which makes the use of the ‘coercive’ Article 7 decision more convenient to achieve such actual cooperation.

Before embarking on the case analyses below, it is necessary to briefly present the ‘cooperative’ approach taken by the Commission in \textit{ARA}, but also several

\textsuperscript{785} Case T-180/15 \textit{Icap plc and Others v European Commission} (n 227) paras 196-98.
\textsuperscript{786} ibid para 196.
\textsuperscript{787} See section 4.1.4.
subsequent cases. It has been noted above that Article 7 decisions can be utilised in a diverse manner - from cooperative to coercive - by the Commission. In this context, the Commission has more recently begun utilising Article 7 decisions in a pronounced cooperative fashion. *ARA* is the first case that was concluded under what the Commission now calls its ‘cooperation framework’. While *ARA* concerned an infringement of Article 102 TFEU, other cases concluded under this framework concerned vertical restraints. It should be noted that all of these cases lie outside the scope of the Settlement Notice, as they do not concern cartels. The first indication that the Commission considered this type of resolution of a case possible was given by Commissioner Vestager in a speech held on 1 February 2016:

Here in the Commission, we also need our procedures to be as efficient as they can be. Antitrust procedures do take time. Time to dig up evidence, time to analyse it, time to reach decisions in a way that respects the right of companies to defend themselves. But the more time we spend on each case, the fewer cases we can deal with. So if companies are willing to cooperate with us in a way that makes the procedures more efficient, I want to encourage that. We should reward companies that admit to having broken the law, especially when they come up with remedies to make the markets more competitive, or companies that provide evidence voluntarily. Because the faster we can wrap up a case and restore competition to the market, the less consumers will suffer. And to get that result, I think it's worth cutting the fines we impose. (emphasis added)

The Commission has had the possibility of granting reductions of fines for cooperative undertakings in its Fining Guidelines at least since 2006, but has seldom used that option. To cite the provision used in *ARA*, paragraph 37 of the Fining Guidelines, states:

Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a

---

788 See section 5.2.
790 See: *Asus* (n 766); *Denon & Marantz* (n 766); *Phillips* (n 766); *Pioneer* (n 766); *Guess* (Case AT.40428) Commission Decision C(2018) 8455 [2019] OJ C 47/5.
791 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 (n 26) para 1.
particular case may justify departing from such methodology or from the limits specified in point 21.793

Furthermore, paragraph 29 of the Fining Guidelines holds that the Commission may reduce a fine:

(...), where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so (...).794

However, the Commission has so far only relied on paragraph 37 of the Fining Guidelines in cases concluded under its ‘cooperation framework’. The reasons for using paragraph 37 of the Fining Guidelines as a basis for reducing fines are further analysed below.795

Subsequent to ARA, the Commission also concluded its investigations in Asus, Denon & Marantz, Phillips and Pioneer as well as in Guess with such a ‘cooperative’ Article 7 decision.796 Since concluding several cases under its ‘cooperation framework’, the Commission has issued a short factsheet in connection with its decision in Guess. In this factsheet, the Commission compares the ‘cooperation framework’ to cartel settlements, but for non-cartel cases.797 The Commission’s factsheet is very brief, basically only outlining the essential elements of this procedure, but not detailing the exact requirements set out for an undertaking’s cooperation or the reduction of the fine envisaged by the Commission. It can be noted that the relevant elements where the Commission can consider cooperating with undertakings are described as follows:

The cooperation framework set out in this document concerns situations where companies are willing to acknowledge their liability for an infringement (including the facts and their legal qualification). Companies can in addition choose to cooperate by voluntarily providing or clarifying evidence or by helping in the design and implementation of remedies.798

This factsheet issued by the Commission thus confirms the existence of this ‘cooperation framework’ as a variation of Article 7 decisions that the it intends to use in the future, rather than an exceptional resolution of certain cases.

793 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28) para 37.
794 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28) para 29.
795 See section 5.6.2.
796 Asus (n 766); Denon & Marantz (n 766); Phillips (n 766); Pioneer (n 766); Guess (n 790).
797 European Commission, ‘Cooperation - FAQ’ (n 789) 1.
798 ibid.
Two case analyses are presented below. First, the Google Search case illustrates the use of an ‘ordinary’ Article 7 decision, although the procedure carried out by the Commission included several attempts to adopt an Article 9 decision. Second, the ARA case illustrates a deviation from the Article 7 procedure that places it somewhere between a cartel settlement and an Article 9 decision. While providing an illustration of the analysis of the different case resolution mechanisms conducted above, the case analyses above ‘zoom in’ on certain aspects of the resolution of cases more closely. In particular, this concerns the choice of the case resolution mechanisms employed in a particular case, as well as the fine and the remedy imposed as part of the resolution of the case. After analysing each case separately, certain reflections are made, comparing these cases and relating them to the abstract findings regarding the different case resolution mechanisms.

5.6.1 The Google Search (Shopping) case

The Commission concluded the Google Search case in June 2017, after a seven-year long investigation. According to the Commission’s decision, Google has used its dominant position in the online search market to favour Google’s shopping comparison service, which allows customers to compare the prices of the same product between different retailers. Several other websites, such as Pricerunner or Nextag, offer a comparable service. According to the Commission, Google has placed its own shopping service in a prominent manner on its general search result site, whereas rival shopping comparison sites have been demoted to lower search result spaces.799 The Commission does not categorise Google’s behaviour in terms of a specific type of abuse, but states that:

The Conduct is abusive because it constitutes a practice falling outside the scope of competition on the merits as it: (i) diverts traffic in the sense that it decreases traffic from Google's general search results pages to competing comparison shopping services and increases traffic from Google's general search results pages to Google's own comparison shopping service; and (ii) is capable of having, or likely to have, anti-competitive effects in the national markets for comparison shopping services and general search services. (emphasis added)800

The Commission finds this behaviour to be an abuse of Google’s dominant position in the general search market.801 As a remedy, the Commission has

799 Google Search (Shopping) (n 151) para 344.
800 ibid para 341.
801 ibid art 1.
required Google to stop the selective behaviour and apply the principle of equal treatment to its own shopping comparison service *vis-à-vis* competing shopping comparison services.\textsuperscript{802} The Commission has also imposed a fine of EUR 2.42 billion on Google.\textsuperscript{803}

As the Commission itself states, the decision in *Google* constitutes a ‘precedent’ as it qualifies a novel type of behaviour as an abuse of a dominant position.\textsuperscript{804} The question of the theory of harm under which Google infringed Article 102 TFEU has been particularly prominent, given that the Commission itself has not named a specific theory of harm, old or new, in its decision.\textsuperscript{805} In scholarly discussion, the *Google* case also gave rise to several other questions, including: How far can the ‘special responsibility’ of a dominant undertaking be stretched?\textsuperscript{806} Can Google be required to adopt a ‘neutrality policy’ in the way that it displays search results on its search page?\textsuperscript{807} Can third party service providers expect a certain placement in Google’s search results?\textsuperscript{808} Further, is there a causal relationship between Google’s abusive behaviour and the potential decline of certain services, rather than the fast-moving nature of the sector?\textsuperscript{809} Given that the *Google Search* case was opened in 2010, it cannot be excluded that the conditions in the market in question have changed in the

---

\textsuperscript{802} ibid art 3.
\textsuperscript{803} ibid art 2.
\textsuperscript{804} European Commission, ‘Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service - Factsheet’ (n 725).
\textsuperscript{805} In this regard, see for example: Beata Mäihäniemi, ‘Imposing Access to Information in Digital Markets Based on Competition Law: In Search of the Possible Theory of Harm in the EU Google Search Investigations’ (LLD Thesis, Helsinki University 2017).
\textsuperscript{806} Case 322/81 NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities EU:C:1983:313, para 57; *Google Search (Shopping)* (n 151) paras 331-36.
\textsuperscript{807} It can be debated whether or not the Commission’s decision does so. See: *Google Search (Shopping)* (n 151) art 4.
\textsuperscript{808} This point has already been advanced as regards the *Microsoft (tying)* case, see: Ibáñez Colomo, ‘On the Application of Competition Law as Regulation: Elements for a Theory’ (n 74) 294.
meantime. Further, regarding the definition of the relevant product market, it has been contended that merchants such as eBay and Amazon nowadays accommodate a range of sellers of the same product, making price comparison possible for consumers. Without elaborating on the position taken by the Commission regarding these issues, it is possible to conclude that the Google Search case can be qualified as raising novel questions in the context of the application of Article 102 TFEU.

With regard to the case resolution mechanism chosen, the Commission originally pursued an Article 9 procedure in the Google Search case, including several rounds of proposed commitments and market tests before the switch to an Article 7 procedure. It is submitted here that the novelty of this case should have led to the pursuit of an Article 7 decision from the outset. While it was thus correct to revert to an Article 7 decision, valuable resources were wasted when trying to negotiate commitments in three rounds. It is likely that this case took longer time to resolve due to the pursuit of two different procedures compared to if the Commission had opted for the Article 7 procedure from the beginning. Given the controversial nature of the case, it is easy to argue in retrospect that the Commission pursued an Article 9 procedure not because of the desired faster case resolution, but because it was uncertain whether its theory of harm would withstand a Court review. In practice, it appears that the Commission abandoned the Article 9 procedure because it did not believe that the commitments offered by Google would properly address the concerns expressed by the Commission.

Concerning the fine imposed by the Commission on Google, the fact that a fine was imposed at all is interesting to analyse further. This analysis can in part be based on the fact that the Commission itself considers that the case contains novel aspects; and in part on the circumstance that the Commission reverted from the Article 9 procedure to the Article 7 procedure.

Addressing first the question of the change in procedure, Recital 13 of Regulation 1/2003 states that ‘[c]ommitment decisions are not appropriate in cases where the Commission intends to impose a fine’. As already noted, it is not entirely clear how that Recital should be interpreted. From the analysis conducted above, it is clear that Recital 13 inter alia prevents the Commission

810 Google Search (Shopping) (n 151) paras 216-50.
811 Almunia (n 723).
812 Compare section 4.3.4.
813 Marx (n 146) 157.
814 Google Search (Shopping) (n 151) paras 123-37.
from using Article 9 decisions in cartel cases. Conversely, with regard to other cases, recourse to both the type of infringement at hand and the status of the Commission’s investigation have been advanced by commentators, but an authoritative interpretation by the Court is not available yet. It was submitted above that an interpretation relation to the state of the Commission’s investigation should be preferred.816

With regard to the situation where the Commission switches from the Article 9 procedure to an Article 7 procedure, several interpretations have been advanced. Interpreting Recital 13 of Regulation 1/2003 literally, it can be argued that the Commission should not impose a fine on an undertaking where the Article 9 procedure has failed.817 Calzolari suggests that the imposition of fines in cases where an Article 9 procedure fails and an Article 7 decision is subsequently adopted constitutes a ‘paradox’, because the Commission suggested at the beginning of the Article 9 procedure, in line with Recital 13, that it did not intend to impose a fine.818 Such an interpretation assumes that the decision of whether an Article 9 decision is ‘appropriate’ for a certain case, once taken, cannot be changed by the Commission. Consequently, Recital 13 would have the effect of binding the Commission to the decision of refraining from the imposition of a fine and would make the threat of the revision of the procedure to using the Article 7 procedure instead considerably weaker.819

In its decision in Google Search, the Commission expressed the view that it was entitled to impose a fine on Google, despite the failed Article 9 procedure.820 In support of this decision, the Commission cites the General Court’s assessment in Cartes Bancaires stating that the Commission had not exceeded its margin of discretion when it reverted from an Article 9 procedure to an Article 7 procedure.821 However, it can be noted that the General Court, in paragraph 461 cited by the Commission, does not mention the Commission’s power to impose fines in a situation where it reverts to an

816 See section 4.3.
819 Calzolari (n 817).
820 Google Search (Shopping) (n 151) paras 730-34.
821 Case T-491/07 RENV Groupement des cartes bancaires (CB) v European Commission (n 643) para 461.
Article 7 procedure from an Article 9 procedure; \(^{822}\) and that the Commission, in its Article 7 decision against *Cartes Bancaires*, did not impose a fine either.\(^{823}\) The reference to the General Court’s reasoning in *Cartes Bancaires* does thus not appear convincing.

In the absence of Court guidance on the interpretation of Recital 13 regarding the Commission’s power to impose a fine in case of a change between different case resolution mechanisms, it is possible to consider whether an analogy could be drawn to the General Court’s reasoning in *Timab*. This case has already been analysed above with regard to the principle of equal treatment.\(^{824}\) *Timab* concerned a change of procedures from a cartel settlement to an Article 7 decision where the Commission had already indicated the range of the fine it intended to impose on Timab. Once the cartel settlement was abandoned, the Commission imposed a higher fine as part of an Article 7 decision than the one it had indicated within the settlement procedure. The General Court held, and the Court of Justice confirmed, that a cartel settlement constituted a separate procedure from an ‘ordinary’ Article 7 procedure. Further, if the Commission, as a consequence of a more detailed investigation in the Article 7 procedure, found that the undertaking in question could be held liable for a more extensive infringement than what had been envisaged in the cartel settlement, the Commission was also entitled to impose a higher fine than that previously envisaged.\(^{825}\) With regard to Article 9 decisions, it should be underlined that such a decision is based on the ‘the concerns’ of the Commission, rather than on a concrete finding of an infringement. Therefore, where the Commission reverts a case from an Article 9 procedure to an Article 7 procedure, it must conduct a more extensive investigation that may also lead to the assessment that a fine should be imposed on the undertaking in question.

In the light of the General Court’s reasoning in the *Timab* case, it appears unlikely that Recital 13 would prevent the Commission from imposing a fine in case of a reversion of an Article 9 procedure to an Article 7 procedure.

In sum, an interpretation of Recital 13 as referring to the state of the Commission’s investigation in a case eligible for an Article 9 decision thus seems appropriate. Save for cartel cases which are principally excluded from Article 9 decisions due to their serious nature, the Article 9 procedure is initiated at a point in time when the Commission has not yet reached a state of the investigation going beyond a ‘preliminary assessment’. In these cases,

---

\(^{822}\) ibid para 461.


\(^{824}\) See section 4.2.3.

\(^{825}\) Case T-456/10 *Timab Industries and Cie financière et de participations Roullier (CFPR) v European Commission* (n 11) paras 96-107; Confirmed by: Case C-411/15 P *Timab Industries and CFPR v European Commission* (n 604) para 196.
instead of referring to a certain type of infringement as ‘deserving’ a fine, this interpretation of Recital 13 would mean that the Commission, at the time of initiating the Article 9 procedure, had not adduced sufficient evidence to impose a fine, a situation that may change in case of a reversion of the procedure.

Moving on to the question of whether fines should be imposed in cases of novel infringements, the Commission has never adopted a general policy in this regard. However, there are examples of cases where novel conduct was taken into account when calculating fines, for instance in the first case concerning cartel facilitators. In the situation where both Article 9 and Article 7 decisions are involved in a case concerning novel conduct, the situation is somewhat more complicated and has in commentary been connected to the question of interpreting Recital 13. As a reference, it is possible to cite the Motorola case as an example of an Article 7 decision where the Commission did not impose a fine for an abuse. In Motorola, the Commission explicitly stated that it did not impose a fine due to the novel nature of the conduct. Further, on the same day as the Motorola decision was adopted, the Commission also adopted its Article 9 decision in Samsung, which can be interpreted as suggesting that it did not consider that this particular type of case should be subject to a fine.

It is understandable, in view of the change of procedures and the novelty of the Google Search case together with the Commission’s previous decisional practice that Google claims that the Commission should have refrained from imposing a fine. However, it is established case law that the Commission’s fining practices in specific cases cannot be used to make claims as regards the fine to be imposed in another case and that the Commission may assess cases individually in that regard. The General Court held already in Compagnie générale maritime that:

(...) the fact that the Commission has not imposed a fine on the perpetrator of a breach of the competition rules cannot in itself prevent a fine from being

826 Organic Peroxides (n 782) para 454.
827 Calzolari (n 817).
829 Motorola (n 828) para 561.
imposed on the perpetrator of a similar infringement. The principle of equality of treatment cannot be invoked where there is illegality.\textsuperscript{832}

Whether or not the Commission was entitled to impose a fine on Google will be subject to appeal before the General Court.\textsuperscript{833}

Lastly, it is interesting to analyse the remedy imposed on Google. As noted above, the Commission imposed a cease-and-desist order on Google, but also an obligation to notify the Commission about the ‘specific measures’ taken to comply with that order. Beyond that, Google must also report to the Commission on its compliance with the order for a period of five years.\textsuperscript{834} Given that the decision in \textit{Google Search} was an ordinary Article 7 decision, the Commission did not receive any assistance when designing the remedy.

In its decision, the Commission states that there is more than one way to bring the infringement to an end, and that it is thus not able to impose a specific remedy.\textsuperscript{835} But, the notification obligation imposed in Article 4 of the decision has forced Google to nonetheless design a remedy that complies with the Commission’s cease-and-desist order. In its decision, the Commission also details the requirements that Google’s measures should fulfil.\textsuperscript{836} In that sense, the remedy imposed on Google aims to achieve the same goal as an Article 9 procedure, that the undertaking designs its own remedy, but temporally after the adoption of the Article 7 decision. Besides the temporal difference in the design of the remedy, another difference lies in the amount of work required by the Commission in order to ensure compliant behaviour after the Article 7 decision was adopted. In \textit{Google Search}, the Commission needs to assess the measures adopted by Google, first at an initial stage, but also continuously over the five-year reporting period. Indeed, it appears that the Commission is monitoring whether Google’s measures comply with its cease-and-desist order.\textsuperscript{837}

In conclusion, the \textit{Google Search} case demonstrates the difficulties that can be encountered by the Commission in determining the choice of case resolution mechanism as well as considering how to use the means available

\textsuperscript{832} Case T-86/95 \textit{Compagnie générale maritime and Others v Commission of the European Communities} EU:T:2002:50, para 242.

\textsuperscript{833} Case T-612/17 \textit{Google and Alphabet v Commission} (n 831) plea 6.

\textsuperscript{834} \textit{Google Search (Shopping)} (n 151) arts 3-4.

\textsuperscript{835} ibid para 698.

\textsuperscript{836} ibid paras 697-700.

within that mechanism. Regarding Article 9 decisions, Google Search demonstrates the difficulties of cooperation where there is a lack of agreement on the existing competition problem and its proper remedy.

With regard to Article 7 decisions, especially where a switch has been made from an Article 9 procedure, Google Search illustrates how Article 7 decisions can be used coercively, including the imposition of a fine where previous attempts at cooperation have failed. Nevertheless, it is notable that the Commission imposed a remedy that requires continued interaction with Google. In view of the experience in the Microsoft case,838 the aftermath of the Google case, chiefly in terms of monitoring compliance with the remedy imposed, will likely provide interesting insights regarding the question how infringements of Articles 101 and 102 TFEU can be brought to an end.

5.6.2 The ARA case

The ARA case has already been mentioned in chapter 4 on the subject of the Commission’s ability to impose remedies in Article 7 decisions, but deserves to be analysed separately. This analysis shows the flexibilities enjoyed by the Commission in employing the Article 7 procedure in a cooperative manner, in particular seen in contrast to the procedure carried out in the Google Search case analysed above.839

The ARA case concerned an abuse of a dominant position committed between 2008 and 2012 by an Austrian recycling company. In 2003, ARA and a number of other waste collection undertakings received an exemption under the current Article 101(3) TFEU for the system of waste collection set up between these undertakings. However, that exemption was conditional upon non-hindrance of the entry of competitors in the household exemption market through the sharing of infrastructure.840 The sharing of infrastructure was considered necessary as the Commission found in its decision in 2003 that the waste collection infrastructure could not be duplicated.841 This finding was also made in view of Austrian law, which required that any undertaking licensing waste collection had to prove nationwide coverage to be authorised to operate in the market in question.842

In 2008, an undertaking competing with ARA, Intersoh/EVA, attempted to enter the household exemption market and contacted municipalities, collectors and ARA as regards the shared use of the existing waste collection

---

838 See section 4.1.1.4.
839 See section 5.6.1.
841 ibid paras 281-87.
842 ARA Foreclosure (n 150) paras 23-24.
infrastructure. ARA was consulted on this question by the municipalities and collectors and stated in this regard that Intersoh/EVA would have to plan its collection ‘region by region’ and would have to set up its own collection system where possible. Intersoh/EVA also discussed the question of shared use of infrastructure directly with ARA which denied their request for shared use in the whole of Austria and only offered a ‘pilot’ in a limited number of Austrian regions.\textsuperscript{843} The Commission finds in the ARA case that ARA held, during the time of the infringement, 95 per cent of the Austrian household exemption market.\textsuperscript{844} Based on the criteria established in Bronner and Magill,\textsuperscript{845} the abuse consisted of ARA’s refusal to grant access to the shared use of the waste collection infrastructure, which ARA partially owned and partially controlled through contracts with municipalities and undertakings.

The Commission concluded this case on 20 September 2016 with an Article 7 decision, finding the infringement described above for the period of 2008 to 2012, but with a 30 per cent reduction of the fine. In exchange for this reduction, ARA handed in a cooperation submission, which contained:

\begin{quote}
\footnotesize
\begin{enumerate}
\item an acknowledgement in clear and unequivocal terms of ARA’s liability for the infringement of having negligently refused access to the essential household collection infrastructure summarily described as regards the main facts, their legal qualification and the duration of the infringement;
\item an indication of the maximum amount of the fine it anticipates to be imposed by the Commission and which it would accept in the framework of cooperation;
\item its confirmation that it has received the SO and the two LoF, that it has had full access to the Commission’s file at the time of the SO, that it has subsequently been granted sufficient opportunity to have access to the evidence supporting the Commission’s objections and that it has been given sufficient opportunity to make its views known to the Commission;
\item its agreement to receive the final Decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in English; and
\item its acknowledgement that the divestiture of the part of the Austrian household collection infrastructure which ARA owns is necessary and proportionate to effectively terminate the infringement.\textsuperscript{846}
\end{enumerate}
\end{quote}

\textsuperscript{843} ibid paras 39-49.
\textsuperscript{844} ibid para 64.
\textsuperscript{845} Case C-7/97 Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG EU:C:1998:569, para 41; Joined cases C-241/91 P and C-242/91 P Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities (Magill) (n 230) para 73.
\textsuperscript{846} ARA Foreclosure (n 150) para 19.
Thus, the cooperation included both the acknowledgement of the infringement (such as required for a cartel settlement) and cooperation on the remedy (such as required for an Article 9 decision). Further, ARA provided a language waiver and confirmed that its procedural rights had been respected. ARA’s reward for cooperating with the Commission was a substantial reduction of the fine. Looking closer at the Commission’s calculation of the fine, not only did ARA receive a 30 per cent reduction of the fine, the fine itself, EUR 6.1 million, was also set very low. The fine finally imposed on ARA equals approximately 3.17 per cent of ARA’s worldwide turnover for 2015, remaining substantially below the legal maximum of 10 per cent of the total turnover of the previous business year.

The ‘cooperative’ Article 7 procedure in ARA can be seen as filling gap in the Commission’s case resolution mechanisms. This type of resolution provides an alternative option in abuse of dominance cases which are not suitable for an Article 9 decision, for example, where the investigation has progressed so far that the Commission considers that an Article 7 decision should be imposed or where the Commission needs to establish legal precedent. This is especially considering the criticism directed towards the Commission for resolving too many cases with an Article 9 decision. At the same time, the undertaking may cooperate with the Commission on certain elements of the procedure such as is common in Article 9 decisions and cartel settlements.

With regard to the cooperation on remedies, this type of ‘cooperative’ Article 7 procedure also raises a concern: do such cooperative decisions lawfully allow the Commission to impose more far-reaching remedies than what would be possible under an ordinary Article 7 decision? Granted, that the Court of Justice has explicitly stated that the Commission may require undertakings to suggest remedies to bring an infringement to an end. Yet, where an undertaking receives a monetary reward for its cooperation, it might agree to remedies that go further than the remedies that the Commission could have imposed in an ordinary Article 7 decision. The fact that the ARA decision features the first structural remedy ever imposed in an Article 7 decision

---

847 See, for an explanation: Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (n 192) para 27.
848 ARA Foreclosure (n 150) para 20.
849 ibid para 10.
851 Joined cases 6/73 and 7/73 Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities (n 340) para 45. See also section 4.1.1.1.
supports such a conclusion. The Commission’s argument in favour of the lawfulness of this remedy is that ARA suggested the structural remedy and also confirmed that it considered the remedy proportionate and necessary.\textsuperscript{852} By securing ARA’s cooperation, the Commission circumvented a risk that it has perhaps been unwilling to take in previous decisions where a structural remedy might have been more effective than the behavioural remedy imposed: the risk of an annulment by the Court.

The Commission’s reasoning with regard to the lawfulness of the remedy made binding, can be related to the \textit{Alrosa} case, which concerned remedies that may be imposed by the Commission in Article 7 and 9 decisions respectively, already extensively analysed.\textsuperscript{853} In \textit{Alrosa}, the Court of Justice differentiates Article 7 and Article 9 decisions with regard to the remedies that may lawfully be imposed with reference to, \textit{inter alia}, the cooperation offered by the undertaking,\textsuperscript{854} but also with reference to the differing functions of these case resolution mechanisms.\textsuperscript{855} If the Commission were allowed to impose remedies in Article 7 decisions that were more far-reaching than what would ordinarily be the case with reference to cooperation of undertakings, it could be called into question whether there is any remaining difference between Article 7 and 9 decisions. Further, the strength of the principle of proportionality where Article 7 decisions are made binding might be questioned, more specifically inquiring whether undertakings may agree to the Commission diverging from this principle. While it is not certain how the Court would rule on this issue, it can be doubted that the Court would grant the Commission the same margin of discretion as in Article 9 decisions when making commitments binding.\textsuperscript{856}

With regard to the substance of the remedy imposed, the \textit{ARA} case offers some interesting aspects to be analysed. The Commission decision requires ARA to divest the part of the waste collection infrastructure it still owns to prevent ARA from repeating its refusal to grant shared use in the future. The Commission states with regards to the proportionality of the structural remedy that:

No other less burdensome measures can be conceived that would equally effectively remove ARA's remaining possibility to refuse shared use to the part of the household collection infrastructure it owns and ensure access to it. A mere declaration by ARA not to refuse access in the future to that part of the

\textsuperscript{852} ARA Foreclosure (n 150) para 148.
\textsuperscript{853} See section 4.3.
\textsuperscript{854} Case C-441/07 P \textit{European Commission v Alrosa Company Ltd} (n 232) para 48.
\textsuperscript{855} ibid paras 46-47.
\textsuperscript{856} See further section 6.6.5.
household collection infrastructure on the basis of the above mentioned legal uncertainty in the AWG would not be as effective as a divestiture. Such a declaration would require a long-term monitoring of ARA's behaviour whereas a divestiture provides for a clear-cut solution.\textsuperscript{857}

In fact, the Commission required ARA already in 2003 to allow the shared use of the waste collection infrastructure. ARA was apparently able to circumvent that order by maintaining that the Commission had made that order under Article 101 TFEU rather than under the ‘essential facility’ doctrine connected to Article 102 TFEU.\textsuperscript{858} The argument the Commission is making in its \textit{ARA} decision is that the structural remedy imposed is more effective than a behavioural remedy, making the structural remedy proportionate. That reasoning cannot be disputed \textit{per se}. It also appears that the Commission in the passage quoted above wishes to dispel arguments that it only imposed a structural remedy because of the cooperation offered by the undertaking.

Granted that the Commission appears to argue that the structural remedy should have been imposed in the \textit{ARA} case even without ARA’s cooperation, the remedy can be called into question from several perspectives. Firstly, it raises the question of why the Commission has never before imposed a structural remedy on an undertaking in an Article 7 decision before and why it has even accepted orders to grant access as remedies in Article 9 decisions?\textsuperscript{859} This question is especially relevant as regards other cases where the owner of a natural monopoly was involved, considering that such an undertaking has an incentive to refuse access to the monopoly structure.\textsuperscript{860} Secondly, the infringement in question already ended in 2012, whereas the Commission adopted its decision in 2016. In 2013, Austria amended the relevant legislation regarding waste collection which prohibits the duplication of waste infrastructure and obliges the owners of such infrastructure to grant shared use. The competition law infringement committed by ARA, to refuse, directly and indirectly, access to waste infrastructure, was thus prohibited by Austrian law in 2013. The Commission also observes that in the meantime, several competitors to ARA have entered the household exemption market. As already argued above, this remedy was rather aimed at preventing new infringements rather than bringing an ongoing infringement to an end.\textsuperscript{861}

\textsuperscript{857} \textit{ARA Foreclosure} (n 150) para 147.
\textsuperscript{858} ibid para 144.
\textsuperscript{859} For example, see \textit{Microsoft} (n 339); \textit{Deutsche Bahn I/II} (Cases AT.39678 and AT.39731) Commission Decision C(2013) 9194 final [2014] OJ C 86/4.
\textsuperscript{860} Ibáñez Colomo, ‘On the Application of Competition Law as Regulation: Elements for a Theory’ (n 74) 269–70.
\textsuperscript{861} See section 4.1.1.2.
It is also interesting to note that there is no evidence in the *ARA* decision that the Commission carried out a market test for the remedy offered by ARA. While the Article 7 procedure does not require a market test, the Commission is required to carry out such a test for remedies suggested by undertakings under the Article 9 procedure. As the remedy was suggested by ARA rather than by the Commission, it would appear that the procedure in this regard was more similar to Article 9 than to Article 7. A market test is carried out before an Article 9 decision can be adopted to ensure that the proposed commitments would sufficiently address the Commission’s concerns in the view of third parties. To ensure the proper functioning of the remedy proposed by ARA and to further support its claim of the necessity of the remedy, the Commission should have considered carrying out a market test on its own accord.

The concerns regarding the remedy voiced here lead to a further question that could be raised in connection with the procedure carried out in *ARA*: might this procedure further deprive the Court of important cases for review, given that such decisions would be unlikely to be appealed? In view of the nature of the cooperative procedure applied in *ARA*, the structural nature of the remedy imposed and the fact that the infringement had already ended, it is regrettable that the *ARA* case will not be subject to a Court appeal. In the absence of case law by the Court, it is difficult to assess the legality of the ‘cooperative’ Article 7 procedure carried out by the Commission. Further, such an appeal would have shed light on the interpretation of Article 7 of Regulation 1/2003, especially with regard to the requirements that remedies are ‘proportionate and necessary to bring the infringement effectively to an end’.

As is apparent from Commissioner Vestager’s speech cited above, the Commission itself presents such ‘cooperative’ Article 7 decisions as a way of increasing efficiency by cooperating with undertakings. It would also seem that cooperative undertakings are those that understand that they have broken the law and who wish bring their case before the Commission to an end as smoothly as possible. However, in the *ARA* case, the motivation for the consensual procedure on the part of the undertaking seems to have been another. An article written by one of the lawyers representing ARA suggests

---

862 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 27(4).
864 A tendency to deprive the Court of cases to review has for example been identified by AG Wahl: Nils Wahl, ‘Recent Trends at the Court of Justice of the European Union’ [2018] *Concurrences: Revue des Droits de la Concurrence*, 5.
865 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 7(1).
that ARA, contrary to its Cooperation Submission, did not believe that it had done anything wrong.\textsuperscript{866} Rather, the reason for cooperating with the Commission was that it did not believe that it could successfully appeal a Commission decision at the General Court, due to a perceived limited judicial review exercised by the Court of ‘complex economic assessments’ made by the Commission.\textsuperscript{867} This statement reveals that the aim of undertakings which agree to a consensual solution with the Commission may not be to improve their compliance with competition law in the future, but rather to circumvent the ordinary Article 7 procedure, which is perceived as lengthy and not fully legitmate.\textsuperscript{868}

By extension, the Commission should reconsider whether its ‘cooperation framework’ should operate under the exception provided in paragraph 37 of the Fining Guidelines. When the Commission introduced the cartel settlement procedure, it adopted the new Article 10a in its Regulation 773/2004 followed by a notice explaining the procedure used by the Commission in such cases.\textsuperscript{869} The Commission modelled its procedure in the \textit{ARA} case upon the cartel settlement procedure.\textsuperscript{870} Nevertheless, even if there is already an established procedure for ‘settling’ cases closed by an Article 7 decision, there are new elements contained in the ‘cooperative’ Article 7 decision adopted against ARA. Most notably, the remedy suggested by ARA and the calculation of the fine as an exchange for the cooperation are new elements in the Article 7 decision adopted in \textit{ARA}.

With regard to the calculation of the fine, the Commission states that the reduction of the fine by 30 per cent is made under paragraph 37 of the Fining Guidelines, which allows the Commission to depart from the methodology set out for the calculation of fines. When using paragraph 37 of the Fining Guidelines, the Commission is required to state specific reasons for the

\textsuperscript{867} ibid 168–169.
\textsuperscript{868} A possible connection between undertaking’s tendency to conclude cases cooperatively with the Commission and their belief that a Court appeal would be fruitless is also identified by AG Wahl, who hopes that recent case law reviewing Commission decisions more thoroughly might change that trend in the future. See: Wahl, ‘Recent Trends at the Court of Justice of the European Union’ (n 864) 5
\textsuperscript{869} Commission Regulation 773/2004/EC, of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (n 9) art 10a; Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (n 9); 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 (n 26).
\textsuperscript{870} European Commission, ‘Cooperation - FAQ’ (n 789) 1; Wollmann (n 866) 168.
departure from its ordinary calculation of fines as, according to the General Court:

(...)

Granted, in ARA the Commission only used paragraph 37 to justify the reduction of the fine and used its usual methodology for calculating fines differently. Nonetheless, it appears a bit odd that the Commission ‘resorted’ to this exception where there is a mitigating factor that could have been used to justify the reduction, namely the possibility to reduce a fine:

(...)

While the use of paragraph 37 of the Fining Guidelines maximises the flexibility of the Commission, it also maximises the uncertainty for undertakings, which is why they may hesitate to enter such a procedure. Such uncertainty may also lead to a loss of legitimacy for the Commission as an enforcer. It is desirable that undertakings cooperating with the Commission in the Article 7 procedure at least know the range of the fine reduction that the Commission may envisage depending on the cooperation offered before entering the procedure.

In summary, the ARA case shows the degree of flexibility enjoyed by the Commission within the confines of the Article 7 procedure, at least with regard to the design of remedies and calculation of fines. Indeed, that procedure can quite easily be adapted to the circumstances in a particular case. However, when adapting that procedure there is a danger that the undertaking concerned is left in uncertainty, for example, regarding the assessment of the proposed remedy by the Commission. If the undertaking cooperates with the Commission, it may reap advantages in the form of a reduction of the fine. But, at the same time it is likely to lose its possibility to successfully appeal the Commission’s decision later on. It may thus appear to the undertaking that it is ‘shooting in the dark’ when, for example, proposing a remedy to the Commission.

871 Case T-180/15 Icap plc and Others v European Commission (n 227) para 289.
872 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28) para 29.
873 The Court could then use a reasoning analogous to that in Alrosa. See: Case C-441/07 P European Commission v Alrosa Company Ltd (n 232) paras 38-40. See also section 2.3.2.
5.6.3 Reflections on the Google Search and ARA cases

Viewing the categorisation of the different case resolution mechanisms in the beginning of this chapter in conjunction with the case analyses above, a number of observations can be made.

Both cases studied above are Article 7 decisions on the face of it. However, procedurally, there is a significant difference between the Google Search case vis-à-vis the ARA case. While the Google Search case was concluded in an adversarial manner, ARA was concluded cooperatively in a similar fashion as a cartel settlement. This supports the point made above concerning Article 7 decisions, namely that Article 7 decisions can be utilised in various manners, ranging from the adversarial, to the, formally or informally, cooperative.874

Contrary to Article 7 decisions, pre-defined cooperative case resolution mechanisms, such as cartel settlements and Article 9 decisions, may have a limited scope, enabling the enforcement authority to only use such mechanisms in certain types of cases and under certain circumstances. As a result, the Commission may be prevented from a cooperative approach under these case resolution mechanisms or regulatory conversations may fail, leading to a change to the Article 7 procedure. In Google Search, the Commission appears to have failed to agree with Google on suitable remedies, forcing it to revert to an Article 7 decision.875 In ARA, the Commission was prevented from using the cartel settlement procedure and did not, for one reason or another, find it suitable to conclude this case using an Article 9 decision. The reason may have been that the investigation had reached a stage where a conversion to an Article 9 procedure was not desirable, as the Commission sent a SO to ARA in 2013 and the case was concluded in 2016.876

The flexibility of the Article 7 decision subsequently allowed the Commission to nevertheless cooperate with the undertakings concerned in the desired manner.

Relating the findings of the case analyses to the overall question of ordering case resolution mechanisms along a cooperation-coercion continuum, such an ordering does not appear meaningful. For example, by ordering case resolution mechanisms from cooperative to coercive as follows: (1) Article 9 decisions, (2) Cartel Settlements, (3) Article 7 decisions, it could be objected that this order does not take due regard of the fact that all case resolution mechanisms cannot be used for all types of infringements of Articles 101 and 102 TFEU and that this order disregards the perceptions of undertakings concerning individual resolutions of cases for instance where an Article 9 decision makes a far-reaching remedy binding.

874 See section 5.2.
875 See section 5.6.1.
876 ARA Foreclosure (n 150) para 15.
The perceptions and attitudes of undertakings are a further important component when considering case resolution mechanisms through the lenses of regulatory enforcement styles. In this context, it is worth repeating that the ultimate aim of the Commission’s system of case resolution mechanisms is to secure compliance with Articles 101 and 102 TFEU.\textsuperscript{877} However, the use of a ‘cooperative’ case resolution mechanism does not necessarily guarantee a genuine cooperative spirit and future compliance on the part of the undertaking. On the contrary, cooperation can equally be utilised by undertakings where there are real or perceived problems in a system of regulatory enforcement, for example, a limited judicial review of Commission decisions.

While the flexibility of a case resolution mechanism may be advantageous for an enforcement authority and for the undertakings involved, there are also potential pitfalls. As shown in the analysis of the ARA case, resolving a case in a settlement-like mechanism outside the confines of a pre-defined procedure risks causing legal uncertainty for the undertakings, especially where a case resolution is unlikely to become the subject of a court appeal. With regard to the negotiation of remedies, there is also a danger of suboptimal remedies being made binding if the latter are not subject to a market test.

In fact, the cooperative resolution of a case may thus conceal legitimacy issues related to, \textit{inter alia}, the enforcement authority, the judicial review of authority decisions or the regulatory enforcement action carried out by the enforcement authority.\textsuperscript{878}

Regarding the design of the different case resolution mechanisms, it can be observed that the ambiguous design of such instruments poses a problem from a regulatory enforcement perspective. While some mechanisms appear cooperative on the surface, they actually allow the Commission considerable leverage against the undertakings, given the threat of fines that can be used by the Commission, should the undertaking not cooperate. This circumstance has in particular been observed with regard to Article 9 decisions. Even though Article 9 decisions also offer considerable advantages for undertakings, it may be difficult for them to weigh the risks and benefits of such a procedure before agreeing to enter into negotiations with the Commission.\textsuperscript{879} Another issue in the design of case resolution mechanisms has already been observed with regard to the cooperative use of Article 7 decisions, namely legal uncertainty

\textsuperscript{877} See section 3.1.

\textsuperscript{878} With regard to the ACCC, some of these issues are for example observed in: Parker, ‘Effective and Legitimate Enforcement of Competition Law: A Riddle Wrapped in a Mystery Inside an Enigma?’ (n 567).

\textsuperscript{879} See section 4.3.1.2.
on the part of undertakings, partly with regard to the cooperation required, partly with regard to the reward in the form of fine reductions offered by the Commission. In effect, both problems concerning the design of case resolution mechanisms may lead to a perceived lack of legitimacy is unlikely to result in better compliance with competition rules.

Regarding the Commission’s choice of what case resolution mechanism to employ in what case, it has already been observed that this choice, in part, determines whether the objectives set out in chapter 3 can be achieved. Yet, besides the type of infringement at issue, there are no restrictions on the Commission as to what case resolution mechanism shall be employed in what case. Rather, it appears that the case resolution mechanism is chosen on a case-by-case basis and is influenced by a number of circumstances that may or may not relate to the objectives pursued by that case resolution mechanism, for example: the cooperation offered by the undertaking, the Commission’s desire to resolve cases efficiently, the remedies that are projected to be achieved in a case, the assessment of whether a case could be defended before the Court and so on. Under these circumstances, a suboptimal resolution of cases appears more likely if case resolution mechanisms are chosen on a case-by-case basis than if there were pre-defined criteria that determined that choice for any one case.

5.7 Conclusions

The aim of this chapter has been to view case resolution mechanisms through the lenses of regulatory enforcement styles. For that purpose, it has been attempted to categorise different case resolution mechanisms as well as Commission guidance in line with regulatory enforcement styles and consequently place them on a coercion-cooperation continuum. As already observed in the previous section, such an exercise has not been fully possible to carry out for several reasons. What emerges is instead a much more nuanced and detailed view of the different case resolution mechanisms and guidance than what may have been expected from the conclusion of the previous chapter.

Concluding chapter 4, the different case resolution mechanisms have been analysed with regard to the perspectives they take, distinguishing roughly between an ‘enforcement-oriented’ perspective and a ‘regulation-oriented’ perspective. From the analysis carried out in this chapter, it becomes clear that all case resolution mechanisms can be placed within a regulatory

880 See section 5.6.
881 See sections 4.3.2 and 4.3.3.1.
882 See section 4.4.2.
enforcement style, but not as neatly as perhaps expected. In this regard, it can first be observed that different case resolution mechanisms can be employed in different manners, making it difficult to place them on a cooperation-coercion continuum as envisaged in the introduction to this chapter. Article 7 decisions, on their surface, may seem like an instrument of coercion, but may in fact be used in a remarkably flexible manner by the Commission. This is also illustrated by the case analyses carried out in this chapter. In contrast, cartel settlements and Article 9 decisions require certain types of cooperation to function. This is not negative per se, but undertakings not willing to cooperate in the exact manner required by these mechanisms may perceive them as oppressive and demanding instead of cooperative and consensual, as intended by their form. Alternatively, the cooperative spirit advanced in the beginning of any procedure may turn to opposition because of different views on key questions, such as the remedies necessary to address the Commission’s concerns.

As a result, viewing case resolution mechanisms through the lenses of regulatory enforcement strategies adds further perspectives from which case resolution mechanisms can be viewed. They cannot only be viewed with regard to their formal attributes, as done in the conclusion to chapter 4, but also with regard to undertaking’s perceptions as well as with regard to the practical conduct of the procedure and the interaction between the undertaking and the Commission. In this regard, the case analyses of the ARA and Google Search cases show that the use of a single case resolution mechanism, an Article 7 decision, can lead to very different outcomes, both in the interaction between the Commission and the undertaking and the formal result achieved. These analyses also illustrate different approaches to dealing with the trade-offs faced by the Commission when choosing what case resolution mechanism shall be employed in a given case.

As already mentioned in the conclusion of chapter 4, even though the Commission is somewhat restricted with regard to the cases it can resolve by Article 9 decision or by cartel settlement, there will always be at least two mechanisms to choose from in a given case. The Commission thus makes its choice of what case resolution mechanism to employ in a given case on a case-by-case basis. Given the understanding of the opportunities and pitfalls linked to the different case resolution mechanisms in this chapter, the following chapter turns to the question whether responsive regulation theory could be used as a basis for designing a prescriptive approach to the Commission’s choice between case resolution mechanisms that would ultimately aim to achieve the objectives set out in chapter 3 in a strategic manner.

---

883 See section 4.4.2.
6 Designing a Responsive Case Resolution System

The aim of this chapter is to assess how an effective system of case resolution mechanisms could be designed based on insights from regulatory enforcement theory. More particularly, the question answered is whether and how a prescriptive approach could be adopted concerning the design of case resolution mechanisms and the choice between case resolution mechanisms, using the theory of responsive regulation as a model. The aim here is not to assess what would be the one ‘best’ or most effective way for the Commission to resolve cases. Such an assessment would be extremely difficult, if not impossible, to make considering that it would relate to hypothetical model. Rather, the aim here is to critically review the design of responsive regulation and assess whether, and if yes how, a responsive case resolution system could be designed to function within the context of EU competition law enforcement.

As a scholar, it is possible to study enforcement carried out by regulatory authorities from different points of view. Documenting regulatory behaviour and differentiating between different enforcement styles, as in the previous chapter, is one type of study. Such documentation has also produced research findings as to why enforcement authorities act as they do. The type of research conducted in this chapter is of a different nature, studying the interaction between the behaviour of authorities and undertakings to determine the instrument of regulatory enforcement that should be used in a prescriptive manner in any particular case.

The question of the legal instrument that should be used by enforcement authorities in any given situation naturally has a particular relevance in regulatory environments where authorities have several different styles of regulatory enforcement at their disposal. For example, the Commission has a choice between different case resolution mechanisms in any given case of a suspected infringement of Article 101 or 102 TFEU. When confronted with a potential infringement of Article 102 TFEU, the Commission can choose to

resolve the case with an Article 7 decision or an Article 9 decision. The Commission’s current approach can thus generally be qualified as a case-by-case approach to the resolution of cases. However, the Commission could also choose to take a more prescriptive approach, setting up a set of criteria that prescribe its choice of case resolution mechanism in any given case. Such a prescriptive approach may base the choice between case resolution mechanisms on theories of why undertakings infringe the law or choose to comply with it. As mentioned earlier, research within the area of regulatory enforcement identifies three main factors that motivate compliance with the law:

(...)[1] fear of detection and punishment; [2] concern about the consequences of acquiring a bad reputation and [3] a sense of duty, that is, the desire to conform to internalized norms or beliefs about right and wrong (…)885

The theory advanced with regard to the connection between these motivations and regulatory enforcement styles is that the enforcement authority, if it knows why an undertaking has infringed the law, can adapt its response to this particular undertaking’s motivational structure or circumstances. This, in turn, will lead to better compliance with the law.886 However, this theory poses several practical problems. Most importantly, it is not possible for an enforcement authority to know why an undertaking has infringed the law, at least if that undertaking has no previous infringement history. Additionally, it may not be so easy to boil down the motivating factors behind an undertaking’s actions into one single category. Indeed, undertakings, being complex organisations made up of humans, act based on a set of different motivating factors. It does not appear to be possible to attach one motivational ‘label’ on an undertaking that can subsequently be utilised for enforcement purposes.887

In response to these regulatory challenges, scholars have proposed prescriptive approaches to authority action, which aim to solve the dilemma of *when to punish and when to persuade* or in other words, when to use a coercive instrument of enforcement and when to use a cooperative instrument of enforcement.888 The following sections begin with a presentation and

885 Kagan, Gunningham and Thornton (n 84) 37.
887 Parker and Lehmann Nielsen, ‘Mixed Motives: Economic, Social, and Normative Motivations in Business Compliance’ (n 91); Ayres and Braithwaite (n 91) 20–35. See also section 5.6.2.
888 This dilemma is already clearly outlined in: Kagan and Scholz (n 23) 86; See also: Ayres and Braithwaite (n 91).
analysis of responsive regulation as the best-known theory of prescriptive enforcement. The purpose is to ascertain whether a responsive approach might be adopted for case resolution mechanisms used against potential infringements of Articles 101 and 102 TFEU. Responsive regulation is chosen for the purposes of this study, as it is ‘the most sustained and influential account of how and why to combine deterrent and cooperative regulatory enforcement strategies.’ As such, responsive regulation advances an intuitively sound theory of when enforcement authorities should choose what instrument of regulatory enforcement. Further, the prescriptive approach that forms the centre of responsive regulation is flexible enough to also be used in the resolution of cases of EU competition law, which does not exhibit all the classical traits of regulation.

Beyond responsive regulation, scholars have advanced a number of other prescriptive theories of regulation, many of which are based in some way on responsive regulation, such as smart regulation, meta-regulation, really responsive regulation and risk-based regulation. While all of these theories advance interesting models, it is not possible to examine them all within the confines of this study. Instead, responsive regulation is examined with regard to its ability to be applied to the Commission’s case resolution mechanisms in EU competition law.

Before considering further how responsive regulation could be employed to case resolution mechanisms, it is important to explain why a prescriptive style of regulatory enforcement, in particular, responsive regulation, is chosen as the subject of this study. Besides the already cited motivating factors for responsive regulation, there are a number of other reasons why a prescriptive approach to the choice between case resolution mechanisms could be advanced: Such an approach aims to achieve predictability and legal certainty in enforcement. While a prescriptive approach to enforcement may limit the discretion enjoyed by the authority, it may also save time and resources not spent on the choice of enforcement instrument. Regulated undertakings may find that predictability in an authority’s actions makes it easier to interact with

889 Parker and Lehmann Nielsen, ‘Testing Responsive Regulation in Regulatory Enforcement’ (n 760) 377.
890 See section 1.3.3.
Further, different case resolution mechanisms have different characteristics and a prescriptive approach to enforcement aims to secure the correct allocation of case resolution mechanisms to cases with regard to the objectives pursued by case resolution mechanisms.

Indeed, as concerns the objectives identified in chapter 3, the implementation of a responsive case resolution system also allows a reconsideration of the prioritisation of these objectives. As shown in chapter 4, different case resolution mechanisms pursue different objectives and the use of these different mechanisms will necessarily have an impact on the extent to which the different objectives will be reached.892

Applying responsive regulation to the concrete framework of case resolution mechanisms in EU competition law enforcement below provides insights into the strengths and weaknesses of responsive regulation and also more generally the intricacies of designing a prescriptive enforcement system. Indeed, it will be shown below that the transposition of a theory, such as responsive regulation, into an already existing legal framework of case resolution mechanisms poses several challenges. As a result of these challenges, it is argued that a prescriptive approach to the choice between case resolution mechanisms can be based on a theory such as responsive regulation, but must be adapted to the specific conditions of a legal system. The exercise carried out in this chapter hence also aims to contribute to the further development of the theory of responsive regulation by illustrating how some of the existing conceptual problems could be addressed.

This chapter first addresses a number of preliminary questions connected to the use of responsive regulation in the enforcement of Articles 101 and 102 TFEU: In section 6.1, responsive regulation as an influential prescriptive theory of regulation and regulatory enforcement is introduced. Section 6.2 considers whether this theory could be utilised in a prescriptive approach to the Commission’s choice between case resolution mechanisms and analyses what steps would need to be taken to design such an approach. Section 6.3 considers the use of corporate compliance programmes (CCPs) as a part of responsive regulation and a potential component of the Commission’s case resolution mechanisms. Subsequently, sections 6.4-6.8 set out and assess a concrete system of responsive case resolution of Articles 101 and 102 TFEU. Section 6.8 concludes.

---

892 See sections 4.3.2 and 4.3.3.1.
6.1 Responsive Regulation

As explained in the previous section, a central concern of prescriptive theories of regulatory enforcement is to find a solution to the problem of when to punish and when to persuade. Ayres and Braithwaite’s theory of responsive regulation makes the assumption that most undertakings wish to comply with the law.\textsuperscript{893} The authors developed responsive regulation as a result of empirical research, for example in regulation on mine safety and nursing homes as well as Braithwaite’s practical work as Commissioner of the Australian Trade Practices Commission (now the Australian Competition and Consumer Commission). Further, responsive regulation builds on, for example, game theory.\textsuperscript{894} As a regulatory enforcement style, responsive regulation retains the threat of sanctions for non-compliant behaviour, but places sanctions at the top of an enforcement pyramid that can be used by the regulator as a response to non-compliant behaviour. Softer means of intervention, such as the provision of guidance and the implementation of self-regulation such as CCPs are placed at the bottom of that pyramid.\textsuperscript{895} Ayres and Braithwaite illustrate this as follows:\textsuperscript{896}

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{enforcement_pyramid.png}
\caption{Example of an enforcement pyramid}
\end{figure}

At the core of responsive regulation lies the vision of a prescriptive hierarchy of enforcement instruments, moving from a more cooperative to a more coercive approach. In this view, the enforcement authority, when it has

\textsuperscript{893} Ayres and Braithwaite (n 91) 26–27. See section 1.3.4.
\textsuperscript{894} ibid 21; Braithwaite (n 886) 477–79.
\textsuperscript{895} Ayres and Braithwaite (n 91) 36–37.
\textsuperscript{896} Example adapted from: ibid 35.
detected a potential infringement, should start its enforcement action with the least coercive instrument possible, escalating up the pyramid if it does not receive a cooperative response from the undertaking. The authority may also move down the pyramid if a previously uncooperative undertaking starts to cooperate. The contention is that most undertakings will comply as a result of such non-invasive enforcement. This is based on the assumption that a majority of undertakings wish to comply with the law out of either moral or social duty. Further, undertakings which are met by a responsive regulator should develop a more cooperative and positive attitude, leading to better future compliance. The few undertakings that do not comply should subsequently be coerced into compliance by increasingly invasive enforcement measures.

Responsive regulation thus prescribes what actions the enforcer should take along the enforcement pyramid. This so-called tit-for-tat enforcement style can be employed in different ways. It can either be employed within one enforcement procedure or across several enforcement procedures against the same actor. Notably, this flexibility also makes it possible to apply responsive regulation in regulatory enforcement situations that are not based on continuous interaction between the authority and the undertakings.

Responsive regulation theory prescribes that regulators should use only one criterion, the cooperation offered by the undertaking, when deciding what regulatory enforcement action to take against the undertaking. Braithwaite clarifies:

Strategic use of the pyramid requires the regulator to resist categorizing problems into minor matters that should be dealt with at the base of the pyramid, more serious ones that should be in the middle, and the most egregious ones for the peak of the pyramid. Even with the most serious matters - flouting legal obligations for operating a nuclear plant that risks thousands of lives, for example- we stick with the presumption that it is better to start with dialogue at the base of the pyramid. A presumption means that however serious the

---

897 ibid 36–37.
898 Ayres and Braithwaite (n 91) 37–40; Parker and Lehmann Nielsen, ‘Testing Responsive Regulation in Regulatory Enforcement’ (n 760) 379.
problem, our normal response is to try dialogue first for dealing with it, to only override the presumption if there are compelling reasons for doing so.\textsuperscript{901}

Braithwaite’s argument is that even the most serious regulatory risks should first be met with persuasive action by the regulator. Only where the undertaking does not cooperate shall more coercive action be taken.

A great deal of criticism has been advanced against responsive regulation: Firstly, Tombs and Whyte point out that tit-for-tat regulation, such as responsive regulation, still ultimately also relies on deterrence for compliance, while deterrence is at the same time strongly criticised by the same authors.\textsuperscript{902} Secondly, Yeung claims that Ayres and Braithwaite overlook the fact that different regulatory instruments may be used to pursue different objectives and cannot simply be applied to any given regulated conduct because they are more or less coercive.\textsuperscript{903} Thirdly, the concept of the enforcement pyramid is criticised by Ashworth for its failure to take the seriousness of an infringement into account.\textsuperscript{904} This may lead to a situation where a minor infringement is treated harshly because of non-cooperation, while a serious infringement is treated mildly because of the undertaking’s cooperation. Such action by the regulator may not be acceptable, legally, politically or from a societal point of view.\textsuperscript{905} In particular, a responsive approach may in some cases be at odds with general principles of law. For example, basing the choice of enforcement instrument on the cooperation or non-cooperation of the undertaking may be in conflict with the principle of equal treatment.\textsuperscript{906}

Some of these criticisms can be traced back to the aims of responsive regulation. Ayres and Braithwaite make two claims with regard to responsive regulation: their theory shall both save resources for the regulator and achieve better compliance than an approach based on just one style of regulatory enforcement.\textsuperscript{907} Essentially, their approach is based on the pursuit of effective and efficient regulation. Regulators are thus encouraged to pursue cooperative enforcement instruments first and move on to increasingly coercive enforcement instruments as long as compliance is not achieved. As a result, responsive regulation neglects paying attention to the requirements of general principles of law inherent in most legal systems. These criticisms are taken

\textsuperscript{901} Braithwaite (n 886) 483.
\textsuperscript{902} Tombs and Whyte (n 307) 752–53; Yeung, \textit{Securing Compliance: A Principled Approach} (n 22) 162.
\textsuperscript{903} Yeung, \textit{Securing Compliance: A Principled Approach} (n 22) 162–67.
\textsuperscript{904} Ashworth (n 757) 248–49; Braithwaite (n 886) 483.
\textsuperscript{906} Yeung, \textit{Securing Compliance: A Principled Approach} (n 22) 168; Freigang (n 905) 467–68.
\textsuperscript{907} Ayres and Braithwaite (n 91) 38–39.
into account in considering how responsive regulation could be employed in EU competition law enforcement below.

6.2 Transposing responsive regulation into an existing legal framework

The main appeal of responsive regulation as a theory is its simple structure which appears intuitively logical, taking the characteristics of the different regulatory enforcement styles as well as research on the motivating factors behind the actions of undertakings into account. However, several challenges appear when attempting to transpose responsive regulation into an existing legal framework.

As a preliminary point, it is important to consider how responsive regulation can be utilised in the resolution of cases of suspected infringements of Articles 101 and 102 TFEU, considering that Ayres and Braithwaite did not develop their theory specifically for that purpose. In a lecture summarising the ‘essence of responsive regulation’, Braithwaite points out that the theory of responsive regulation has been used in various regulatory contexts, both by public and private regulators. Furthermore, Braithwaite also draws from his own experiences as a regulator in competition and consumer law in Australia where responsive regulation has been utilised. Responsive regulation was initially developed with reference to more ‘classical’ areas of regulation, such as nursing home supervision, and arguably works best in such contexts. But it is submitted here that responsive regulation is so broadly formulated as a theory, that it can also be utilised in other contexts such as that of resolving cases in the enforcement of Articles 101 and 102 TFEU.

The reason for the flexibility of responsive regulation as a theory is that it aims to provide a broad solution to the challenge of securing compliance of undertakings. This challenge remains the same comparing, for instance, coal mining safety and competition rules. Assuming that there are different reasons for undertakings’ compliance, the challenge for an enforcement authority is to know how to deal with what actor at what point in time in order to elicit the desired response, ultimately securing compliance. As Parker and Nielsen summarise:

---

908 Yeung, Securing Compliance: A Principled Approach (n 22) 162.
909 Braithwaite (n 886) 477, 480; Parker and Lehmann Nielsen, ‘Testing Responsive Regulation in Regulatory Enforcement’ (n 760) 384.
910 Gunningham (n 900) 204–05.
responsive regulation seeks to advance explanations of regulatory compliance and the practice of regulatory enforcement by proposing a theory about the way these plural motivations for compliance interact with one another and respond to plural deterrent and cooperative regulatory enforcement strategies.  

With regard to the transposition of responsive regulation into EU competition law enforcement, the main concern relates to the fact that competition law does not exhibit some of the characteristics of classical regulation.\(^\text{912}\) Especially relevant in this regard is the fact that competition rules are not sector-specific, but apply to undertakings across all sectors of the economy. As a result, most contact between competition law enforcers and undertakings are one-off, rather than on a continuous basis, although exceptions of course exist.\(^\text{913}\) Gunningham points out that where interactions are infrequent, it is difficult for an enforcer to determine how to interact with an undertaking, making practical escalation and de-escalation on the pyramid a difficult task.\(^\text{914}\) Even if it is acknowledged that responsive regulation may work better where repeated interactions are more common, Parker and Nielsen argue that it is possible to utilise responsive regulation even where repeated interactions are less common, such as in competition law.\(^\text{915}\) It may be added that, while most interactions between undertakings and competition authorities may be one-off, when interactions do occur, the complex nature of competition law infringements often causes extraordinarily long durations of interactions, meaning that there is time for ‘a learning curve’ where the competition authority can get acquainted with the undertaking and its motives for (non-)compliance.

Further the application of competition law \textit{ex post} may be an obstacle to the optimal functioning of responsive regulation, given that the interaction between enforcers and undertakings only starts once an infringement of competition law is suspected to have been committed. It could be argued that a number of cooperative enforcement styles are excluded in a situation where a potential infringement has already occurred. However, as already argued, this is a one-sided view of modern competition law enforcers who engage in a number of activities that target the situation \textit{ex ante} an infringement. Examples of such activities are the issuing of case-specific and general

\(^{911}\) Parker and Lehmann Nielsen, ‘Testing Responsive Regulation in Regulatory Enforcement’ (n 760) 378. \(^{912}\) See section 1.3.3. \(^{913}\) See section 4.1.2.8. \(^{914}\) Gunningham (n 900) 205–06. \(^{915}\) Parker and Lehmann Nielsen, ‘Testing Responsive Regulation in Regulatory Enforcement’ (n 760) 385.
guidance or block exemption regulations. More specifically concerning case resolution mechanisms, remedies imposed as part of the resolution of a case have already been identified as forward-looking, having by their very nature some impact on the future development of a certain sector or certain undertakings. Viewing the Commission’s enforcement of Articles 101 and 102 as reaching beyond the point in time when a case is resolved thus implies that the relationship between the Commission and undertakings required to follow certain remedies continues after the formal resolution of a case. The argument that the Commission’s case resolution mechanisms intervene too late for a responsive approach to function properly is thus too short-sighted.

Concerning the Commission’s system of case resolution mechanisms used in suspected infringements of Articles 101 and 102 TFEU, it is essential to bear in mind that the scope of the present study is narrower than the scope of responsive regulation overall. The resolution of a case can indeed only begin once there is a suspicion of a concrete infringement. Responsive regulation, as a broader theory, also allows different classes of regulation to be organised in a regulatory pyramid, thus covering both the choice of the classes of regulation and the regulatory enforcement styles applied in a given area of law. Conversely, the case resolution mechanisms examined here focus only on the regulatory enforcement to be used against suspected infringements of Articles 101 or 102 TFEU. The question to be answered here is thus how responsive regulation can be applied in that type of enforcement environment. Prima facie, there is no apparent reason why a responsive regulation pyramid could not be employed for only a part of the regulatory process, namely the enforcement. With regard to the class of regulation employed in competition law, it has already been concluded that Articles 101 and 102 TFEU are designed as command regulation. However, as also pointed out, this does not require the exclusive use of control enforcement by the Commission. Rather, a hybrid style of enforcement can already be said to be employed. Hence, an enforcement pyramid focusing on the utilisation of different case resolution mechanisms could be designed for the resolution of potential infringements of Articles 101 and 102 TFEU.

Formulated in concrete terms, the question would be: what steps need to be taken to design a system of case resolution mechanisms based on responsive regulation? It is submitted here that the answer requires further analysis of two questions: First, how should a responsive approach to the resolution of cases be designed and employed in individual case resolutions? Second, what challenges exist that may be obstacles to the design and utilisation of such an

---

916 See section 1.3.3.
917 See section 3.1.1
918 Ayres and Braithwaite (n 91) 38–40.
919 See section 5.1.
approach? Challenges addressed below are (i) the concept of recidivism existent in EU competition law; and (ii) the application of the principles of equal treatment and legitimate expectations. The aim in the following sections is not to suggest a design for a responsive case resolution system, but rather to illustrate the steps to be taken and to point out the difficulties that may be encountered in that process.

6.2.1 The practical design and utilisation of responsive regulation

According to Ayres and Braithwaite, case resolution mechanisms are to be ordered in an enforcement pyramid according to the coerciveness of the decision adopted and the elements of cooperation included in each mechanism. But, as the analysis of case resolution mechanisms in chapter 5 has shown, the case resolution mechanisms currently employed by the Commission are not easily classified according to their coerciveness. Rather, how coercive a case resolution mechanism is perceived to be depends on the point of view. Referring to the external attributes of a mechanism, a cartel settlement would be less coercive than an Article 7 decision with an attached fine. Or, referring to the internal workings of a mechanism, an undertaking may perceive an Article 7 decision that has been achieved in a cooperative spirit to be less coercive than a cartel settlement that regulates cooperation in detail.

This challenge could either be resolved by choosing one perspective only and ordering case resolution mechanisms according to that perspective. However, such a solution risks missing one of the aims of responsive regulation, namely to instil confidence in the enforcement authority in undertakings if some feel that they are being treated unfairly. Or, the challenge could be resolved by reconsidering the design of existent case resolution mechanisms. Yet, in such a case, a prescriptive approach would not be adopted within the confines of the current system of law and law enforcement, but rather, proposals for changes to the design of the system of case resolution mechanisms *lex ferenda* are advanced.

Another challenge is the designation of case resolution mechanisms for specific cases. The Commission has restricted the use of certain case resolution mechanisms to certain types of cases, notably cartel settlements and commitments. At the same time, the enforcement of both Articles 101 and 102 TFEU is mainly based on a single legal instrument, Regulation 1/2003. Article 7 decisions are also used to resolve both infringements of Articles 101 and

920 See section 6.1.
921 See section 5.7.
922 See section 5.2.
102 TFEU. A solution to that challenge would be to design different enforcement pyramids for different types of cases.

Lastly, an aspect that is ambiguous in Ayres and Braithwaite’s conception of responsive regulation is when the enforcer should escalate up or down the enforcement pyramid. Parker and Nielsen conceptualise two versions of responsive regulation that relate to the enforcer’s individual behaviour vis-à-vis an undertaking. This behaviour relates to how explicit enforcers should be when escalating up the pyramid, but does not explain concretely under what circumstances escalation should occur.923 Indeed, it may be difficult to pin down exact criteria for when escalation or de-escalation should occur. Rather, escalation and de-escalation are likely to occur as part of the ‘regulatory conversations’ already mentioned above.924 However, too much ambiguity regarding the functioning of the enforcement pyramid may achieve the opposite result to the one desired by responsive regulation, creating legal uncertainty and mistrust among undertakings.925 Thus, it is imperative to create at least some transparency in how the enforcer makes the choice of when to escalate up the pyramid. As already mentioned, responsive regulation is expected to work best where there is regular interaction between undertakings and enforcers. This raises the question whether escalation and de-escalation should occur only within one investigation or continuously across several investigations against one undertaking. For example, assuming that a given undertaking has previously infringed Article 101 or 102 TFEU: should the Commission, in a new investigation, start from the bottom of the pyramid, or higher up on the pyramid taking the undertaking’s history into account? Either use of responsive regulation would be possible. However, for reasons of legal certainty and transparency, it is desirable that the Commission is transparent about its approach when selecting a mechanism to resolve a case, especially if this selection is the result of a prescriptive system.

6.2.2 The concept of recidivism in EU competition law

As explained above, escalation and de-escalation on the enforcement pyramid may occur in different ways. One possibility is to take an undertaking’s previous history of law infringements or interactions with law enforcement authorities into account when choosing what tier of the enforcement pyramid to utilise. This may be justified by stating that undertakings that have

---

924 See section 5.2.
925 Haines (n 755) 219–20.
previously been subject to enforcement action can be presumed to be more calculating in their attitude towards law enforcement.

Taking account of an undertaking’s infringement history may be associated with the existing concept of recidivism in the Commission’s Fining Guidelines. Recidivism has already been addressed above as regards the deterrent effect of Article 7 decisions. It has been recognised by the Court that repeated infringements indicate an undertaking’s ‘propensity to commit such infringements’. Thus, in the absence of sufficient deterrence of a first infringement decision, the Commission may already now increase the fine imposed on certain recidivists by up to 100 per cent. However, it has been concluded above that the current definition of ‘recidivism’ is rather narrow, and thus does not cover all infringers whose fines should be increased following the aim of specific deterrence. From a retributive point of view, it can be argued that a repeat infringer is more blameworthy than a first-time infringer. Thus, there is agreement across responsive regulation theory and theories of punishment that repeat infringers should be treated harsher than first-time infringers. However, reference to repeat offenders in responsive regulation does not refer to the magnitude of fines, but to the type of case resolution mechanism used to resolve a case. The issue of the fine imposed is analysed further below in this chapter. Regarding the issue of choosing a case resolution mechanism, there are several reasons why it would be necessary to differentiate between the concept of recidivism as it already exists in the Commission’s Fining Guidelines and the criterion of an ‘undertaking’s infringement history’ for the purposes of a responsive case resolution system.

Firstly, where an undertaking infringes either Article 101 or 102 TFEU for a second time, but in a dissimilar fashion as compared to the first infringement, that undertaking is not considered a recidivist. A ‘similar’ infringement has been defined by the Court on the basis of a comparison regarding the type of infringement. In this regard, infringements of Article 101 TFEU and infringements of Article 102 TFEU will usually not be considered to be

---

926 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28) para 28.
927 See section 4.1.2.8.
929 Case T-38/02 Groupe Danone v Commission of the European Communities (n 928) para 349; Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28) para 28.
930 See section 1.3.2.2
931 See section 6.5.3.1.
‘similar’. Even dissimilar infringements of one and the same legal provision do not necessarily imply that a later infringement is considered recidivism. Thus, reference to recidivism as ‘an undertaking’s infringement history’ would only allow escalation up the pyramid in narrowly defined cases.

Secondly, not all existing case resolution mechanisms include the finding of an infringement, whereas the definition used by the Fining Guidelines only covers recidivism where an infringement has previously been found. This means that undertakings which have previously been investigated by the Commission and where the case was concluded using an Article 9 decision, are not considered to be recidivists. If an Article 9 decision against a specific undertaking does not cause that undertaking to be considered a recidivist, an escalation up the enforcement pyramid would not be possible.

To avoid practical problems as well as problems of terminology, the Commission would need to carefully consider the wording of the criterion or criteria used to escalate up the enforcement pyramid. Principally, there is nothing in the current framework of competition law enforcement preventing the Commission from taking advantage of its broad discretion when choosing what case resolution mechanism to employ. While the link between the concept of recidivism and the reasoning when an enforcement authority should escalate up the enforcement pyramid can be made, there is no obvious reason why the current definition of recidivism would need to serve as a point of reference. As already pointed out, one is used for the calculation of fines while the other determines the choice of case resolution mechanism. With due regard to the applicable constitutional restraints, the Commission could for example choose to escalate up the pyramid when an undertaking has previously been investigated for an infringement.

933 See section 4.1.2.8.
935 See further section 6.5.3.
6.2.3 The application of the principles of equal treatment and legitimate expectations

Another aspect specific to the enforcement of competition law by the Commission are the multiple roles taken by the Commission as the investigator and enforcer of Articles 101 and 102 TFEU. In particular, the Commission’s role when adopting decisions that are binding on the undertakings addressed, is relevant in this regard. Here, the Commission takes on a quasi-judicial role. That role also imposes a number of demands on the Commission, in particular with reference to the constitutional restraints defined in chapter 2 above. As outlined below, these demands may be a hindrance to applying responsive regulation in the manner proposed by Ayres and Braithwaite. With regard to the further development of responsive regulation as a theory named in the introduction, the demands imposed by constitutional restraints indeed present an opportunity to consider how responsive regulation can be used in compliance with constitutional restraints. Especially relevant in this regard are the principles of equal treatment and legitimate expectations.

Firstly, cartel cases by nature always include several undertakings. When choosing what case resolution mechanism to use in a cartel case, the principle of equal treatment must be observed. For example, if the Commission considers settling a cartel case with one undertaking, this opportunity must be open to all undertakings party to that case. Responsive regulation proposes that the enforcement authority treats undertakings differently when investigating a potential law infringement, depending on their history with the enforcer or their behaviour during the investigation. Such treatment may be in conflict with the principle of equal treatment in a cartel case.

Secondly, implementing a prescriptive approach to the choice between case resolution mechanisms that is based on a specific enforcement pyramid and explicit criteria for escalating up and down the pyramid may create legitimate expectations on the part of undertakings as regards the case resolution mechanism to be used in their case. Assuming that the Commission would issue soft law guidance detailing the criteria for the choice of a specific case resolution mechanism, it would bind itself to those criteria. Such criteria

936 See section 6.
937 See section 4.2.3.
938 Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri A/S (C-189/02 P), Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others (C-202/02 P), KE KELIT Kunststoffwerk GmbH (C-205/02 P), LR af 1998 A/S (C-206/02 P), Brugg Rohrsysteme GmbH (C-207/02 P), LR af 1998 (Deutschland) GmbH (C-208/02 P) and ABB Asea Brown Boveri Ltd (C-213/02 P) v Commission of the European Communities (n 140) para 211.
would then give rise to legitimate expectations on the part of undertakings, as long as they are in compliance with the general legal framework set out for case resolution mechanisms. While the creation of legitimate expectation is not a hinder to the use of responsive regulation per se, such expectations may be seen as a too far-reaching limitation of the Commission’s discretion. If the Commission, for whatever reason, wishes to deviate from the case resolution mechanism thus designated, it may face an annulment of its decision in Court.

Thus, having set out the considerations to be taken when transposing responsive regulation into an existing legal framework, it can be concluded that this theory, in the way it has been formulated, cannot be applied seamlessly to the system of case resolution mechanisms subject to this study. To be able to accomplish such a transposition, the design of the different case resolution mechanisms, amongst other issues, must be reconsidered. While this finding makes the transposition of responsive regulation more complicated, it also offers the opportunity to consider whether the Commission’s system of case resolution mechanisms should include regulatory enforcement instruments not currently part of these mechanisms. Below, the use of an instrument of self-regulation, CCPs are introduced and considered as a possible instrument to be used in the Commission’s case resolution.

6.3 Corporate compliance programmes as a part of case resolution mechanisms

Given that responsive regulation proposes that regulatory enforcement always starts with the least intrusive instrument available, different self-regulatory approaches offer themselves for use in the lower tiers of the enforcement pyramid. With regard to competition law enforcement, an instrument used by several NCAs are CCPs which aim to ensure that undertakings do not infringe competition law in the first place. Defined simply, a CCP is:

(...) a corporate scheme entailing education of employees about illegal activities, monitoring their behaviour, and disciplining them in case of illegal conduct.

---

939 Compare: Case T-347/03 Eugénio Branco, Lda v Commission of the European Communities (n 258) para 102.
940 See section 6.1.
A CCP thus aims to ensure that the undertaking subject to the CCP does not infringe applicable law. A CCP designed to comply with competition law may vary depending on the size of the undertaking, the industry in which it operates and various other parameters. By way of example, a CCP may include the basic training of employees in competition law complemented by a more in-depth schooling of employees who are prone to violate competition law, such as those that have regular contact with the relevant trade association and/or competing undertakings. Moreover, undertakings may issue guidelines for their employees that include the most important rules and specific ‘dos’ and ‘don’ts’ to be followed. Frequently, a telephone line for whistle-blowers is also part of a CCP. After the introduction of the programme, the programme itself and the measures included should be repeated and reviewed regularly to check whether they meet the intended objectives and to train new employees as well as keep old employees up-to-date. Maintaining a working corporate compliance programme is thus a process that is never fully completed. Ideally, undertakings will thereafter comply with competition law or will at least be able to discover and stop ongoing and future breaches of competition law.

CCPs can be used by undertaking of their own accord or may be mandated, for example as part of industry self-regulation. Furthermore, they can be used as an accessory to command regulation, for example, as a mitigating factor or

---

219

2

A CCP thus aims to ensure that the undertaking subject to the CCP does not infringe applicable law. A CCP designed to comply with competition law may vary depending on the size of the undertaking, the industry in which it operates and various other parameters. By way of example, a CCP may include the basic training of employees in competition law complemented by a more in-depth schooling of employees who are prone to violate competition law, such as those that have regular contact with the relevant trade association and/or competing undertakings. Moreover, undertakings may issue guidelines for their employees that include the most important rules and specific ‘dos’ and ‘don’ts’ to be followed. Frequently, a telephone line for whistle-blowers is also part of a CCP. After the introduction of the programme, the programme itself and the measures included should be repeated and reviewed regularly to check whether they meet the intended objectives and to train new employees as well as keep old employees up-to-date. Maintaining a working corporate compliance programme is thus a process that is never fully completed. Ideally, undertakings will thereafter comply with competition law or will at least be able to discover and stop ongoing and future breaches of competition law.

CCPs can be used by undertaking of their own accord or may be mandated, for example as part of industry self-regulation. Furthermore, they can be used as an accessory to command regulation, for example, as a mitigating factor or
as a remedy.\textsuperscript{948} The analysis below aims to determine the preconditions under which CCPs could be part of a proposed responsive case resolution system by the Commission, a question addressed more specifically later on in this chapter.\textsuperscript{949} The following sections include an analysis of (1) whether or not CCPs can be effective in preventing infringements of competition law; (2) how an effective CCP should be designed and how a competition authority can monitor both this design and the continuous application of the CCP; and (3) how a CCP can be included in a competition authority’s case resolution mechanisms. This last step is carried out by studying the example of the Australian NCA utilising CCPs as a remedy. As the utilisation of CCPs in the context of EU competition law enforcement is a contested issue, a thorough analysis is conducted below.\textsuperscript{950}

6.3.1 The effectiveness of corporate compliance programmes

Studying the question of whether CCPs actually prevent infringements of the law is not without difficulties. CCPs may be designed very differently in different undertakings and simply comparing their effectiveness with regard to compliance would lead to misleading conclusions. It is thus useful to rephrase and ask the question ‘under what circumstances is a CCP effective in preventing law infringements?’ CCPs may also be more or less effective in different areas of law, depending on the properties of the relevant legislation. Surveying the literature related to the effectiveness of CCPs, a vast number of different research designs and outcomes can be observed.\textsuperscript{951} Two studies relevant to competition law are analysed below.

First, Parker and Nielsen studied 999 Australian businesses regarding their compliance with Australian competition and consumer law in the presence of


\textsuperscript{949} See section 6.5.4.

\textsuperscript{950} See for example: Wils, ‘Antitrust Compliance Programmes & Optimal Antitrust Enforcement’ (n 948); Geradin, ‘Antitrust Compliance Programmes and Optimal Antitrust Enforcement: A Reply to Wouter Wils’ (n 948).

a CCP. They found that the presence of a CCP was not enough and had to be supplemented with a commitment from the management regarding compliance, oversight and planning by management as well as the allocation of adequate resources for compliance.952 Parker and Nielsen’s study comes close to the issue examined in the present study, that is the impact of CCPs on undertakings’ compliance with competition law. Of course, there are differences between the competition regimes in Australia and the EU, but nonetheless, the basic competition rules are similar.953 The study was based on surveys completed by compliance officers or other employees involved in compliance activities.954 The questions were so specific that they could only be answered with a yes or a no to avoid bias and social adequateness. Still, as with any survey, it is difficult to ensure that no biases taint the replies.955 The questions asked concerned elements hypothesised to be part of an effective CCP, such as the existence of a written compliance code, the handling of complaints, the training of employees, the review of compliance systems and the disciplining of employees for non-compliance.956 Parker and Nielsen found that a CCP might generally have an effect on compliance, but that actual compliance depended on whether the formal components of the CCP were connected to the internal culture and values of the undertaking in question. In an undertaking where abiding competition rules was not valued more highly than, for example, sales targets, it was likely that a formal CCP was not going to make any difference.957

Second, Simpson carried out two vignette studies as regards the factors influencing managers’ intentions to commit a number of different corporate crimes. As the second vignette study featured an improved design as compared to the first study, only the second study is considered here. The respondents, MBA students and working managers, had an average work experience of 12 years, thus forming an acceptable proxy to surveying managers only.958 The vignettes concerned corporate crimes such as price fixing, environmental wrongdoing and bribery.959 The vignettes differed with regard to factors hypothesised to have an impact on the likelihood that the manager would

953 See: Competition and Consumer Act 2010, section 45AF as regards cartels and section 46 as regards misuse of market power.
955 ibid 15.
956 ibid 16–20.
957 ibid 28–29.
958 Simpson and others (n 109) 122.
959 Simpson, Corporate Crime, Law, and Social Control (n 49) 140–41.
infringe the law. They concerned the manager’s position, tenure and authority; benefits of non-compliance for manager and undertaking; economic pressures on the undertaking, environmental constraints; and internal origins of compliance.\textsuperscript{960} The result was that the mere presence of a CCP did not in itself lead to better compliance. There was also no difference in participants’ answers that could be linked to the elaborateness of the CCP. In other words, it did not matter whether the CCP only consisted of a code of conduct or whether it also included mandatory training, a telephone hotline and regular inspections.\textsuperscript{961} Rather, it was the consequences that followed from non-compliance that were important. For example, if an employee (in the vignette scenario) had previously been punished or even fired for non-compliance, the propensity to infringe the law decreased.\textsuperscript{962}

The studies cited above agree that a CCP alone does not automatically improve compliance with the law. It is rather how the programme is put into action and the commitment of top management to the programme which improve compliance.

A critical question that can be asked is whether a CCP may actually render compliance by an undertaking less effective? No such evidence emerges from the studies above, where CCPs at worst had no effect at all. However, Wils claims that CCPs may have some perverse effects in a worst-case scenario. Employees, instead of learning to comply with competition law, may learn how to best conceal their infringements of competition law and forego punishment. Further, employees may decide to delete evidence of past or ongoing infringements as a result of competition law compliance training.\textsuperscript{963} Unfortunately, Wils does not provide any empirical evidence to indicate that such perverse effects actually occur in the presence of CCPs. Thus, these claims are difficult to substantiate further.

It can be concluded that CCPs may improve compliance, but only if they are accompanied by a genuine commitment to comply that is also demonstrated in practice, especially from the part of the undertaking’s management. It appears intuitive that a behavioural code, training or a telephone hotline, will not necessarily convince those who do not wish to comply or who find compliance unnecessary. It is necessary to convince management and employees to comply, otherwise a CCP will be useless. A CCP may be an important instrument for undertakings to improve their compliance with relevant laws, especially if the law is complicated and requires training the employees. However, to actually achieve compliance with that law or

\textsuperscript{960} ibid 117–18 and 139–40. 
\textsuperscript{961} ibid 144–45. 
\textsuperscript{962} ibid. 
\textsuperscript{963} Wils, ‘Antitrust Compliance Programmes & Optimal Antitrust Enforcement’ (n 948) 13–14.
regulation, the undertaking’s management needs to follow through on the implemented CCP and needs to show commitment to the CCP itself.

6.3.2 The design and monitoring of corporate compliance programmes

If CCPs are to be utilised as part of a competition authority’s enforcement, two concrete questions must be answered: Firstly, what guidelines or requirements should the competition authority set out for the CCP to be implemented or upgraded? And secondly, how should the competition authority validate that a CCP conforming to the requirements has been implemented and continues to function over time?

As concluded above, CCPs that are merely box-ticking exercises tend not to be successful. How can an effective CCP consequently be designed? There are a multitude of models aiming to answer this question, so much so that it is not possible or indeed desirable to examine all the models in the present study, given that this is not the main focus here. Organisations which have models for effective CCPs range from competition authorities, such as the Competition and Markets Authority (the British NCA, abbreviated CMA) international trade organisations, such as the International Chamber of Commerce (ICC), smaller interest organisations as well as law firms and consultancy agencies. The latter have of course not published plans for CCPs, since selling CCPs is major business for them. Moreover, there is also some academic research on how an optimal CCP should be designed. A selection of the most relevant views is presented below.

To first address an important aspect resulting from the studies cited in the section above, it is important to analyse what ‘compliance culture’ is, since it seems to be the single most important factor for successful CCPs. Is

---


965 Competition and Markets Authority, ‘How Your Business Can Achieve Compliance with Competition Law’ (n 942).


967 See section 6.3.1.
compliance culture a concept that can be defined, and subsequently measured or controlled by an outside authority? Parker and Nielsen, in the study already presented in the previous section, offer two different definitions of compliance culture:

We have distinguished two ways in which we might understand compliance culture: First, “compliance management in practice” relates to how organizational managers and employees actually manage and respond to compliance issues on a day-by-day basis, whether they notice them, whether they are dealt with according to corporate commitments to compliance, and whether conflicts about compliance are reported up the line and resolved appropriately. (...) Second, compliance culture can also refer to values, beliefs, and attitudes within an organization that support compliance with the law. This is much more subjective and difficult to measure.968

Parker and Nielsen also hypothesise that the actions described in their first definition will influence more deeply embedded corporate values that are part of their second definition of compliance culture.969 This hypothesis is supported by the research carried out by Tyler and Blader as regards corporate governance. Tyler and Blader find that employee compliance with rules is best achieved if the values of the undertaking are aligned with that of the employee. Although it appears difficult to change values in adults; in the case of the misalignment of values, undertakings can nevertheless attempt to achieve compliance by enforcing corporate governance in a fair manner, creating legitimate corporate rules that employees feel should be followed.970 This point is more thoroughly outlined by Treviño et al., who find that supervisors as well as top management are role models to their subordinate employees. If they are perceived to act in a compliant way, employees will be likely to copy this behaviour. However, not only leadership but also other factors influence compliance amongst employees. These include the fair treatment of employees, since their treatment reflects the values of both the undertaking and management. The poor treatment of employees may also lead them to commit offences.971 Furthermore, dialogue about ethical and compliant behaviour as well as rewards for ethical and compliant behaviour increase overall compliance. Lastly, a culture of not questioning superiors and obedience is negative for compliance as well as an overall focus that is centred

969 ibid.
971 Treviño and others (n 945) 141–42.
on self-interest from the part of management. The conclusion that can be drawn from the research cited above is that a ‘culture of compliance’ relates to both definitions advanced by Parker and Nielsen. A ‘culture of compliance’ is created both by the practical execution of a CCP and its connection to values held within the undertaking.

It should be possible for an external authority to check the first definition of compliance culture offered by Parker and Nielsen, relating to whether or not a CCP is actually followed through by an undertaking, at least if the undertaking is required to document and prove such a measure. In contrast, their second definition is rather more difficult to control and monitor externally as it relates to ‘softer’ factors present in any organisation of humans. However, it appears possible to argue that the implementation and continuous running of a CCP are strong indicators that an undertaking has a genuine compliance culture or that such a culture could at least be developed over time. Examining whether undertakings have set up certain instruments within their CCPs and whether there is a history of following through on the CCP should be fully possible for a competition authority. Thépot, for example, suggests a meta-approach to checking an undertaking’s compliance culture:

(...), competition authorities could require evidence that compliance is being discussed regularly at board meetings and that senior management have attended training. The authority may also want to verify that there is an empowered, independent senior officer responsible for compliance, and the frequency with which the compliance unit reports to the board. The communication dimension of an effective compliance programme lies in internal communication and training material, considering both its accuracy and its emotional impact: the availability of a code of conduct adopted internally, and also directed to business partners, is part of compliance communication, but only if it is actually implemented. In addition, the mention of compliance in top executives’ speeches or other internal communication, as well as the involvement of communication department in compliance can attest to an effective communication of compliance.

Thus, it appears possible to review whether an undertaking has established the necessary compliance culture.

Besides compliance culture, what elements are decisive for the effectiveness of a CCP? In their study, Parker and Nielsen identify six additional elements of CCPs, which they find positively related to compliance. These six elements

\[972\] ibid 143–44.

\[973\] For further research, see: Treviño and others (n 945); Lynn Sharp Paine, ‘Managing for Organizational Integrity’ (1994) 72 Harvard Business Review 106.

\[974\] Thépot (n 941) 43.
are (1) a written compliance policy; (2) dedicated staff responsible for the CCPs; (3) a functioning system of handling external complaints, for instance from customers, the general public or public authorities; (4) a functioning system of handling internal complaints from employees; (5) the training of employees, especially new employees and finally (6) an external review of the CCPs. It should perhaps be emphasised that these elements may vary greatly in quality. For example, the mere existence of a telephone hotline for complaints is not the same as a functioning system for handling complaints. It is rather the measures that are taken as a result of employee complaints which characterise such a functioning system. Certain elements, such as a functioning system for handling external complaints, dedicating employees exclusively to the running of a CCP and having the CCP reviewed are often costly, especially if they are applied continuously, and not just as a one-off.

As Parker and Nielsen point out, assigning employees to the running and control of a CCP shows the dedication of management to the programme, since these activities require a real investment by the undertaking. Dedicated employees may thus strengthen the effect of one-off measures such as a written compliance policy. Indeed, this author would argue that it is likely that it is the cumulative combination of the six above-named factors which amounts to an effective compliance programme, even though Parker and Nielsen do not themselves address this issue in their study.

Beyond academic research, it is relevant to consider what competition authorities themselves find to be an effective CCP, especially if these authorities have previously decided to utilise CCPs in some way. One such authority is the CMA. The CMA developed an approach to the design and application of CCPs which seems to be widely recognised. In its fining guidelines, the CMA refers to its CCP guidance as the basis for recognising a CCP as a mitigating factor when calculating fines. Rather than prescribing certain elements of a CCP, the CMA considers that it is impossible to create a CCP where ‘one size fits all’. Therefore, it outlines a four-step approach for undertakings wishing to create a CCP that is tailored to the needs of their business. That four-step approach can be illustrated as follows:

---

976 ibid 28.
977 International Chamber of Commerce (n 966) 42.
979 Competition and Markets Authority, ‘How Your Business Can Achieve Compliance with Competition Law’ (n 942) 9.
The CMA, in conformity with the research cited above, holds that the core of any CCP or compliance effort must be a commitment to compliance ‘from the top down’. As just stated above, the singularly most important factor for functioning compliance is the commitment of top management, which is subsequently passed down through the ranks of the undertaking.\textsuperscript{980} How an undertaking can show compliance culture is exemplified in the CMA guidance. The CMA recommends that a senior officer takes charge of the undertakings’ compliance activities.\textsuperscript{981} Other members of top management should check and challenge the work done in compliance by asking questions and making sure that the compliance efforts are followed up. Also, top management should regularly remind employees of their compliance efforts and ensure that everyone in the organisation is kept up-to-date on compliance issues that concern them. Further, if there is a written code of conduct, employees should know that a breach of competition rules is also a breach of the code of conduct which may lead to disciplinary measures. Enabling employees to anonymously report competition law compliance concerns is considered an important part of management’s commitment to compliance.\textsuperscript{982} Middle and junior management should be involved in compliance as well by

\textsuperscript{980} ibid 10.
\textsuperscript{981} ibid 11.
\textsuperscript{982} ibid 12.
participating in training together with their teams and showing that they are committed to compliance, also by naming a ‘compliance champion’ in their team of employees whose task it is to ensure compliance with the relevant laws within that specific group of employees. These examples show that what the CMA envisages as compliance culture is equivalent to Parker and Nielsen’s first definition of compliance culture showing employees that management is actually committed to the CCPs and follows through on the programme.

With the core established, the CMA recommends undertakings to take four steps to fully develop a CCP that is suitable for them. The first step is risk identification. This essentially means that each undertaking has to analyse what competition law risks are associated with their business. The second step is to assess the risks identified in the previous step by categorising the identified risks into different levels. The third step is risk mitigation. In this step, the undertaking decides which measures are necessary to prevent competition law infringements and implements those necessary measures. The final step is a review, where an undertaking, at regular intervals, repeats all of the steps above to ensure that their compliance efforts are up-to-date with the needs of their business.

What is most relevant in the context of CCP design is the third step outlined by the CMA, where the undertaking takes concrete measures that make up the elements of the CCP. In the third step, the CMA essentially recommends the same elements identified in academic literature: (1) Training the employees according to their risk level. Managers may be more exposed to risks than desk officers due to contact with customers and competitors. (2) Setting up a code of conduct. (3) Establishing a system for employees to report complaints or concerns. Within this system it is also possible to give advice to employees who are not sure how to act in a given situation. Reviewing the CCP is the final step in the CMA’s four-step approach to compliance. Reviews should be carried out on a regular basis and when the situation demands, for example, when a competition law investigation is carried out by a competition authority or if a new business is acquired. Such reviews can be carried out in the form of an external audit, even though the CMA does not make this mandatory. Elements that are added by the CMA are a system documenting contact with

983 ibid 13.
985 Competition and Markets Authority, ‘How Your Business Can Achieve Compliance with Competition Law’ (n 942) 30.
986 ibid 22–23.
987 ibid 30.
competitors and ensuring that sensitive measures such as joining a trade association or attending trade association meetings are notified and if necessary approved by legal counsel. This gives the undertaking the opportunity to stop potential competition law infringements before they occur, but also gives them a basis for punishing employees who have not followed the rules, potentially resulting in a competition law infringement. If employees are not required to seek approval for attendance at trade association meetings, competition law infringements may potentially go undetected for a long period of time.

Another competition authority which has issued detailed guidance for adopting a CCP is the French competition authority (Autorité de la concurrence, the ‘Autorité’). Even though the Autorité also states that no ‘one size fits all’, in contrast to the CMA’s individualistic approach to CCP design, it prescribes a number of elements any CCP must include if it is to be considered effective by the Autorité. These are: (1) The undertaking in general and the management in particular shall clearly and publicly commit itself to compliance. The commitment shall not just rest on the recognition that compliance is required by law, but also recognise that competition law infringements have a negative impact on consumers and the economy in general. More concretely, (2) the undertaking shall appoint a person responsible for the design, implementation and running of the CCP. This person should be equipped to be able to run the programme effectively, both financially and concerning human resources. (3) The undertaking shall make appropriate information and training available to employees. This includes, for example, the aforementioned compliance code or code of conduct, but also mandatory and repeated training for employees. (4) The undertaking shall implement systems to check compliance at individual employee level, enable employees to ask advice and to whistle-blow as regards compliance. Regular reviews or audits of the CCP are also considered mandatory by the Autorité. Such reviews can be carried out by external parties, but this does not appear to be an absolute requirement. (5) The Autorité considers a system for

988 ibid 26–27.
handling complaints or requests from employees including a system of consequences for competition law breaches essential.990

Controlling employee compliance individually has not been mentioned in the other documents reviewed above. This involves, for example, inserting clauses in employment contracts or strategy documents that employee compliance is checked individually and may even have consequences for individual salaries or benefits.991 Such clauses would also avoid the danger of overambitious performance objectives leading to competition law infringements, which is sometimes discussed in the literature on CCPs.992

Enabling employees to seek advice or whistle-blow has previously been labelled as setting up a system for internal complaints or the like. Employees shall be able to ask for advice about potential behaviour and report illegal behaviour without negative reprimands.

There are also efforts to create a system of certification of CCPs. The German Institute of Public Auditors has issued a standard for auditing CCPs called ‘Principles for the Proper Performance of Reasonable Assurance Engagements Relating to Compliance Management Systems’. The international standardisation organisation, ISO, has also adopted a standard for compliance programmes in general, ISO 19600. Notably, this standard uses an almost identical system for adopting and maintaining a CCP as the CMA system illustrated above.993

To summarise, comparing the elements of a CCP suggested in Parker and Nielsen’s study to those required by the Autorité and the CMA shows that the elements required in these three models are very similar. It can thus be concluded that there appears to be a consensus on the criteria that identify effective CCPs as opposed to a CCP which is merely ‘window dressing’. The essential elements of a CCP found in most of the models analysed above are thus: (1) Evidence of compliance culture defined as a serious commitment to compliance, where the measures of an undertaking’s management indicate such a commitment. (2) A written compliance code is drafted and made binding within the undertaking. (3) For larger undertakings, sufficiently equipped employees are tasked with running the CCPs; for smaller undertakings, this task is delegated to appropriate employees. (4) Appropriate and regular training for employees is conducted. (5) Employees are able to ask for advice and report infringements by others without the risk of reprimand.

990 Autorité de la concurrence, ‘Framework Document of 10 February 2012 on Antitrust Compliance Programmes’ (n 989) para 22.
991 ibid para 22.
(6) There are systems in place that can identify situations that could potentially lead to competition law infringements and procedures to mitigate this risk in advance, (7) Infringements by employees are treated appropriately, for example, by reporting to the relevant competition authority and through internal disciplinary measures for the employee concerned. (8) The CCP is reviewed regularly and in certain situations, if necessary, by a third party.994

Given that there are elements in an effective CCP that appear to be generally agreed upon by the reviewed literature and relevant practice, it is pertinent to turn to the question of whether and how competition authorities should review the ‘effectiveness’ of a CCP. The French and the British NCAs have different practices in this regard: On the one hand, the CMA holds that ‘no one CCP fits all’, which also means that it does not require undertakings to show that they have implemented certain elements of a CCP to be granted a reduction of a fine. Rather, the CMA expects undertakings to show that they have taken the steps required to mitigate risks that are appropriate for their undertaking.995

This has the advantage of providing the CMA with a great deal of flexibility, but also makes the assessment of what an effective CCP is more complex and demanding for the authority. Such an approach may also create legal uncertainty for undertakings which are unsure whether their CCP will be considered as reaching the standard of an ‘effective CCP’ in the eyes of the authority. The Autorité, on the other hand, has, as illustrated above, a very specific list of elements that it requires to be present in ‘an effective’ CCP. The approaches of the two NCAs appear to be at odds, the Autorité being quite formalistic and the CMA more flexible. Given that there is scientific evidence indicating that certain elements of a CCP are supportive of better compliance, some minimum standards for a CCP could be set to make assessments less difficult and to disqualify certain CCPs from the outset. At the same time, leeway should be given for individual solutions that fit the undertaking in question, especially considering that compliance culture is the most important factor in an effective CCP.

It is sometimes argued that it would be too burdensome for competition authorities to check the effectiveness of a CCP.996 However, speaking to the contrary, there are a number of competition authorities and several private institutions that obviously find it possible to do just that. Further, competition authorities can put the burden of proof for showing that a CCP is effective on

---

995 ibid 31–32.
996 Wils, ‘Antitrust Compliance Programmes & Optimal Antitrust Enforcement’ (n 948) 19.
the undertaking in question, relieving itself of at least some of the workload. Of course, ‘an effective CCP’ is not the same as ‘a fail-proof CCP’. As with any form of regulation, there is a residual risk that CCPs will fail, but that they should only do so in exceptional circumstances.

While the examples given above are based on theoretical literature and the guidelines issued by competition authorities, an example of how a competition authority can concretely use CCPs in a case resolution mechanism is studied below using the example of the Australian NCA.

6.3.3 The Australian example

The Australian competition authority (the ‘Australian Competition and Consumer Commission’, abbreviated ‘ACCC’) utilises CCPs, mainly by way of so-called ‘enforceable undertakings’ which often include the commitment to adopt an effective CCP when a case is settled with the ACCC. These enforceable ‘undertakings’ can be compared to the commitments used by the Commission in Article 9 decisions. Article 87B of the Australian Competition and Consumer Act provides that:

The Commission may accept [written commitments] given by a person for the purposes of this section in connection with a matter in relation to which the Commission has a power or function under this Act (...).

On its homepage, the ACCC states that it will usually require the undertaking seeking to conclude a case by means of Article 87B of the Competition and Consumer Act to adopt an effective CCP. To facilitate the adoption of CCPs which are acceptable to the ACCC, the latter has published four templates for undertakings to use when implementing a CCP. The different templates are meant for different sized undertakings, the smallest template being for micro-undertakings and the biggest meant for major corporations. If the

---

997 Competition and Markets Authority, ‘CMA’s Guidance as to the Appropriate Amount of a Penalty’ (n 978) fn 33.
998 In this study, the term ‘undertaking’ denotes corporations or companies subject to competition law. The ACCC’s use of the term ‘undertaking’ can be approximated to the term ‘commitments’ as used in the present study, instead of ‘undertakings’ the term ‘commitments’ is used throughout the rest of this section. Regarding commitments, see section: 2.2.2.
999 The original wording is ‘a written undertaking’.
1000 Competition and Consumer Act, art 87B.
commitments provided are not followed, the ACCC has the possibility of enforcing these commitments by way of a court measure with reference to Article 87B(4) of the Competition and Consumer Act.

Commitments can be given in a number of different cases where the Competition and Consumer Act has been infringed. An example of a competition law infringement where commitments were made binding concerns a number of hotels in Queensland that tried to fix the prices of drinks served in hotel bars.\textsuperscript{1003} After this infringement was discovered, one of the hotels offered commitments which, among other things, consisted of the adoption of a CCP.\textsuperscript{1004} The commitments detail the measures to be taken as part of the CCP and also prescribe that the hotel must commission an independent audit of the CCP and that the audit report is to be sent to the ACCC.\textsuperscript{1005} The hotel must also continue to improve its CCP and if directed by the ACCC carry out additional audits of the CCP.\textsuperscript{1006}

A more recent example is the \textit{Townsville Taxis} case.\textsuperscript{1007} Townsville Taxis administered, among other things, taxi bookings on behalf of drivers registered in a taxi service district in Queensland. Townsville Taxis prohibited taxi drivers from making use of its services by taking taxi bookings via their mobile phone or via mobile apps. The ACCC found that it was possible that this behaviour violated Sections 47\textsuperscript{1008} and 45(2)/4D\textsuperscript{1009} of the Competition and Consumer Act.\textsuperscript{1010} Townsville Taxis agreed to change its rules pertaining to drivers and also agreed to implement a CCP as part of the commitments made binding by the ACCC.\textsuperscript{1011} This is essentially a cease-and-desist remedy.
coupled with the adoption of a CCP. Regarding the implementation of the CCP, the commitment reads as follows:

Townsville Taxis undertakes for the purposes of section 87B of the Act, for a period of (3) three years from the commencement of [these commitments], that it will:

(i) within (3) three months of the commencement of [these commitments], establish and implement a Competition and Consumer Law Compliance Program (the Compliance Program) in accordance with the requirements set out in Annexure A, being a program designed to minimise Townsville Taxis' risk of future contraventions of Part IV of the Act and to ensure its awareness of the responsibilities and obligations in relation to Part IV of the Act;

(ii) maintain and continue to implement the Compliance Program for a period of (3) three years from the commencement of [these commitments]; and

(iii) at its own expense, provide to the ACCC a copy of any documents required by the ACCC in accordance with Annexure A.

Annexure A referred to in the above quote contains the specific CCP that Townsville Taxis is to adopt. It conforms to one of the templates published by the ACCC, namely the ‘Stage 2’ template in accordance with the size of Townsville Taxis. The CCP contains seven main parts and requires that Townsville Taxis (1) appoints a compliance officer; (2) provides suitable training for that officer concerning the requirements of the Competition and Consumer Act; (3) ensures that staff are trained on competition law compliance once a year; (4) set up a competition law complaints handling system; (5) ensure a report from the compliance officer to the undertaking’s Board every six months; (6) order a review of the CCP to be carried out by an independent reviewer and (7) provide the ACCC with information, both reporting on the completion of several of the steps required as well as on the report of the reviewer and the steps taken to conform with the reviewer’s recommendations. The ACCC may also require the undertaking to carry out a new review if it suspects that the CCP has not been implemented correctly. The cost of all of these actions shall be paid by Townsville Taxis.

In the previous section, different approaches to the design and monitoring of CCPs adopted by undertakings within the scope a competition authority’s regulatory enforcement were analysed. The competition authority may either set guidelines for the implementation of a CCP, stipulating specific elements of a CCP to be present. Or, it can adopt a meta-approach where a certain process for the adoption of a CCP is required. The ACCC appears to have favour the former approach, further detailing its requirements depending on

---

1012 The original wording in each instance of ‘[these commitments]’ is ‘this Undertaking’.
1013 Standard White Cabs Limited - s.87B undertaking (n 1007) para 18.
1014 ibid Annexure A.
the size of the undertaking in question. The contents of the templates used by the ACCC show that it requires undertakings to pay for the implementation, running and review of the CCP and provide reports to it. By setting out specific requirements for the CCP to be adopted, its review and reporting duties, the ACCC is able to minimise its own workload in checking whether the undertaking in question has actually followed the actions it has committed itself to.

For the purposes of the proposed responsive case resolution system set out below, the Australian example serves as the inspiration for the use of CCPs as a remedy.1015 As noted above, the ACCC uses CCPs within a procedure that is comparable to the Commission’s current Article 9 decisions. However, as the design of the Commission’s case resolution mechanisms is reconsidered below, the suggested use of CCPs as a remedy also differs from that of the ACCC, in particular with regard to the case resolution mechanisms within which CCPs are used.

6.4 Framing a proposal for a responsive case resolution system

The assessment carried out above shows that the implementation of a prescriptive approach to regulatory enforcement, such as responsive regulation, into an existing legal framework of case resolution mechanisms can be difficult for a number of reasons. Therefore, the exercise carried out below considers how responsive regulation could be utilised with respect to the Commission’s case resolution mechanisms, making changes to the current legal framework set out by, inter alia, Regulations 1/2003 and 773/2004. This proposed responsive case resolution system shall simultaneously aim to reach the objectives set out in chapter 3, take due regard of the peculiarities of competition law and be in compliance with the wider legal framework of constitutional restraints. Further, proposing a responsive approach allows the opportunity to consider the integration of an instrument of self-regulation not currently present in case resolution mechanisms, namely CCPs.

Before concretely proposing a responsive case resolution system, some preliminary considerations must be taken. This concerns firstly the prioritisation between objectives set out in chapter 3 and second the structure that should be adopted in designing that system given the peculiarities of Articles 101 and 102 TFEU.

With regard to the prioritisation of objectives, chapter 4 revealed several challenges concerning the achievement of the objectives set out in chapter 3.

1015 See section 1.4.5.
Notably, that the Commission’s ability to bring infringements to an end with the help of specific remedies are limited by both legal and practical obstacles;\textsuperscript{1016} that deterrent fines are difficult to calculate and achieve in practice;\textsuperscript{1017} that the theory of general deterrence suffers from conceptual problems and takes a narrow view on the prevention of infringements of competition law.\textsuperscript{1018} Further, it was found that the choice of what case resolution mechanism to use in any particular case may be an obstacle to achieving certain objectives.\textsuperscript{1019}

Given the Commission’s broad discretion in determining competition policy, it is possible to make certain prioritisations between the objectives outlined in chapter 3, without for that sake removing any objectives.\textsuperscript{1020} In fact, the Commission already makes implicit prioritisations between objectives through its choice of case resolution mechanisms. In the proposed responsive case resolution system below, the design of the case resolution mechanisms and their order in the enforcement pyramid reveals a certain prioritisation of objectives: The possibilities of the Commission to make specific remedies binding are increased, while still aiming to ensure that competition rules are continuously clarified and developed. Further, fines are given a stronger retributionist emphasis. Lastly, the instruments aiming to explicitly prevent infringements of competition law are expanded by adding CCPs as a possible remedy. These prioritisations are further illustrated in the analysis below regarding the proposed responsive case resolution system.

With regard to the structure of the assessment carried out below, it should be recalled that infringements of Articles 101 and 102 TFEU differ in the challenges that they present from an enforcement point of view. This has already been observed more generally in chapter 2 above.\textsuperscript{1021} This is because the types of behaviour covered by Articles 101 and 102 TFEU differ substantially from one another. Further, in the current system of case resolution mechanisms, different mechanisms are used for different types of infringements. In view of these differences, it is relevant to consider how to

\textsuperscript{1016} See section 4.1.1.1.
\textsuperscript{1017} See sections 4.1.2.5 and 4.1.2.6
\textsuperscript{1018} See section 4.1.3.
\textsuperscript{1019} See sections 4.3.2 and 4.3.3.1.
\textsuperscript{1020} Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P \textit{Dansk Rørindustri A/S} (C-189/02 P), \textit{Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others} (C-202/02 P), \textit{KE KELIT Kunststoffwerk GmbH} (C-205/02 P), \textit{LR af 1998 A/S} (C-206/02 P), \textit{Brugg Rohrsysteme GmbH} (C-207/02 P), \textit{LR af 1998 (Deutschland) GmbH} (C-208/02 P) and \textit{ABB Asea Brown Boveri Ltd} (C-213/02 P) v \textit{Commission of the European Communities} (n 140) para 172.
\textsuperscript{1021} See section 2.1.
distinguish between different types of infringements, raising the questions what infringements should be distinguished and on what grounds?

The most obvious distinction is that between infringements of Articles 101 and 102 TFEU. Infringements of Article 101 TFEU pertain to behaviour carried out by several undertakings together, while infringements of Article 102 TFEU are typically carried out unilaterally by one undertaking.1022

Moreover, the broad wording of Article 101 TFEU means that not only cartels are covered, but likewise vertical agreements between undertakings as well as ‘open business agreements’ between competitors.1023 This distinction is also visible in the Commission’s Leniency Notice and in its Settlement Notice which exclude infringements of Article 101 TFEU that are not (secret) cartels.1024 Conversely, the use of Article 9 decisions is not permitted for ‘secret cartels’.1025 This differentiation between infringements of Article 101 TFEU merits further investigation to consider whether separate treatment is necessary for the purpose of applying a responsive case resolution system.

Support for a distinction between different infringements of Article 101 TFEU can be found in the reasoning of the Commission in this regard. In the Leniency Notice and the Settlement Notice, the Commission defines ‘cartels’ in the same way:

Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid rigging, restrictions of imports or exports and/or anti competitive actions against other competitors. Such practices are among the most serious violations of Article 81 EC [now Article 101 TFEU].1026

1022 For the purposes of this study, infringements of Article 102 TFEU carried out by collectively dominant undertakings are excluded, because such cases are so seldom.
1023 An example of a vertical case is: e-Books (n 683); A case of cooperation between competitors is: BA/AA/IB (n 634).
1024 Commission Notice on immunity from fines and reduction of fines in cartel cases (n 27) para 1; 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 (n 26) para 1.
1025 Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (n 192) para 116.
1026 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
Further, in the Leniency Notice, the Commission states that:

By their very nature, secret cartels are often difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them. Therefore, the Commission considers that it is in the Community interest to reward undertakings involved in this type of illegal practices which are willing to put an end to their participation and co-operate in the Commission's investigation, independently of the rest of the undertakings involved in the cartel.\(^{1027}\)

It is important to note that the Commission is not entirely consistent in its approach, as it delimits the Leniency Notice to ‘secret cartels’ and the Settlement Notice to ‘cartels’. It is possible to imagine a non-secret cartel, for example, a signalling cartel.\(^{1028}\) Such a cartel would fall outside the scope of the Leniency Notice, but inside the scope of both a cartel settlement and an Article 9 decision. However, more interesting than the scope of different soft law instruments, is the reasoning behind the distinction between cartels and non-cartels. It is possible to conclude from the Leniency Notice that the reason for restricting the scope of ‘secret cartels’ is that those infringements are most difficult to detect. Non-cartels are often based on contractual clauses which do not cause as much difficulty regarding detection as cartels do, the latter often being based on oral agreements or even concerted practices. It appears reasonable that the Commission does not want to grant fine reductions for leniency applications which are based on conduct it can detect \textit{ex officio} or via complaints.

Also, in this context it appears logical to exclude Article 9 decisions from the use against secret cartels. If it were possible to reach Article 9 decisions in such cartel cases, avoiding the finding of an infringement and a fine, the Leniency Notice would become quite unattractive for undertakings. Furthermore, cartels seldom allow for remedies beyond cease-and-desist remedies, making the imposition of Article 9 decisions unattractive for the Commission.\(^{1029}\)

With regard to the settlement procedure, the delimitation of that procedure to cartels only is less apparent. When cartel settlements were introduced as a case resolution mechanism, several reasons were given by Commission officials to

\(^{1027}\) Commission Notice on immunity from fines and reduction of fines in cartel cases (n 27) para 3.


\(^{1029}\) European Union, Commitment Decisions in Antitrust Cases (n 210) 7.
justify why settlements were delimited to cartels: (1) the frequency of cartel cases as compared to other case types. (2) The size of the file in cartel cases and the attached workload of providing access to the file. By simplifying the burdensome procedure of access to the file, the Commission was able to achieve significant efficiency gains. Procedural efficiencies were also achieved by the language waiver provided.\textsuperscript{1030} And (3), the disagreements between the Commission and the undertakings involved in cartel cases usually focused on procedure and the calculation of the fine, rather than substantive questions such as the theory of harm. Therefore, it appears easier to reach an agreement on the infringement with undertakings in cartel cases.\textsuperscript{1031} The argument is thus that cartels are especially burdensome to investigate and that cooperation by one or several undertakings substantially facilitates that investigation.

By the same reasoning as that employed with regard to leniency, the investigatory burden would not be eased sufficiently in settlements of non-cartel cases. Why should the Commission grant undertakings a fine rebate if their cooperation does not contribute substantially to the investigation? However, this argument does not consider the entire benefits reaped by the Commission in settlement cases. As concluded in chapter 4, the main procedural efficiency of the settlement procedure is the absence of an appeal to the Court.\textsuperscript{1032} Furthermore, in the ARA case (which concerned an infringement of Article 102 TFEU nonetheless), the Commission used a procedure very similar to that of the settlement procedure.\textsuperscript{1033} Thus, the Commission can nowadays clearly see the advantage of using a cartel settlement-like procedure even in cases that do not concern cartels.

It is possible to conclude that the division between cartels and non-cartels is not exact, but probably the most useful distinction given the different types of infringements of Article 101 TFEU. For the purposes of the structure and clarity of the assessment below, the distinction between types of cases types roughly created by the Commission, is retained. At the end of the discussion in the following section, it is considered whether this distinction could be reviewed, creating a unified approach to case resolution mechanisms used for all types of infringements of Articles 101 and 102 TFEU.

\textsuperscript{1030} See section 4.2.2.
\textsuperscript{1032} See section 4.2.2.
\textsuperscript{1033} See section 5.6.2.
6.5 Article 101 TFEU – cartel cases

The analysis in the following section first addresses the types of case resolution mechanisms that are appropriate in a responsive case resolution system, given the nature of cartels. Based on that assessment, an enforcement pyramid is designed. The reasoning behind that enforcement pyramid is subsequently explained in practical terms. Lastly, the use of CCPs as a remedy is considered more specifically.

6.5.1 Appropriate case resolution mechanisms for cartel cases

Currently, cartel cases are resolved by two case resolution mechanisms, Article 7 decisions and cartel settlements. Further, as already mentioned, secret cartels are also subject to the Leniency Notice. While this is an instrument designed to facilitate the Commission’s discovery of cases, it has an important impact on the fines imposed on undertakings and thus needs to be taken into account here as one of the elements affecting the resolution of a case. As already explained, the Commission does not use Article 9 decisions in secret cartel cases. While there is no explicit limitation in Regulation 1/2003 in this regard, the limitation in Recital 13 that the Commission should not use Article 9 decisions when it ‘intends to impose a fine’ is interpreted as preventing the use of Article 9 decisions in cartel cases.

Following that interpretation of Recital 13, an Article 7 decision with an attached fine, alternatively a cartel settlement, should be used in cases which cover typical cartel behaviour, such as price fixing or the allocation of quotas. It is commonly known that these infringements are illegal and include an element of intent by the undertakings involved. Cartels often fall within the ‘object-box’ of infringements of Article 101 TFEU. ‘By-object’ infringements are defined, by the Court, as ‘certain forms of collusion between undertakings [that], by their very nature, [are] injurious to the proper functioning of normal competition’ Given the nature of cartels, it is difficult to argue why these infringements should be resolved without the finding of an infringement or the imposition of a fine. This is especially given that there is little that can be done by a competition authority to ensure that undertakings do not simply keep on colluding after the Commission closes its case.

\[1034\] Commission Notice on immunity from fines and reduction of fines in cartel cases (n 27).
\[1035\] See section 4.3.
\[1036\] Whish and Bailey (n 101) 122.
\[1037\] Case C-226/11 Expedia Inc. v Autorité de la concurrence and Others (n 316) para 36.
\[1038\] See section 4.1.1.1.
Mehta and Centella, both Commission officials at the time of their writing, argue that:

In principle, the Commission can be expected to impose a fine in all cartel cases against which it decides to act, and it considers them a priority amongst antitrust cases because cartels are outright, deliberate violations which are often concealed and difficult to detect and investigate. It is therefore crucial to impose sanctions for them which are set at a level sufficient to deter.\footnote{Mehta and Centella (n 1031) 398.}

Braithwaite, discussing the general utilisation of responsive regulation, argues against this type of reasoning, stating that no matter how serious the behaviour in question, the responsive enforcement authority should always start its intervention in a cooperative manner.\footnote{Braithwaite (n 886) 483.} To a competition lawyer such an approach may appear like an outrageous proposal.

To further analyse Braithwaite’s contention, it is necessary to consider Article 9 decisions, not in their formalised manner as currently defined by Regulation 1/2003, but in their basic elements: The essential element present in an Article 9 decision leading to a resolution of the case at hand is the requirement on the undertaking to change its behaviour in line with the remedies made binding by the Commission. No fine is imposed and no infringement found. With reference to cartels, it is interesting to note that the Leniency Notice provides for immunity or substantial reductions of fines for certain undertakings. A cartel settlement can grant undertakings a further reduction of the fine. Thus, it does not necessarily appear that the thought of reducing or even removing fines for cartelists that cooperate in a certain manner with the Commission is unthinkable within the context of EU competition law enforcement. Conversely, not establishing an infringement in cartel cases is, so far, unheard of, given the type of behaviour at hand. Even without a fine, a Commission finding of an infringement may have negative consequences for an undertaking, for example, in relation to stock rates, but also considering that the finding of an infringement enables private claimants to bring follow-on actions for damages.\footnote{See section 4.1.3.3.}

Accepting that an infringement should be found where the Commission has discovered a cartel and can prove its existence, the question is how fines should be addressed. Currently, the Commission’s Leniency Notice makes it difficult for the Commission to reduce or even remove fines in cartel cases on any other grounds, save for the limited reduction granted in settlement cases. If the Commission were to substantially reduce fines or even refrain from fining cartel participants, undertakings would no longer see why they should

\footnotesize{\textsuperscript{1039} Mehta and Centella (n 1031) 398.\textsuperscript{1040} Braithwaite (n 886) 483.\textsuperscript{1041} See section 4.1.3.3.}
report cartels to the Commission, as it would seem that it is possible to receive a reduced fine also without reporting a cartel. This way, the Commission has locked itself into a situation where it must impose fines in cartel cases to legitimise the existence of the Leniency Notice.

The Leniency Notice is considered essential for the discovery of cartels by the Commission.\footnote{European Commission, ‘Commission Staff Working Document Accompanying the Report on Competition Policy 2014’ (n 595) 21–22.} However, leniency has also been criticised for providing perverse incentives for undertakings to ‘play the leniency game’\footnote{Marvão (n 528) 20; Kovacic et al. suggest that especially large multi-product undertakings may utilise leniency programmes as a tool to discipline smaller competitors inside of cartels. See: William E Kovacic, Robert C Marshall and Michael J Meurer, ‘Serial Collusion by Multi-Product Firms’ (2018) 6 Journal of Antitrust Enforcement 296, 335.} and for making the Commission too dependent on leniency applicants.\footnote{Guttuso (n 284) 412.} Further, the Commission itself has indicated that it has become more difficult to receive high-quality leniency applications because of intensified private enforcement.\footnote{At least, the Commission gives that impression in: European Commission, ‘Proposal for a Directive of the European Parliament and the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union’ COM(2013) 404 final 3; See also: Leah Nylen, ‘After 25 Years, Is Leniency Still a Bargain?’ (MLex, 9 October 2018) <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1029620&siteid=190&rdir=1> accessed 11 October 2018.}

The question is thus whether the Leniency Notice provides as much benefit to the Union interest of discovering cartels as the Commission claims that it does?\footnote{Commission Notice on immunity from fines and reduction of fines in cartel cases (n 27) para 3.} Naturally, it is not possible to answer this question conclusively. However, the Leniency Notice has enough flaws to allow a hypothetical inquiry on how the Commission could structure the resolution of cartel cases without the Leniency Notice.

This might of course imply a drop in detection rates of cartels, but might also result in increased efforts to detect cartels \textit{ex officio}. Even in the presence of leniency, a competition authority must be able to make a credible threat of detection \textit{ex officio}.\footnote{Guttuso (n 284) 400.} More generally, the Commission appears to have dedicated increasing resources to \textit{ex officio} detection. Connected to the sector inquiry into e-commerce,\footnote{European Commission, ‘Report from the Commission to the Council and the European Parliament: Final Report on the E-Commerce Sector Inquiry’ (n 705).} the Commission opened a number of
investigations in 2017. Furthermore, the Commission has introduced a whistle-blower tool that allows individual employees to safely report infringements of competition law to the Commission. However, the Commission would in all likelihood need to intensify its own efforts to detect cartels if it were to abolish the Leniency Notice. For the purposes of proposing a responsive approach to the resolution of cartel cases, it is subsequently considered how such an approach could be designed absent the Leniency Notice.

6.5.2 The enforcement pyramid for cartel cases

To design an enforcement pyramid for cartel cases, it is necessary to consider three possible resolutions of an infringement in a cartel case: a finding of an infringement (1) without a fine, (2) with a reduced fine and (3) with a fine. The first two alternatives would require some type of cooperation of the undertaking to justify the reduction of the fine. Furthermore, it is proposed here that, in the absence of a specific remedy that could be imposed in cartel cases, undertakings’ cooperative behaviour should include their readiness to adopt or upgrade a CCP to prevent future infringements of Article 101 or 102 TFEU. The enforcement pyramid for cartel cases might accordingly be drawn up as follows:

![Enforcement Pyramid for Cartel Cases](image)


1050 European Commission, ‘Cartels: Anonymous Whistleblower Tool’ (n 187).

1051 More generally, CCPs have already been introduced in section 6.3.
Explaining the reasoning in this pyramid, the main distinction between these case resolution mechanisms lies in the fines and the remedies imposed. Even though fines as a means of specific deterrence have been criticised strongly in this study, fines are still necessary as a way of increasing coercion. There are three reasons for this: The main reason is that retributive fines must also be increased as the culpability of the infringer increases. Further, fines serve to confirm compliant undertakings in their law-abiding behaviour.\textsuperscript{1052} Lastly, fines are important for the creation of a basic general deterrent effect.\textsuperscript{1053} However, as is obvious from the lowest tier of the pyramid, there is less focus on high fines in the resolution of cartel cases according to the enforcement pyramid above. Instead, the introduction of CCPs is suggested as a remedy aimed at the prevention of further infringements. The case resolution mechanisms suggested in the two lower tiers of the pyramid would require undertakings to cooperate with the Commission and accept a remedy that requires them to introduce or upgrade an existing CCP.

6.5.3 Practical use of the enforcement pyramid

Given this enforcement pyramid, how should the Commission choose what tier of the pyramid to utilise? Also, what exact type(s) of cooperation would be required for the first two stages of the pyramid and how would fines be reduced in this regard?

Regarding the criteria to be used, it is submitted here that the Commission should rely on both infringement history and cooperation offered by the undertaking. It could be argued that to avoid infringements of the principle of equal treatment more easily, the Commission might only use cooperation as a criterion for choosing what tier of the enforcement pyramid to utilise.\textsuperscript{1054} Such a delimitation of criteria would in theory result in all undertakings being able to qualify for the lowest tier of the pyramid and, if they cooperated accordingly, be exempt from any fine. Remembering what has been held on the seriousness of cartels, this would not be the preferable outcome.\textsuperscript{1055} Therefore, it is submitted here that the Commission should consider both infringement history and cooperation by undertakings as criteria for choosing the appropriate case resolution mechanisms.

\textsuperscript{1052} Andenaes (n 309) 180; Wils, ‘Optimal Antitrust Fines: Theory and Practice’ (n 280) 184.
\textsuperscript{1053} See section 4.1.3.1.
\textsuperscript{1054} See section 6.2.3.
\textsuperscript{1055} See section 6.5.1.
6.5.3.1 Infringement history

The first criterion, ‘infringement history’ must be distinguished from the concept of recidivism as included in the Fining Guidelines. Recidivism is a narrower concept that denotes only similar infringements, whereas ‘infringement history’ denotes all infringements of Article 101 or 102 TFEU which are established by a Commission decision.\textsuperscript{1056} This broader concept is preferred here for the choice of case resolution mechanism in order to remain as close as possible to the theory of responsive regulation. Also, even though infringements of Articles 101 and 102 TFEU are different in nature, they both aim to reach the same goal, that is, to restrict competition. If an undertaking involved in the cartel is a first-time infringer, the first, lowest tier of the pyramid should be pursued. Undertakings with an infringement history should not be able to entirely avoid fines and be placed at least in the second, middle tier of the pyramid.

In practice, this placement of undertakings in the different tiers of the enforcement pyramid also means that de-escalation down the pyramid is only possible from the third to the second tier, but not from the second to the first tier. This is because the first tier is reserved for undertakings without a previous history of an infringement of Article 101 or 102 TFEU. While this is a deviation from Braithwaite’s conception of the utilisation of the enforcement pyramid named above,\textsuperscript{1057} it is justifiable to take account of the seriousness of the infringements of competition law, in this case cartels.

It is likely that the use of the infringement history criterion would lead to undertakings party to the same cartel being placed in different tiers of the pyramid. This situation can be compared to hybrid settlements, where the Commission has experienced certain procedural difficulties, but which are not impossible to conduct if the Commission wishes to do so.\textsuperscript{1058} What is impossible, due to the principle of equal treatment, is to entirely exclude some parties of one cartel from a cooperative resolution of the case.\textsuperscript{1059}

However, it is not clear whether a differentiation between different parties to the same cartel on the lower two tiers of the enforcement pyramid would also be in conflict with the principle of equal treatment. According to that principle, undertakings in the same situation shall not be treated differently, unless such treatment can be justified objectively.\textsuperscript{1060} The crucial difference between the lower two tiers of the pyramid is the fine imposed on the undertaking. That

\textsuperscript{1056} See also section 6.2.2.
\textsuperscript{1057} See section 6.1.
\textsuperscript{1058} See section 4.2.3.
\textsuperscript{1059} See sections 4.2.3 and 6.2.3.
\textsuperscript{1060} Joined cases 117/76 and 16/77 Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen and Diamalt AG v Hauptzollamt Itzehoe (n 261) para 7. See further, section 2.3.5.
differentiation in fines within the enforcement pyramid proposed here is justified by different levels of cooperation offered by undertakings to the Commission. It can be argued that undertakings that have previously infringed competition law are not in the same situation as undertakings that have not previously infringed competition law or, in the alternative, that fines are justified objectively on account of their culpability. With regard to fines, this is sound reasoning following a retributive theory of punishment. Indeed, in the present approach to the resolution of cases, fines are calculated individually and undertakings subject to immunity may not receive a fine at all. Thus, it is submitted here that the Commission could use the lower two tiers of the pyramid within one case, differentiating between undertakings that have previously infringed Article 101 TFEU and those that have not.

An associated question is that of the calculation of fines for undertakings that have previously infringed competition rules, especially in cases resolved in the second tier of the pyramid. Indeed, if an undertaking has previously infringed Article 101 or 102 TFEU and that case was resolved on the first tier of the pyramid, also including the introduction of a CCP, there is good reason to argue that that undertaking should be punished for nevertheless committing an infringement again. However, it is not argued here that these circumstances should result in the resolution of the case on the top of the pyramid. Rather, the undertaking should be given the chance to improve by resolving the case in the second tier of the pyramid. As recalled in the beginning of this section, the current concept of recidivism in the Commission’s fining guidelines only applies to infringements of a similar type. Therefore, to be able to take a previous infringement into account when setting the amount of the fine, it is submitted here that the Commission’s Fining Guidelines would need to be amended, broadening the scope of the aggravating factor of recidivism, so that it would pertain to all previous infringements of Articles 101 or 102 TFEU. This would also have the advantage of creating concurring criteria pertaining to repeat infringements between the choice of case resolution mechanism in a responsive case resolution system and the calculation of the fine. As already pointed out, there is already a concurrence in the logic for these two choices and concurring definitions would avoid confusion in this regard.

6.5.3.2 Cooperation

Addressing the cooperation required of undertakings, the second criterion, there would be different levels of cooperation required in the two lower tiers

---

1061 Commission Notice on immunity from fines and reduction of fines in cartel cases (n 27) para 8.
of the pyramid. The lowest tier, available only for undertakings with no previous infringement of Article 101 TFEU, should include the current cooperative elements of cartel settlements, that is an acknowledgement of the infringement and procedural cooperation.\footnote{Meaning waivers of a further hearing, full access to file and a language waiver, compare: 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 (n 26) para 20.} In addition, the introduction or upgrade of CCPs as well as cooperation regarding evidence should be required. The cooperation regarding evidence would require providing the Commission with evidence of a ‘significant added value’, for example, a corporate statement or documentary evidence.\footnote{Commission Notice on immunity from fines and reduction of fines in cartel cases (n 27) paras 24-25.} In marked contrast to the current practice under the Leniency Notice, immunity from fines would not be dependent on revealing an infringement or enabling the Commission to prove an infringement.\footnote{iibid para 8.} The lowest tier of the pyramid would thus require three types of cooperation from the undertaking, all cumulatively necessary in the absence of a fine: a ‘settlement’ (acknowledgement of the infringement and procedural cooperation),\footnote{Up to this point the term ‘settlement’ has only been used in connection with the Commission’s cartel settlement procedure in Article 10a of Regulation 773/2004. However, that term has a broader meaning within law enforcement in general relating to an agreement reached by, for example, an enforcement authority and the subject of law enforcement to resolve a case. In this study, the term ‘settlement’ is here used to denote the acknowledgement of an infringement and the agreement of certain procedural cooperation by an undertaking subject to investigation for an infringement of Article 101 or 102 TFEU.} an introduction or upgrade of a CCP and cooperation on evidence. The lowest tier of the pyramid is also restricted to undertakings which have not previously been found in infringement of Article 101 TFEU. For undertakings that have previously infringed Article 101 or 102 TFEU, the possibility of removing fines is problematic from the perspective of retribution. Further, the suspicion would be that a repeat offender willing to cooperate in that tier is simply ‘playing the game’ which should not be rewarded.\footnote{Marvão (n 528) 23–24.}

The second tier of the pyramid, available to cooperative undertakings with a previous infringement history or undertakings that do not wish to cooperate to the extent required in the lowest tier, would require the introduction or upgrade of a CCP and, voluntarily, the components of a settlement, an acknowledgement of the infringement and procedural cooperation, as well as cooperation on evidence. With regard to this prioritisation between the different possible types of cooperation, it should be noted that the Commission
currently takes a different approach in its ‘cooperation framework’. This framework requires a settlement, but makes cooperation on remedies and evidence voluntary, although the use of CCPs as proposed here is not present in this framework.1067 The reason why a different prioritisation is made here is that emphasis is placed on preventing future infringements of competition law rather than on the efficient resolution of a case by the Commission. An undertaking may not consider that it has done something wrong in the case at hand, but may nonetheless commit itself to improving its performance with regard to compliance with competition rules in the future. It can be added that undertakings may acknowledge that they have committed an infringement simply to be able to access the advantages of a cooperative resolution of a case, the reduction of the fine. In contrast, the introduction of a CCP as suggested in this study requires the undertaking to invest considerable resources in future compliance with competition rules. Undertakings not willing to make such an investment are likely not either interested in actual future compliance with competition rules. The willingness to introduce a CCP can thus be seen as an ‘entry requirement’ to resolving a case cooperatively with the Commission.

6.5.3.3 Fine reductions

Regarding the reduction of the fine granted as part of the second tier of the pyramid, the size of the reduction would need to be differentiated depending on the cooperation offered. A cartel settlement is currently ‘worth’ a 10 per cent fine reduction. In addition to that, the introduction or upgrade of a CCP should be rewarded with a reduction of the fine. In ARA, the reduction of the fine that can be attributed to the remedy was 20 per cent.1068 However, the structural remedy offered by ARA would probably have warranted a higher reduction of the fine than a CCP, which can be regarded as a behavioural remedy, would have done. Coates and Zulli, in considering CCPs as a remedy, suggest a reduction of up to 5 per cent, but assuming that such a reduction would be added to an existing reduction on account of the Leniency Notice and a cartel settlement.1069 That reduction seems quite small, making it uncertain whether undertakings would be willing to commit to the introduction or upgrade of a CCP on those terms, given that the introduction and maintenance of such a programme is quite costly.

1067 European Commission, ‘Cooperation - FAQ’ (n 789) 1.
1068 This assumption is made considering that 10 per cent of the reduction accounted for the admission of the infringement equivalent to the fine reduction granted for cartel settlement. See section 5.6.2.
1069 Coates and Zulli (n 948) 258–59.
As a result of the above considerations, a reduction similar to that presently given in exchange for a cartel settlement, 10 per cent, appears to be more reasonable, given the precedent set in *ARA*. It would be possible, as suggested by Coates and Zulli, to make this a maximum reduction, rather than a set amount.\textsuperscript{1070} The fact that CCPs can take different forms speaks in favour of such an approach, and the Commission could choose to reward more extensive programmes with a greater reduction. Speaking against a maximum approach is the fact that the extensiveness of a CCP, which can be offered by an undertaking, depends on the financial strength of that undertaking, making it easier for financially affluent undertakings to achieve a greater reduction. Rather, it is submitted here, that the approach of the Australian NCA that demands different CCPs from different undertakings, depending on their size, should be adopted.\textsuperscript{1071} If the Commission is to reduce fines in exchange for the introduction or upgrade of a CCP, it should also set high demands on undertakings and should not be content with a suboptimal CCP to be introduced/upgraded. Also, setting a maximum reduction could lead to litigation at a later stage contesting whether the specific percentage granted to an undertaking is proportionate or not. Thus, the reduction should be a set percentage of the fine rather than a variable range of possible reductions.

Beyond the introduction/upgrade of a CCP, an additional reward should be granted to undertakings that actively assist the Commission in its investigation by providing evidence, as currently provided in the Leniency Notice.\textsuperscript{1072} The final reduction would thus depend on the elements of cooperation that would be offered by the undertakings and the quality of evidence provided. Further, where several undertakings cooperate on evidence, the Commission may have to stagger fine reductions depending on the timing of the undertaking’s offer of evidence. This is a procedure already applied within the Leniency Notice.\textsuperscript{1073} The reductions granted by the Leniency Notice can also act as a guide in this regard. At present, where an undertaking does not qualify for immunity, the first undertaking to offer evidence of ‘significant added value’ receives a reduction of 30-50 per cent, the second 20-30 per cent and the third up to 20 per cent.\textsuperscript{1074} Thus, the maximum reduction granted would be 70 per cent: 10 per cent for the ‘settlement’, 10 per cent for the introduction/upgrade of a CCP and up to 50 per cent for cooperation on evidence. The imbalance between the reductions granted for the ‘settlement’ and CCP *vis-à-vis*

\textsuperscript{1070} ibid.
\textsuperscript{1071} See further section 6.3.3.
\textsuperscript{1072} See: Commission Notice on immunity from fines and reduction of fines in cartel cases (n 27) para 24.
\textsuperscript{1073} ibid para 26.
\textsuperscript{1074} ibid paras 23-26.
cooperation on evidence cooperation can be explained by the difficulties encountered by the Commission in proving cartel infringements to the required standard of proof.\textsuperscript{1075}

6.5.4 Corporate compliance programmes as a remedy

The core of the proposal regarding CCPs already introduced above is the following: considering that specific remedies going beyond a cease-and-desist order can normally not be designed for undertakings that are part of a cartel, cooperative undertakings should commit to implementing a CCP in the lower two tiers of the enforcement pyramid.\textsuperscript{1076} Having introduced CCPs, their effects on the compliance of undertakings, and their possible utilisation by competition authorities above,\textsuperscript{1077} the question addressed more concretely here is why CCPs should be employed as a remedy and how such a requirement should be designed.

While it is possible to envisage that the Commission might make the adoption of a CCP obligatory in the lower two tiers of the enforcement pyramid, it would be difficult if not impossible to force an undertaking to develop a commitment to compliance. As found in various empirical studies cited above and emphasised in several competition authorities’ guidance papers, a commitment to compliance is the most important precondition for the effective functioning of a CCP.\textsuperscript{1078} It is thus possible to generally question the effectiveness of a remedy prescribing the introduction or upgrade of a CCP. Conversely, the basic assumption in responsive regulation is that most undertakings wish to comply with the law, instead of assuming that no undertaking which has infringed the law wishes to comply with the law.\textsuperscript{1079} If a (mutually agreed on) CCP does not prove effective, the Commission would subsequently escalate up the enforcement pyramid to a harsher case resolution mechanism, also considering the circumstances of the case in the calculation of the fine. In that way, those undertakings that do not have a genuine desire to comply would, if detected, be punished eventually. The adoption of a CCP as a first remedy is thus reasonable in a responsive case resolution system.

There are also other approaches used by competition authorities and discussed by scholars with regard to the utilisation of CCPs within public enforcement. The more prominent proposal is probably the recognition of CCPs as a mitigating factor in the calculation of fines rather than the use of CCPs as a

\begin{itemize}
\item \textsuperscript{1075} Mehta and Centella (n 1031) 401–02.
\item \textsuperscript{1076} See section 6.5.1.
\item \textsuperscript{1077} See sections 6.3.1, 6.3.2 and 6.3.3.
\item \textsuperscript{1078} See section 6.3.1.
\item \textsuperscript{1079} See section 6.1.
\end{itemize}
remedy.\textsuperscript{1080} By comparison, a disadvantage of the approach suggested here is its reach: the use of CCPs as a remedy only incentivises the adoption of a CCP after an infringement has been detected. However, the use of CCPs as a mitigating factor in the calculation of fines would not suit the responsive case resolution system proposed here. Most obviously, as fines are not envisaged to be a part of the bottom tier of the pyramid, the utilisation of CCPs as a mitigating factor would not be possible in these case resolutions. Rather, the logic in the enforcement pyramid designed here is that undertakings are considered competent enough to decide what measures they should take to comply with competition rules, as long as they are not found to have infringed the same rules. In other words, undertakings would continue to self-assess their behaviour. When an infringement is found and a CCP shall be upgraded or introduced as a remedy, a thorough analysis of the infringement should be the starting point. This should include how the infringement occurred, whether and how corporate structures facilitated it as well as which employees instigated, upheld and supported the infringement.

With regard to the design of CCPs as a remedy, a central question is the formulation of the Commission’s requirements concerning the design of named CCPs. From the survey of available guidance by competition authorities above, three alternatives can be discerned: Firstly, the ACCC has a number of template CCPs prepared which can be chosen depending on the size of the undertaking. The French Autorité has a detailed list of requirements for a CCP which it considers effective whereas the British CMA prefers recommendations as to the contents and focuses on the process of adoption and review carried out by the undertaking.\textsuperscript{1081} From the point of view of saving authority resources, the Australian example appears the most suitable, given that the different templates take into account different types of undertakings but establish a set number of requirements to be fulfilled by the undertakings. The Autorité also provides clear criteria for undertakings, although the specific design of the CCP would still have to be carried out by the undertakings themselves and checked by the competition authority. The CMA’s model is most flexible in the sense that it can be tailored to the individual needs of an undertaking. However, this tailoring also sets higher demands on the assessment carried out by the competition authority when determining the effectiveness of a proposed CCP. Considering the limited resources of the Commission and the apparently well-functioning example of the ACCC, it appears that the template approach is the most workable solution for using CCPs as remedies. The disadvantage is that a template may not fit

\textsuperscript{1080} Wils, ‘Antitrust Compliance Programmes & Optimal Antitrust Enforcement’ (n 948); Geradin, ‘Antitrust Compliance Programmes and Optimal Antitrust Enforcement: A Reply to Wouter Wils’ (n 948); But see: Coates and Zulli (n 948).

\textsuperscript{1081} See section 6.3.2.
the exact requirements of each undertaking. In this regard, the Commission should, when designing templates, consider the types of undertakings in which it expects to implement CCPs. The ACCC has developed templates according to the size of the undertaking. However, this approach may not be suitable for the Commission which is more likely to deal with larger undertakings whose activities are of Union interest.\(^{1082}\) It is, for example, possible to design templates not only with reference to the size of the undertaking, but also specific to different sectors of the economy. However, different models will fit the preferences of different competition authorities, and hence no strong recommendation is given here.

It is also important to consider how the Commission should monitor the continuous application of the CCPs introduced or upgraded by undertakings. What appears to be a common thread throughout the approaches described above is that the regular review of a CCP forms an essential part of such a programme.\(^{1083}\) Regular reviews of a CCP and monitoring by the competition authority would suitably be combined. How and by whom such reviews are to be carried out is, however, less clear. This could either be done by the undertaking itself, by the competition authority or by a third party, such as an independent auditor. The most obvious choice here is the appointment of a monitoring trustee, an already familiar tool for the Commission, that would also be responsible for auditing the CCP.\(^{1084}\) In the *Townsville Taxis* case, the ACCC appears to have taken a combined approach that requires reviews and reports by the undertaking as well as by an independent reviewer.\(^{1085}\) In the interest of saving Commission resources, this approach would also seem suitable for the CCPs suggested as remedies in this section, requiring reporting by both the undertaking and the monitoring trustee.

In the light of the current limits to the Commission’s powers to impose specific remedies in Article 7 decisions, it is important to consider whether the imposition of CCPs as a remedy would be lawful. As already mentioned above, in a cartel case where there are several remedies that could effectively bring the infringement to an end, the Commission may not limit the undertakings’ freedom to conduct a business by choosing the remedy that should be employed by way of an Article 7 decision.\(^{1086}\) Furthermore, while

\(^{1082}\) Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 11(6).

\(^{1083}\) See section 6.3.2.

\(^{1084}\) See further the proposal in: Kovacic, Marshall and Meurer (n 1043) 341.

\(^{1085}\) See section 6.3.3.

\(^{1086}\) Case T-24/90 *Automec Srl v Commission of the European Communities* (n 159) para 52; In *Automec*, the Court actually refers to ‘freedom of contract’, not to ‘freedom to conduct a business’. However, these two freedoms can both be traced to the freedom to conduct a business.
remedies may aim to prevent future infringements, it is not certain that a remedy only aimed at prevention would be considered proportionate by the Court. As further elaborated below concerning the lawfulness of the remedies that would be imposed within the cooperative case resolution mechanisms, it is likely that the judicial review of such remedies would be stricter than what is currently the case in Article 9 decisions. Therefore, it appears necessary to guarantee the lawfulness of CCPs imposed as a remedy by incorporating their use in the legal framework that would serve as a basis for the responsive case resolution system outlined below.

Thus, to summarise, in a responsive case resolution system in cartel cases, the Commission should focus on cooperation with undertakings to bring the infringement to an end and prevent further infringement. Accordingly, three tiers of an enforcement pyramid can be distinguished: the lowest with the full cooperation of the undertaking, the middle tier with the introduction of a CCP and further voluntary cooperation and the upper tier without cooperation. In the lowest tier, no fine is imposed, in the middle tier fines are reduced depending on the cooperation offered and the upper tier would involve a fine without any reduction for cooperation. In choosing what tier of the enforcement pyramid to employ, the Commission should, besides cooperation, take account of the infringement history of the undertaking concerned. Undertakings that refuse to cooperate with the Commission should be subject to a decision finding an infringement and with an attached fine on the top of the enforcement pyramid.

6.6 Article 101 TFEU – non-cartel cases

It should be recalled that it was preliminarily concluded above that the responsive approach to resolving non-cartel cases should differ from that of cartel cases in a responsive case resolution system. Thus, a separate enforcement pyramid for non-cartel cases is designed and assessed below.
6.6.1 Appropriate case resolution mechanisms for non-cartel cases

By their nature, ‘non-cartel cases’ may, for example, concern contractual clauses in vertical relations,1090 but also practices such as the joint sale of media rights1091 or joint ventures between competitors.1092 Currently, the main difference between the resolution of cartel and non-cartel cases is that non-cartel cases can be resolved with an Article 9 decisions, but not a cartel settlement.

It is important to first make an assessment of whether the different characteristics of these cases merit the design of different case resolution mechanisms as compared to cartel cases. Common for the three examples of case types mentioned above is that they do not concern secret arrangements, as cartels often do. Further, non-cartel infringements more often (but of course not always) fall within the grey area where it is not entirely clear whether Article 101 TFEU has been infringed or not. Further, it is sometimes possible to design specific remedies in these cases. An example of this is the OneWorld case, where a group of airlines committed to making slots at London Heathrow Airport available to competitors to address the concerns held by the Commission.1093 There is thus good reason to argue that the resolution of non-cartel cases should be approached separately from that of cartel cases, for example, by including the possibility of negotiated remedies. Conversely, the argument for excluding such cases from a settlement-like mechanism, referring, for example, to the burden imposed on the Commission by the collection of evidence, is weak.1094 Certainly, investigating a cartel may be more difficult for the Commission due to the secrecy of such arrangements, but the cooperation of the undertakings concerned can even help the Commission in non-cartel cases, as the ARA case clearly shows.1095 The following is submitted here: the three tiers of the enforcement pyramid for non-cartel infringements of Article 101 TFEU should be roughly equivalent to that of cartel cases. However, given that these cases sometimes allow for specific remedies, the introduction or upgrade of a CCP should be supplemented with the possibility to negotiate such a remedy, complementing the introduction or upgrade of a CCP. Each of these mechanisms should retain the finding of an infringement.

1090 e-Book MFNs and related matters (n 400); e-Books (n 683).
1092 BA/AA/IB (n 634).
1093 ibid para 231.
1094 See for example the reasoning in: Mehta and Centella (n 1031) 400–401.
1095 See section 5.6.2.
An objection that may be raised against such an enforcement pyramid is that the Commission should continue to resolve certain non-cartel cases without the finding of an infringement. In chapter 4, Article 9 decisions were criticised, both because of the suboptimal procedure leading to commitments and the lack of efficiency vis-à-vis Article 7 decisions. The most important feature of Article 9 decisions is that the commitments offered by undertakings are made binding by the Commission. The process leading to that decision can be cumbersome, as the Commission and the undertaking(s) need to agree on a definition of the competition problem and on remedies to resolve the problem. That process would not be less cumbersome if the establishment of an infringement were added, but rather the opposite. However, two problems associated with Article 9 decisions would be addressed by introducing a case resolution mechanism that includes both the finding of an infringement and a negotiated remedy similar to commitments in Article 9 decisions: First, the finding of an infringement would ensure the continuous development of competition law, in addition providing guidance to undertakings. Further, the finding of an infringement would force the Commission to establish a clearer connection between the infringement and the remedy designed to bring the infringement to an end. This type of case resolution mechanism would be an opportunity to review the procedure for negotiating remedies, addressing potential weaknesses in that procedure. Moreover, after ARA, the Commission also appears to consider it possible to negotiate a remedy with an undertaking without sacrificing the finding of an infringement.

Therefore, it is submitted here that the finding of an infringement should always be part of formal case resolution mechanisms. However, there may be certain situations where the formal resolution of a case may be avoided, still making an impact on the market concerned. These situations are addressed below.

6.6.2 The enforcement pyramid for non-cartel cases

Based on the analysis above, the enforcement pyramid for non-cartel cases could be similar to that of cartel cases:

---

1096 See sections 4.3.1.2 and 4.3.4.
1097 See section 6.8.1.
The main difference between the enforcement pyramid above and the one proposed for cartel cases is the approach to remedies in the bottom two tiers of the pyramid. As already noted, sometimes, but not always, non-cartel cases allow for the design of specific remedies to bring the infringement to an end and to restore competition. Even where this is the case, the introduction or upgrade of a CCP should still be required of the undertaking to prevent future infringements of competition law. In cases where remedies beyond the equivalent of a cease-and-desist order cannot be designed, the actions required of the undertakings should still be if the undertaking consents to such a resolution of the case. There are two reasons for this. Firstly, this concretises the actions to be taken by the undertakings and makes it easier to ascertain whether the undertaking complies with the Commission decision or not. For the undertakings, it also delimits the scope of actions required, increasing the legal certainty. Secondly, negotiated remedies may allow the Commission and the undertakings to agree on the appointment of an external monitoring trustee, relieving the Commission of some of its monitoring duties.\textsuperscript{1098}

In principle, the enforcement pyramid suggested for non-cartels could thus be merged with that for cartel cases. The Commission would only have to

\textsuperscript{1098} The possibilities to appoint a monitoring trustee are, as shown above, limited under the current Article 7 decisions, see section 4.1.1.4. It is not entirely clear how far-reaching the competences of a monitoring trustee appointed as a result of a negotiated remedy within a decision that also finds an infringement of Article 101 TFEU could lawfully be made without infringing the principle of proportionality. See further section 6.6.5.
distinguish the use of remedies based on the case type. It is worth noting here that the suggestion has not been to design a specific remedy to bring cartel-type infringements of Article 101 TFEU to an end. This is because for cartels, bringing the infringement to an end usually consists of ending the agreement or concerted practice between the undertakings involved altogether. In contrast, in a non-cartel situation bringing the infringement to an end may require changes to, for instance, distribution agreements.  

6.6.3 The use of the enforcement pyramid in practice

For reasons of consistency, the same two criteria should be applied when deciding which case resolution mechanism to employ in a non-cartel case as well as in a cartel case. The assessment made by the Commission when deciding what tier of the enforcement pyramid to employ in what case should be similar to that made in cartel cases. Thus, the first step would be an assessment of the extent of the undertaking’s willingness to cooperate with the Commission as well as the infringement history of the undertaking involved. The application of the undertaking history criterion should be the same as for cartel cases; that is the lowest tier of the pyramid should only be available for undertakings with no history of previous infringement.

Regarding the level of cooperation required in each tier of the pyramid, the approach should also be equivalent to that in cartel cases. In the lowest tier, cooperation regarding remedies, the introduction of a CCP, a settlement (acknowledgement of the infringement and procedural cooperation) and evidence should be required. The middle tier should require the introduction or upgrade of a CCP and voluntary cooperation concerning the design of the remedy, a settlement and cooperation on evidence.

As to fine reductions, the approach suggested for cartel cases above may in principle also be adopted for non-cartel cases. An additional aspect to take into consideration here is the reduction of the fine granted to an undertaking for its cooperation on the design of a remedy. Several options could be considered in this regard: Either, the fine reduction of 10 per cent suggested for CCPs could be retained. Speaking against this option is the fact that undertakings would receive the same maximum reduction for the adoption/upgrade of a CCP in addition to cooperation on the remedy as undertakings would receive in cartel cases for the adoption/upgrade of a CCP only. Alternatively, it would be possible to add an extra fine reduction for the cooperation on remedies. This reduction should be defined as a range of percentage reductions rather than a set percentage to take account of the differences between remedies. For example, a structural remedy may on

---

1099 See, for example Commitments in *e-Book MFNs and related matters* (n 670).
1100 See section 6.5.3.3.
occasion be considered to deserve a higher fine reduction than a behavioural remedy aiming to reach the same goal, because structural remedies are often easier to monitor and make it more difficult for the undertaking to repeat the same infringement.\footnote{For example, in the ARA case, a behavioural remedy requiring ARA to grant access to its collection infrastructure could have been imposed. However, the structural remedy finally made binding was projected to be more effective. See ARA Foreclosure (n 150) paras 140-143.}

It appears that this second option is more suitable for the purposes of fine reductions. It remains thus to consider what maximum reduction of the fine should be considered for cooperation on remedies. As already mentioned, in ARA, the reduction granted by the Commission on account of the structural remedy designed in that case was 20 per cent. However, that case must be seen as extraordinary, as ‘a test case’. It appears that a somewhat lower percentage, of say 10 per cent, would be more suitable as the maximum reduction that can be granted for assistance in the design of a remedy. Furthermore, with regard to cooperation on evidence, the appropriate fine reduction may in non-cartel cases be considered to be somewhat lower, considering that these cases usually do not pose the same challenges as cartels do. However, such an assessment should be made on a case-by-case basis.\footnote{The maximum fine reduction that could be obtained by an undertaking in the second tier of the enforcement pyramid in a non-cartel case would thus theoretically be 80 per cent. However, such a large fine reduction would likely remain the exception. This reduction would be divided as follows:

- Settlement: 10 per cent
- Introduction/Upgrade of a CCP: 10 per cent
- Cooperation on evidence: up to 50 per cent
- Cooperation on the remedy: up to 10 per cent}

In contrast to cartel cases, non-cartel cases are more likely to involve novel aspects, both regarding the conduct in question and the theory of harm employed.\footnote{If genuinely novel aspects should nonetheless appear in cartel cases, the reasoning regarding novel cases in this section can be applied \textit{mutatis mutandis}.}

Each of the three tiers of the pyramid involves the finding of an infringement. Therefore, the clarification objective may be met in any tier of the pyramid, even if it must be acknowledged that decisions may be somewhat more streamlined in the case of a settlement.\footnote{See section 4.2.}
One issue may be that undertakings involved in novel behaviour are less willing to cooperate with the Commission because they do not consider that they have infringed Article 101 TFEU. Alternatively, undertakings may disagree with the Commission on the substance of the infringement and/or the appropriate remedies, making it difficult to arrive at an agreed resolution of the case. In such situations, the Commission does not have any other choice but to pursue the resolution in the highest tier of the pyramid, sacrificing the cooperation of the undertaking, in particular regarding remedy design. However, it should not be forgotten that it would be theoretically possible for the Commission to impose a specific remedy even in those cases.

An important distinction that should be made in the resolution of novel cases concerns the fine imposed in the top two tiers of the pyramid. Undertakings found in infringement of competition law for a behaviour that can be classified as novel should be treated less harshly when a fine is calculated, irrespective of the tier in which the case is resolved. Unless there is any suggestion of the contrary, it can be assumed that the undertaking was not necessarily aware or at least certain that competition law was infringed and the Commission should thus choose to set a lower basic amount for the fine. Such an approach is already possible under the current Fining Guidelines.

6.6.4 Cooperation on remedies

It is worth exploring further how the Commission should cooperate with undertakings on the issue of remedies, procedurally, but also in substance.

A first issue is how ‘the cooperation of an undertaking’ in the design of the remedy should be defined? Would the undertaking need to take the initiative for that form cooperation? To what extent would it need to cooperate? Would it be enough that the undertaking acknowledges that the remedy is proportionate?

---

1105 A situation that apparently arose in: Google Search (Shopping) (n 151).
1106 See further: 4.1.1.1 and especially Joined cases C-241/91 P and C-242/91 P Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities (Magill) (n 230).
1107 Indeed, this possibility already exists for the Commission: Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (n 28) paras 19-20; In practice, the Commission has used the possibility to impose a symbolic fine on an offender engaging in novel conduct and to increase the fine upon repetition. See the case law on cartel facilitators: Organic Peroxides (n 782) para 454; Heat Stabilisers (n 783) paras 744-53.
1108 ARA Foreclosure (n 150) para 19.
Given that the Commission cooperates with undertakings on remedies within the Article 9 procedure, that procedure could simply be adopted. There are two problems with that suggestion, one of a legal nature and one of a practical nature. The legal problem is that the requirements of the principle of proportionality differ depending on whether the Commission finds an infringement of Article 101 or 102 TFEU or not, as established by the Court in *Alrosa*\(^{1109}\) and also addressed in the case analysis of *ARA* above.\(^{1110}\) Irrespective of the current wording of Article 7 of Regulation 1/2003 with regard to proportionality, it is reasonable to assume that the requirements concerning the lawfulness of remedies made binding by the Commission would be higher where the actions taken against an undertaking are also more severe, namely involving the finding of an infringement and, potentially, the imposition of a fine.\(^{1111}\) The practical reason that the procedure for cooperation on remedies under Article 9 decisions should not be adopted for the purposes of the cooperation suggested in this study relates to the criticism of the Article 9 procedure advanced in chapter 4. That criticism can be summarised by saying that the current Article 9 procedure may lead to remedies going beyond what would be necessary to bring the potential infringement to an end due to the Commission’s advantage in negotiating remedies. At the same time, remedies may not be effective because of the superior information held by the undertaking.\(^{1112}\)

While there is no guarantee that the remedies negotiated under the approach suggested here would not suffer from the same deficiencies as Article 9 decisions, there is an important difference namely: the finding of an infringement. That finding, and the attached reviewability by the Court, increases the legal demands on the remedy. An undertaking may, for example, decline to admit an infringement, but cooperate on the design of the remedy. The undertaking may then lodge an appeal against the decision finding an infringement with the Court. In that process, the proportionality of the remedy may also be called into question. As further analysed below, the demands on the Commission in ensuring the proportionality of the remedy that is made binding are higher when an infringement has also been found.

Cooperation on the remedy should at the very least include the undertaking’s acknowledgement of the remedy’s proportionality. Beyond that acknowledgement, how much should the undertaking be required to contribute to the design of the remedy? This is important to define for the sake of legal certainty, for example, if the Commission should decide to grant

\(^{1109}\) Case C-441/07 P *European Commission v Alrosa Company Ltd* (n 232) paras 36-41.

\(^{1110}\) See section 5.6.2.

\(^{1111}\) Case C-441/07 P *European Commission v Alrosa Company Ltd* (n 232) para 48.

\(^{1112}\) See section 4.3.1.2.
certain undertakings a reduction of the fine for remedy cooperation, but not others. The basic requirement on an undertaking in a responsive case resolution system is that it faithfully cooperates with the enforcement authority.\textsuperscript{1113} Thus, ‘cooperating on a remedy’ should require more than just the acknowledgement of the remedy by the undertaking. The definition of such ‘cooperating on a remedy’ could either refer to the undertaking’s conduct during negotiations or to the outcome of that negotiation in the form of a remedy.

It is submitted here that an undertaking should actively be involved in the design of the remedy, for example, by suggesting potential remedies and providing information to the Commission. The focus should thus be on the undertaking’s attitude when designing the remedy, rather than the remedy designed. This requirement also appears to be in line with responsive regulation theory, which considers that all undertakings may not always know how to comply or, in this case, how to design a remedy eventually leading to compliant behaviour. In these cases, the enforcer’s focus should be to ‘build capacity’ to enable undertakings to comply.\textsuperscript{1114} While it would be possible to set up a requirement that the remedy designed must be ‘better’ (however defined) than what the Commission itself would have been able to design and/or impose, such a standard would be difficult to define. Further, an outcome-related definition of cooperation may lead to nitpicking about who came up with what detail in a remedy and would be prone to Court litigation, undermining the cooperative spirit that is the aim of this mode of designing remedies. While the remedy cooperation suggested here, focusing on the undertaking’s cooperative spirit, might also be subject to litigation if the Commission were to refuse a reduction, the Commission could point to certain behaviour, for example, the refusal to provide certain information, as a reason for refusing to reduce the fine. In effect, any reduction that is conditional on the behaviour of the undertaking in question may be subject to litigation, thus any requirement beyond the acknowledgement of the proportionality of the remedy could be subject to litigation. However, the approach suggested here, requiring a cooperative spirit from the undertaking conforms best to a responsive case resolution system.

If negotiated remedies were used as a regular part of the Commission’s resolution of cases, a relevant question would be whether a market test, similar to the one currently used by the Commission in Article 9 procedures, should be carried out.\textsuperscript{1115} The advantage of a market test is that it allows the Commission to gain a deeper understanding of the competition at hand, and

\textsuperscript{1113} See sections 6.5.3 and 6.5.3.2.
\textsuperscript{1114} Braithwaite (n 886) 502–03.
\textsuperscript{1115} This has also been suggested by: Monti, ‘Behavioural Remedies for Antitrust Infringements - Opportunities and Limitations’ (n 357) 199.
the practicability and effectiveness of the suggested remedy. On the negative side, parties providing comments in market tests may be biased and have an interest in stricter remedies than necessary to remedy the actual infringement. Further, market tests take time to carry out, further prolonging the procedure required before coming to a decision. Market tests in Article 9 decisions fill a complementary function given that the Commission has not carried out a full investigation of the potential infringement at hand. While the establishment of an infringement requires the Commission to carry out a full investigation, it is not certain that a SO drafted in the circumstances of a cooperative resolution of a case is as detailed and well-supported as a SO would be if there were a lack of cooperation on the part of the undertaking involved. Further, if the undertaking cooperates on the issue of the infringement found, this may be established by common agreement between the Commission and the undertaking in question, rather than by unilateral investigation by the Commission. In this spirit, paragraph 25 of the current cartel Settlement Notice states that:

By introducing a formal settlement request in the form of a settlement submission prior to the notification of the statement of objections, the parties concerned enable the Commission to effectively take their views into account already when drafting the statement of objections, rather than only before the consultation of the Advisory Committee (...) or before the adoption of the final decision.1116

In the interest of concluding a case in a cooperative form, the Commission must reach an agreement with the undertaking in question regarding the scope of the infringement. It is therefore reasonable to believe that a decision adopted in the context of the settlement procedure is not as meticulously supported as a decision adopted unilaterally by the Commission. A case in point is Timab where the undertaking concerned withdrew from the settlement procedure after the Commission had presented the infringement it intended to find and the supporting evidence held at that point. The Court of Justice held in that case that the Commission was entitled to continue its investigation potentially revealing new information resulting in the establishment of a more extensive infringement than what had been suggested during the settlement procedure.1117 Therefore, it appears likely that negotiated remedies would not always rest on a full investigation of the infringement in question. In this situation, a market test of the proposed remedy may be of value to the Commission.

1116 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 (n 26) para 25.
1117 Case C-411/15 P Timab Industries and CFPR v European Commission (n 604) para 136.
However, no generalisations should be made here with regard to the Commission’s investigations, as their nature probably varies on a case-by-case basis. A possibility would be to introduce an option for the Commission to carry out a market test in cases where it is not certain whether a remedy proposed by an undertaking is suitable to address the infringement in question.1118

In summary, the analysis above suggests that cooperation on remedies should include two requirements on undertakings in exchange for a fine reduction: the acknowledgement of the proportionality of the remedy as well as active cooperation in the design of the remedy. A market test can be carried out at the discretion of the Commission, but must not be required.

6.6.5 The lawfulness of negotiated remedies

Above, the practical cooperation on remedies has been addressed. What has not been addressed are the material remedies that might lawfully be negotiated with or imposed on undertakings.

It was concluded in chapter 4 that the Commission’s possibilities to impose remedies to end infringements of Article 101 or 102 TFEU are somewhat limited where there are several equally effective remedies available.1119 This is because the Commission’s design of a specific remedy may violate the undertaking’s freedom to conduct a business, according to the General Court in Automec.1120 As shown in the analysis of the ARA case, the Commission has made the assessment that it can achieve specific remedies if the undertaking relinquishes, so to speak, its freedom to conduct business by confirming that the remedy negotiated is proportionate. Where the undertaking does not wish to cooperate on the design of the remedy, the Commission appears to consider itself able to oblige the undertaking to do so ex post. Namely, in Google Search, the Commission, instead of imposing a specific remedy, left the concrete remedy design to Google, but required Google to notify the

1118 In addition, Caccinelli and Toledano suggest with regard to remedies imposed as part of Article 9 decisions that these should include a review clause requiring the Commission to review the proportionality of remedies every three years. Such an approach could also be considered for cooperative remedies such as those discussed here. See: Caccinelli and Toledano (n 707) 231.
1119 See section 4.1.1.1.
1120 Case T-24/90 Automec Srl v Commission of the European Communities (n 159) para 52; Automec actually refers to ‘freedom of contract’, not to ‘freedom to conduct a business’. However, these two freedoms can both be traced to the freedom to conduct a business protected by Article 16 of the Charter of Fundamental Rights. See: Explanations relating to the Charter of Fundamental Rights (n 230) explanation pursuant to Article 16.
Commission of the measures taken and provide periodic reports for a period of five years after the infringement had been brought to an end.

The existing case law does not, however, answer the question of how intense the judicial review by the Court in cases where remedies have been negotiated would be. To approximate that review, an analogy to the General Court’s judgment in *Alrosa* can be drawn. The General Court held that the principle of proportionality when reviewing remedies made binding by the Commission in Article 9 decisions should be interpreted with reference to Article 7 decisions and the obligations of the Commission in those decisions.\(^{1121}\) That judgment was annulled by the Court of Justice on appeal, as it did not consider that the principle of proportionality applying to Article 9 decisions should be defined with reference to Article 7 decisions, due to the differing aims of the two provisions.\(^{1122}\) However, as the submission in this study is that the Commission abandon the Article 9 procedure and instead negotiate remedies within an infringement procedure similar to that of Article 7, the analogy drawn here is fitting. With regard to the proportionality of the remedy made binding in an Article 9 decision, the General Court held that:

> Indeed, it would be contrary to the scheme of Regulation No 1/2003 for it to be possible to take a decision which would, under Article 7(1) of the regulation, fall to be regarded as disproportionate to the infringement that had been established, by having recourse to the procedure laid down under Article 9(1) and adopting a decision in the form of a commitment that is made binding, on the ground that the infringement does not have to be formally proved in such a case.\(^{1123}\)

And that:

> (...) the voluntary nature of the commitments also does not relieve the Commission of the need to comply with the principle of proportionality, because it is the Commission’s decision which makes those commitments binding. The fact that an undertaking considers, for reasons of its own, that it is appropriate at a particular time to offer certain commitments does not of itself mean that those commitments are necessary.\(^{1124}\)

This description of the application of the principle of proportionality to be applied to potential remedies, given the current understanding of Article 9 decisions derived from the Court of Justice’s judgment in *Alrosa*, appears

\(^{1121}\) Case T-170/06 *Alrosa Company Ltd v Commission of the European Communities* EU:T:2007:220, paras 86-111.

\(^{1122}\) Case C-441/07 *European Commission v Alrosa Company Ltd* (n 232) paras 36-42.

\(^{1123}\) Case T-170/06 *Alrosa Company Ltd v Commission of the European Communities* (n 245) para 101.

\(^{1124}\) ibid para 105.
more suitable for a ‘cooperative’ Article 7 decision with a negotiated remedy, such as the one adopted in *ARA*. Importantly, it is not sufficient that the undertaking acknowledges the proportionality of the remedy, even though this is useful as part of a cooperative design of a remedy, but the Commission must ensure that the remedy actually conforms to the demands of the principle of proportionality.

What remains unclear is if a negotiated remedy could include the appointment of a monitoring trustee as is common in Article 9 decisions. As already explained, the General Court did not consider that the Commission could appoint a monitoring trustee with broad investigatory powers within the scope of what is now Article 7 of Regulation 1/2003 (then a decision pursuant to Article 3 of Regulation 17/62). Furthermore, the Commission could not require Microsoft to pay for the trustee’s work. In line with the General Court’s judgement, the Commission retained the services of the monitoring trustee in more limited form after the General Court’s judgement in *Microsoft*, but was forced to pay for that work itself. It thus appears that the appointment of a monitoring trustee as such would be possible within a negotiated remedy as suggested in this study. However, what remains unclear is how far-reaching the competences of that trustee could be made given the agreement of the undertaking and who would need to bear the costs for the monitoring trustee.

A further question that needs to be addressed here is to what extent the cooperative remedies considered here would be likely to tend to go beyond what is necessary to bring infringements to an end because of the cooperative forms under which they are negotiated. With respect to the Commission’s practice when making remedies binding in Article 9 decisions, a trend towards ‘regulatory’ remedies has been identified in scholarly commentary. Indeed, many of the sectors subject to Article 9 cases have been the same sectors where there is already pre-existing sector-specific regulation. One example is the energy sector, with cases such as *Distrigaz, RWE Gas Foreclosure*, *German Electricity Markets, E.ON Gas, ENI, Gaz de France, Long-term contracts France, Swedish Interconnectors* and CEZ. In other sectors,

---

1125 Case T-201/04 *Microsoft Corp. v Commission of the European Communities* (n 350) paras 1269-78. See also section 4.1.1.4.


regulation was introduced after competitive problems had been identified by the Commission. Examples are roaming fees and interchange fees for bankcards.\textsuperscript{1128}

However, as already shown in the introduction of this study, there is no universally agreed definition of the term ‘regulation’ and the term is understood differently in different contexts. Therefore, using the term ‘regulatory’ remedies does not appear a suitable choice. As already noted above, Ibáñez Colomo argues convincingly that scholarly criticism regarding ‘regulatory’ remedies mainly relates to concerns that the actions of the Commission go beyond what is necessary to bring infringements to an end.\textsuperscript{1130} Such remedies may for instance prescribe future conditions for competition, or may pursue objectives alien to competition law.\textsuperscript{1131}

Indeed, as also found in chapter 4, the negotiation of remedies in combination with a broad discretion by the Commission to accept remedies due to a light review by the Court increases the possibility that disproportionate remedies are accepted.\textsuperscript{1132} In practice, including negotiated remedies in a case resolution mechanism means accepting that these remedies may from time to time


\textsuperscript{1130} Ibáñez Colomo, ‘On the Application of Competition Law as Regulation: Elements for a Theory’ (n 74) 277.


\textsuperscript{1132} See sections 4.3.1.2 and 4.3.1.3.
become disproportionate in their nature in exchange for aiming to design more effective remedies given the superior information possessed by the undertaking. In this regard, the Court held with regard to the assessment carried out by the Commission when accepting commitments:

\[\text{[It] is a prospective assessment. [The Commission] is called upon to make a decision which is a forecast and which leads it to assess how the market will behave once the commitments have been implemented.}\,1133\]

In a responsive case resolution system as proposed in this chapter, disproportionate remedies, are meant to be prevented by attaching a finding of an infringement to each case resolution mechanism. As elaborated in this chapter, this would probably limit the Commission’s ability to impose remedies that are far-reaching as is currently possible in Article 9 decisions due to the limited review of the Court. One weakness in this regard could be the case resolution mechanism at the bottom of the pyramid which includes the finding of an infringement, but also requires full cooperation. Given the extent of this cooperation, it appears unlikely that such cases would be appealed to the Court. Thus, the Commission could be tempted to make too far-reaching remedies binding. However, as already noted, cooperative elements in case resolutions can, in the hands of an unrestrained competition authority, by their very nature lead to disproportionate remedies. Thus, while the occurrence of disproportionate remedies cannot entirely be ruled out here, the case resolution mechanisms designed in this study aim to minimise their occurrence.

### 6.7 Article 102 TFEU cases

The case resolution mechanisms currently employed in cases where an infringement of Article 102 TFEU is suspected, is the same as in non-cartel cases of Article 101 TFEU: cases can be resolved by an Article 7 or Article 9 decision. Thus, the question is if the same enforcement pyramid as that suggested for non-cartel cases should be applied to Article 102 cases. In other words, is there anything in the nature of Article 102 TFEU that is so different that it requires different types of case resolution mechanisms or a different enforcement pyramid?

The most obvious difference between Article 101 and 102 TFEU cases are the number of undertakings involved. Usually, Article 102 TFEU cases only involve one undertaking. Abuse of a dominant position is often subject to complaints by competitors or customers, thus lacking the secrecy component

---

1133 Case T-76/14 Morningstar v Commission (n 660) para 73.
of cartels. These characteristics make infringements of Article 102 TFEU different from infringements of Article 101 TFEU, but not necessarily so different that another type of case resolution mechanism is required. On the contrary, only one party being subject to investigation makes the resolution of cases easier from the perspective of responsive regulation, as it is not necessary to take the principle of equal treatment into account in the way required in Article 101 TFEU cases. Also, the lack of secrecy makes abuses easier to discover.

However, infringements of Article 102 TFEU pose other enforcement challenges than infringements of Article 101 TFEU. For example, a competitor of a dominant undertaking may complain of an abuse because it is unable to match the dominant undertaking in terms of efficiency. In this context, it is not always obvious whether a market develops in a certain direction because of the abuse by a dominant undertaking or because that dominant undertaking has developed a superior product. For example, in Google Search, one of the issues raised was whether Google had simply developed a superior tool for shopping comparisons on its general search pages or whether it was abusing its dominant position vis-à-vis dedicated search comparison sites.

While the conduct prohibited and the enforcement challenges raised by Article 102 TFEU are different from that of Article 101 TFEU, there is no decisive difference that would justify a different approach in a responsive case resolution system. It is, therefore, submitted here that the enforcement pyramid suggested for non-cartel cases of Article 101 TFEU should also be applied to Article 102 TFEU cases.

6.8 Guidance and persuasion at the bottom of the enforcement pyramid

The enforcement pyramid designed for case resolutions of suspected infringements of Articles 101 and 102 TFEU lacks an important dimension of responsive regulation: guidance and persuasion of undertakings. The finding of an infringement in each tier of the enforcement pyramids above is inter alia meant to ensure the further development of EU competition rules. This is, as exemplified in chapter 4, an important part of the objective of clarifying competition rules. Yet, case-specific instruments that serve to persuade...

1134 Less efficient competitors are not meant to be protected by Article 102 TFEU. See: Case C-413/14 P Intel Corporation v European Commission EU:C:2017:632, paras 133-34.
1135 Google Search (Shopping) (n 151) paras 647-52.
1136 See Figure 7
1137 See section 4.3.3.3.
undertakings to follow competition law and thus prevent infringements of competition law have not yet been addressed. While CCPs also follow this aim, they are in this study proposed to be used where an infringement may already have occurred. Braithwaite generally underlines the importance of communicating with undertakings, educating them and persuading them to comply with the law at the bottom of the pyramid.\textsuperscript{1138}

The reason why no case resolution mechanism based on guidance has been introduced at the bottom of the enforcement pyramids above is that such a case resolution mechanism cannot be used in every potential infringement of Article 101 or 102 TFEU. All potential infringements cannot be treated in this manner due to the nature of competition law infringements. Certain types of infringements, most prominently cartels, cannot, contrary to what Braithwaite suggests,\textsuperscript{1139} be left without investigation. If proven, the finding of an infringement is obligatory in these cases. Rather, the guidance suggested in this section pertains to cases where no infringement has been committed yet or situations where a potential infringement can easily and quickly be stopped by persuasive means. Below, these situations are defined further. General guidance is thus not included in the enforcement pyramid designed above, but should rather be seen as a complementary activity carried out by the Commission.

It is possible to distinguish two situations: (1) Where there is reason to suspect that an undertaking may have committed an infringement, for example, because the Commission has received a complaint by another undertaking. (2) Where no infringement is suspected, but there is communication between an undertaking and the Commission regarding the lawfulness of a specific type of conduct.

6.8.1 Where an infringement is suspected

Where the Commission has reason to suspect an infringement has been committed it will, before a case is officially opened, begin to investigate the case informally to assess whether there is any merit to the suspicion.\textsuperscript{1140} Once proceedings are opened, the Commission must have ‘(...) reasonable indications of a likely infringement.’\textsuperscript{1141} While the Commission carries out its initial assessment of a case, there is also opportunity for the Commission and

\textsuperscript{1138} Braithwaite (n 886) 482.
\textsuperscript{1139} ibid 483.
\textsuperscript{1141} ibid 104.
the undertaking concerned to have a dialogue about the behaviour in question and thus an opportunity to quickly resolve the case.\footnote{Commission Regulation 773/2004/EC, of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (n 9) art 2.} A recent example of such a case was a complaint concerning Amazon/Audible and Apple. The Commission was considering whether to open a formal investigation against these parties regarding exclusivity obligations in the distribution of audiobooks. However, after the parties removed all exclusivity obligations, no case was opened.\footnote{European Commission, ‘Antitrust: Commission Welcomes Steps Taken by Amazon/Audible and Apple to Improve Competition in Audiobook Distribution’ (19 January 2017) <http://europa.eu/rapid/press-release_IP-17-97_en.htm> accessed 20 November 2018; See further: European Commission, ‘Commission Closes Investigation into Contracts of Six Hollywood Studios with European Pay-TVs’ (26 October 2004) <http://europa.eu/rapid/press-release_IP-04-1314_en.htm> accessed 1 October 2018; European Commission, ‘Competition: Commission Secures Changes to Gas Supply Contracts between E.ON Ruhrgas and Gazprom’ (10 June 2005) <http://europa.eu/rapid/press-release_IP-05-710_en.htm> accessed 1 October 2018; European Commission, ‘Competition: Commission Secures Improvements to Gas Supply Contracts between OMV and Gazprom’ (17 February 2005) <http://europa.eu/rapid/press-release_IP-05-195_en.htm> accessed 1 October 2018.} Such a ‘resolution’ of a potential infringement has the advantage of quickly removing the Commission’s concern while at the same time consuming little resources. In other words, the very same advantages pursued by Article 9 decisions.\footnote{Case C-441/07 P European Commission v Alrosa Company Ltd (n 232) para 35.} However, the important difference is that the ‘resolution’ in Amazon/Audible and Apple was conducted before a case could ever be formally opened.

Before the adoption of Regulation 1/2003, such ‘informal settlements’ were often used by the Commission. In Regulation 1/2003, Article 9 decisions were introduced as a development of informal settlements. The intention was to formalise the means by which negotiated remedies were made binding and improve the Commission’s means to monitor and enforce compliance with these remedies.\footnote{European Commission, ‘Antitrust Manual of Procedures: Internal DG Competition Working Documents on Procedures for the Application of Articles 101 and 102 TFEU’ (n 191) 177; Schweitzer (n 654) 2.} However, it is exactly the act of making remedies binding combined with the lack of a finding of an infringement that have led to heavy criticism of Article 9 decisions, also by this author. That criticism does not pertain as much to Article 9 decisions as a case resolution mechanism, as to the way in which the Commission has chosen to use Article 9 decisions.\footnote{See sections 4.3.1.1, 4.3.1.2 and 4.3.1.3.} In that context, the Commission’s decision in ARA can be seen as an answer to that criticism, combining the finding of an infringement with a negotiated remedy. In parallel, it appears that the Commission, in Audible/Amazon and...
Apple, has once again concluded a case using the ‘old’ mechanism of an informal settlement.\textsuperscript{1147}

The question of whether the Commission should abandon Article 9 decisions in a responsive case resolution system has already been considered above.\textsuperscript{1148} In their place, it has been submitted above, should be case resolution mechanisms where an infringement is found, adding negotiated remedies and the imposition of a fine where appropriate. In addition, it is submitted here, that the Commission, with its broad discretion regarding what cases to investigate, should retain the possibility to informally resolve suitable cases. However, this possibility should be reserved to cases where proceedings have not yet officially been opened. It can be argued that always requiring the finding of an infringement for cases that have officially been opened may significantly increase the administrative burden on the Commission for the cases that it does open. Yet, this suggestion is legally sound. The Commission shall only open cases where it has a reasonable suspicion that an infringement has been committed.\textsuperscript{1149} The present Article 9 decisions are attractive for both the Commission (no finding of an infringement, specific remedies) and for undertakings (no finding of an infringement, no fine), making it difficult for the Commission to prioritise a resolution that includes the finding of an infringement.\textsuperscript{1150} The enforcement pyramid suggested above aims to re-balance the incentives set for different types of case resolution mechanisms to ensure that the Commission establishes infringements if it wishes to resolve a case. Cooperative mechanisms are used to facilitate the resolution of cases once proceedings are opened. ‘Informal settlements’ retain the possibility of resolving cases before they are opened. However, ‘informal settlements’ lack the attractiveness of the Article 9 procedure, given that remedies are not made binding, thus preventing over-use by the Commission.

At the same time, it could be argued that non-binding remedies are the disadvantage of returning to informal settlements. Such ‘remedies’ would be difficult for the Commission to monitor and impossible to enforce, other than by opening formal proceedings in any particular case. However, it is exactly that opening of proceedings that is the logical next step in a responsive case resolution system if the Commission believes that an undertaking does not comply with an informal settlement. Furthermore, it is envisaged here that informal settlements would take place before proceedings are opened,

\textsuperscript{1147} European Commission, ‘Antitrust: Commission Welcomes Steps Taken by Amazon/Audible and Apple to Improve Competition in Audiobook Distribution’ (n 1143).

\textsuperscript{1148} See sections 6.5.1 and 6.6.1.


\textsuperscript{1150} See section 4.3.1.2.
providing a short window of time for the undertaking to adjust its behaviour. To satisfy itself that the undertaking is willing to change its behaviour, the Commission could require it to implement the agreed remedies before it fully stops its investigation.

What types of cases should be resolved by ‘informal settlement’? It has already been held above, that resolutions of cartel cases should always include the finding of an infringement. Moreover, the opening of proceedings in cartel cases usually coincides the adoption of the SO. There is thus usually no contact between the Commission and the undertakings concerned before proceedings are opened to ensure that undertakings cannot destroy evidence. Therefore, ‘informal settlements’ would not be possible in cartel cases from a procedural point of view meaning that their use would be restricted to non-cartel cases of Article 101 TFEU and Article 102 TFEU cases. Of those, cases that include novel aspects regarding alleged infringing behaviour or theory of harm involved should be excluded from the scope of an ‘informal settlement’. Otherwise, uncertainty as regards the lawfulness of the behaviour in question would be created which may in turn lead to chilling effects where lawful behaviour is changed within such a resolution. The enforcement pyramid suggested in this chapter was designed, in part, to avoid the lack of clarity associated with Article 9 decisions. Beyond these limitations, it is difficult to define exactly what cases should be resolved with an informal settlement. Rather, this should remain at the Commission’s discretion. Without making any prescriptions, some examples could be: (1) Where the Commission does not consider that a case should be investigated, due to the prioritisation of other cases. (2) Cases that can easily be resolved using a behavioural remedy, for example, cases concerning contractual clauses, such as the Audible/Amazon and Apple case. (3) Cases where the undertaking is particularly cooperative and eager to resolve the conduct quickly.

6.8.2 Where no infringement is suspected

Moving on now to guidance where no infringement is suspected, but where there is a question of lawfulness of a certain type of conduct, for example, because a new business model has emerged in a certain market. Since the coming into force of Regulation 1/2003, the basic rule followed by the Commission is that no case-specific guidance as to permitted conduct is provided to undertakings, save for exceptional situations, for example, in the

---

1151 Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (n 192) para 24.
1152 European Commission, ‘Antitrust: Commission Welcomes Steps Taken by Amazon/Audible and Apple to Improve Competition in Audiobook Distribution’ (n 1143).
case of a request for guidance in novel situations. Instead, undertakings are expected to self-assess their behaviour with the help of the general guidance issued by the Commission as well as the decisional practice of the Commission and the Court. The Commission has carefully sought to prevent undertakings from ‘back-door notifications’ fearing that it may be overwhelmed with meritless cases otherwise. This might also be one reason why the Commission has never used its remaining option of providing informal guidance or adopted an Article 10 decision.

Informal guidance and Article 10 decisions are driven by different actors: In Article 10 decisions, the Commission itself identifies questions where there is uncertainty as to the lawfulness of a specific conduct. Alternatively, if the Commission is informed of a question suitable for an Article 10 decision by an NCA or a third party, it may decide to act on such information. In requests for informal guidance, undertakings determine whether the Commission receives questions as to the lawfulness of certain conduct. While these questions may reflect issues actually relevant for several undertakings, they may also be driven by the individual interests of that undertaking.

In more general terms, are there situations where the Commission should issue case-specific guidance that is not tied to a suspected infringement? Situations where case-specific guidance should be provided are, for example, where there is genuine uncertainty regarding the lawfulness of a certain type of behaviour. Such situations may, for example, appear where NCAs do not apply Articles 101 and 102 TFEU uniformly or as a result of resolutions that did not contain findings of infringements. One such example is the lawfulness of MFN clauses already analysed above. This is both due to different treatment by NCAs, but also to the fact that the Commission has contributed

---

1153 Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (n 29).
1154 See section 2.2.1.
1156 Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (n 29).
1157 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 10.
1159 Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (n 29) para 5.
1160 See section 4.3.3.3.
to the uncertainty by concluding several cases concerning MFNs using an Article 9 decision.\textsuperscript{1161} It is indeed notable that the Commission has never made use of an Article 10 decision, given there are competition issues that would benefit from guidance.

Moreover, the Commission could provide case-specific guidance if it is asked a novel question by an undertaking.\textsuperscript{1162} It is not clear whether the current absence of such guidance is due to an unwillingness on the part of the Commission or due to the absence of questions asked by undertakings. A reason that may keep undertakings from asking questions to competition authorities may be a fear of the competition authority initiating proceedings against them. The information that undertakings would need to provide according to the Commission’s current Notice on Novel Questions could very well be the basis for initiating proceedings.\textsuperscript{1163} Therefore, undertakings may not dare to ask questions, where they are genuinely uncertain of the implications of EU competition law. Another incentive not to point out novel questions could be that a clarification by the Commission may then make it difficult for the undertaking to argue that the conduct was novel in order to receive a lower fine. Such an incentive may at least be created by a responsive case resolution system as proposed in this chapter as such a system would place certain focus on novel behaviour.\textsuperscript{1164} While it is suggested here that the Commission should answer undertaking’s questions regarding novel conduct, guidance provided at the initiative of undertakings should not be included in a responsive case resolution system as the Commission cannot steer the behaviour of undertakings in this regard.

It is thus submitted here that the Commission should provide case-specific guidance if it \textit{ex officio} identifies novel or unclear issues regarding the interpretation of Article 101 or 102 TFEU. This is despite certain disadvantages of providing such guidance. Providing guidance on specific issues may limit the Commission’s discretion when enforcing competition rules later on. This is because the Commission’s answer would be binding on the Commission and the principle of legitimate expectations may thus prevent the Commission from enforcement action if it has previously stated that certain behaviour is permissible according to EU competition rules.\textsuperscript{1165}

However, providing case-specific guidance would arguably make it relatively easy for the Commission to ‘distinguish the case’, circumventing that disadvantage.

\textsuperscript{1161} See: \textit{e-Books} (n 683); \textit{E-Book MFNs and related matters} (n 400).
\textsuperscript{1162} Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (n 29).
\textsuperscript{1163} ibid para 24.
\textsuperscript{1164} See section 6.6.3.
\textsuperscript{1165} See section 2.3.4.
Another disadvantage with regard to case-specific guidance is that the Commission is not the final authority concerning the interpretation of competition rules. While the Commission enforces competition rules at the first instance, the Court has the final say on the interpretation of competition rules. A situation where the Commission has issued an answer to an individual question where the Court at a later stage disagrees with the Commission, may create legal uncertainty for undertakings rather than legal certainty as intended with case-specific guidance. However, this is a general disadvantage attached to all guidance provided by the Commission. In the absence of precedence created by the Court, it is more beneficial that the Commission provide undertakings with guidance on permissible behaviour than that they are left without any guidance at all.

If the Commission identifies a novel or unclear issue regarding the interpretation of Article 101 or 102 TFEU, in what form should it provide guidance? Currently, the Commission may pursue an Article 10 decision in such cases. However, a soft law solution that would be focused on providing guidance on a specific question could be envisaged, rather than providing broad guidance on a range of related issues. The advantage of a Commission decision declaring certain behaviour compatible with EU law is that such a decision would be directly reviewable by the Court, whereas soft law cannot be ‘appealed’ in the same way. Therefore, the adoption of a Commission decision declaring a specific conduct lawful under Article 101 or 102 TFEU should be preferred for the sake of creating legal certainty, despite potentially taking more time, at least where a review before the Court is involved. The adoption of such decisions would be helpful where there is confusion as to the lawfulness of specific conduct that has been created either by the Commission itself or certain NCAs.

6.9 A combined enforcement pyramid

Finally, it is possible to design an enforcement pyramid for a responsive case resolution system of both Article 101 and 102 TFEU cases. This can be depicted as follows:

---

1166 Such as the guidance that can be provided according to: Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (n 29).

1167 Since the Commission has never adopted an Article 10 decision, it is not clear what parties could appeal the decision, besides the addressee of the decision given the stringent criteria for standing before the Court set out in Article 263 TFEU. Yet, the addressee itself appears unlikely to have a reason to appeal the case. Nonetheless, this is a specific question left outside the scope of this study.
This enforcement pyramid can only partially be used for cartel cases. However, that limitation follows logically on from the nature of cartel cases. It is normally not possible to adopt specific remedies in cartel cases. Moreover, an informal settlement during a pre-opening phase of a case is not possible, because the nature of cartel investigations prevents contact between the Commission and the undertakings concerned.

6.9.1 Possible effects of the proposed responsive case resolution system

The aim of the exercise carried out in the sections above has been to consider how a responsive case resolution system could be designed to function within the Commission’s resolution of infringements of Articles 101 and 102 TFEU. The design was guided by the aim to not only create a responsive structure out of different case resolution mechanisms but also to observe the objectives established in chapter 3, as well as ensuring that the constitutional restraints are taken into account. This section considers potential practical effects of that so-designed responsive case resolution system. Three potential points of criticisms could be raised here: Firstly, that the responsive case resolution system might significantly increase the administrative burden on the Commission, decreasing the number of cases it is able to handle. Secondly, that the cooperative resolution of cases may not increase, or even decrease the number of appeals to the Court. A converse effect might be that undertakings
are less willing to cooperate with the Commission because the demands of that cooperation are set too high. Third, that it is uncertain whether a responsive case resolution system would lead to improved compliance with competition rules. However, the desired effects of the proposed responsive case resolution system need to be specified further first.

The main changes to existing case resolution mechanisms and their surrounding legal framework in the responsive case resolution system designed above relate to: the finding of infringements throughout all case resolution mechanisms; the removal of fines at the bottom of the pyramid; the removal of the Leniency Notice; and a general staggering of case resolution mechanisms, relating the choice of mechanism to infringement history and cooperation by the undertaking. The main aim to be achieved with these changes is relate case resolution mechanisms to undertaking’s presumed motives for compliance and to allocate cases more suitably to different case resolution mechanisms in order to reach the objectives established in chapter 3. Further, the responsive case resolution system designed here aims to remove the deficiencies associated with Article 9 decisions by ‘replacing’ that mechanism with the two mechanisms at the bottom of the pyramid. While the mechanism at the bottom of the pyramid does not include a fine, the one in the second tier of the pyramid does, although that fine may be heavily reduced depending on the level of cooperation on the part of the undertaking. Further, negotiated remedies are still possible, aiming to effectively bring infringements to an end. The remedy repertoire is also broadened through the use of CCPs as remedies ultimately aiming to prevent further infringements of competition law.

Regarding the potential criticisms named above, it could be argued that requiring a finding of an infringement as part of each case resolution mechanism in addition to the use of CCPs as remedies would significantly increase the administrative burden faced by the Commission. It is correct that this may be the case. However, with regard to findings of infringements, these are necessary to achieve the clarification objective, creating legal certainty for undertakings. Also, the incentive for the Commission to resolve cases without the finding of an infringement, it is submitted here, is likely to lead to cases not suited for Article 9 decisions to be resolved by this mechanism.\footnote{See section 4.3.1.3.} It is, further, not entirely certain that the requirement to establish an infringement will increase the administrative burden of the Commission, given that Article 9 decisions, lacking a finding of an infringement, have not been adopted significantly faster than Article 7 decisions.\footnote{See section 4.3.4.}
implementation and monitoring of CCPs, the Australian example shows that CCPs can be designed in a way that puts a great deal of responsibility on the undertaking.\textsuperscript{1170} Further, the Commission’s current practice of appointing monitoring trustees for commitments could be utilised to monitor CCP remedies.

It could also be argued that the cooperative resolution of cases would lead to few cases being appealed to the Court, which would, despite the finding of infringements, hinder the clarification objective from being fully achieved. If the Commission does not expect certain cases to be appealed to the Court, it may not feel that its decisions need to reach the standard that would be required by the Court. Thus, the proposed responsive case resolution system may not change the status quo.

Conversely, it could also be that the demands for cooperation on the part of the undertaking in the lower two tiers of the enforcement pyramid are set too high, leading to more resolutions of cases in the top tier of the pyramid and, probably, to more Court appeals. This would subsequently lead to an increased administrative burden for the Commission. In particular, undertakings may not be willing to offer effective remedies if the Commission wishes to include the finding of an infringement and a fine in its decision. In those situations, the Commission might end up with a suboptimal remedy or be forced to pursue a non-cooperative establishment of an infringement with an attached fine. While such a situation is obviously a possibility, the enforcement approach proposed in this study is designed to both give undertakings the opportunity to cooperate with the Commission, and to ensure that competition rules are applied correctly. An undertaking that does not believe it has infringed competition law could always appeal the Commission’s decision to the Court, even if it has cooperated with the Commission on the design of the remedy. It is also logical in a responsive case resolution system that an undertaking that is unwilling to cooperate should be pursued by more coercive means than a cooperative undertaking.

Lastly, it could be argued more generally that it is uncertain whether a responsive case resolution system would secure better compliance with competition rules in general. As submitted in chapter 3, even though the overall goal of competition law enforcement is to secure compliance with competition rules, this (overall) goal can be divided into more concrete objectives.\textsuperscript{1171} If the responsive case resolution system designed here succeeds in fulfilling these objectives more effectively than is currently the case, presumably, compliance will also be secured more effectively.

\textsuperscript{1170} See section 6.3.3.
\textsuperscript{1171} See section 3.1.
Arguments could also be made against applying an enforcement pyramid, questioning whether escalation up the pyramid would actually lead to better compliance. Specifically with regard to competition law enforcement, it can be argued that there are too few repeat interactions for the pyramid to have any effect. With regard to the general functioning of the enforcement pyramid, there is unfortunately a lack of empirical evidence in this area. Therefore, it is difficult to know with certainty whether the use of responsive regulation would lead to better compliance before it has been tested. Specifically in EU competition law enforcement, although there are few repeat interactions, there nevertheless appears to be a significant core of undertakings repeatedly infringing competition rules. A responsive case resolution system would allow the Commission to legitimately use very coercive resolution measures against these undertakings with reference to having tried more cooperative means first.

To conclude, a number of criticisms could be advanced against the responsive case resolution system designed here. These can essentially be grouped into two categories:

First, those that doubt whether the approach would work in the desired way as regards achieving objectives and influencing undertakings’ behaviour. While it is difficult to dispel such doubts with regard to a hypothetical proposal it is important to remember that securing compliance is a complex pursuit that is not only determined by authorities’ actions. A responsive case resolution system, as outlined in this study, is based on the findings regarding the current case resolution mechanisms currently used by the Commission and informed by responsive regulation theory. The design is based both on undertaking’s presumed motives for compliance and on the objectives set out in chapter 3 and has been extensively justified in this chapter. Thus, a differentiation must be made between the expected effects of responsive regulation and the actual effects on the aim of securing compliance. With regard to the theoretical effects, the approach proposed here can be expected to have the desired effects, while the actual effects depend on a number of factors beyond the use of responsive regulation in a certain regulatory context.

Second, some of the criticism above calls into question the regulatory enforcement choices made in the responsive case resolution system designed. This criticism reveals different preferences concerning the prioritisations of objectives. For example, the model designed here builds on giving preference to finding infringements over efficient case resolution. It also favours a prescriptive approach to the choice between case resolution mechanisms over

---

1172 Braithwaite (n 886) 512–14; Parker and Lehmann Nielsen, ‘Testing Responsive Regulation in Regulatory Enforcement’ (n 760) 394.

1173 See sections 1.3.4 and 4.1.3.3.
a more discretionary case-by-case approach. These are choices made in this study based on the assessment of the case resolution mechanisms currently employed. Thus, different choices with regard to the regulatory enforcement of infringements of Articles 101 and 102 can be imagined and would lead to a different approach to the resolution of cases in the responsive approach advocated here. Indeed, the debate underlying these different prioritisations is unlikely to disappear in the near future and can be regarded as beneficial for the development of competition law enforcement overall.\footnote{See, for example: Pablo Ibáñez Colomo, ‘Discretionalists vs Legalists in Competition Law’ (Institut d’études européennes, Brussels, 7 September 2018) <https://antitrustlair.files.wordpress.com/2018/09/discretionalists-vs-legalists-in-competition-law.pdf> accessed 13 November 2018.}

6.9.2 Necessary legislative changes

There are several legislative changes that would need to be made if the Commission were to implement the enforcement pyramid suggested above. These are outlined below. Further, the effects of these changes on undertakings’ legitimate expectations and the review of Commission decisions by the Court must be addressed.

With regard to Regulation 1/2003, no changes would appear to be necessary in theory. It could be argued that Article 9 should be removed, since it is not part of the enforcement pyramid designed above. However, this does not appear strictly necessary, as the Commission could simply decide to stop using Article 9 as a case resolution mechanism.

Concerning the implementation of the case resolution mechanisms suggested for the two lower tiers of the enforcement pyramid, it is not entirely clear whether legislative changes would be strictly necessary. Coates and Zulli argue that the precedent set in ARA would enable the Commission to accept CCPs as a remedy within the exception provided in paragraph 37 of the Fining Guidelines.\footnote{Coates and Zulli (n 948) 357–58.} However, the above analysis of the ARA case shows that the imposition of a ‘negotiated’ remedy via fine reductions, however convenient, is hazardous for the legitimacy of the Commission.\footnote{See section 5.6.2.} The regular use of the Fining Guidelines to reward cooperation by undertakings, whether it be for the suggestion of remedies, the provision of evidence or any other form of cooperation outside Article 7 of Regulation 1/2003 or Article 10a of Regulation 773/2004, would create significant legal uncertainty regarding many of the practical considerations named above. This uncertainty would concern the type remedies that could be made binding, the cooperation...
required regarding negotiated remedies, but also the reductions of fines granted for what type of cooperation. As a result, not only may responsive regulation not have the desired effect, namely improved compliance, but it may also lead to more appeals of Commission decisions. In an appeal situation, the Commission needs to show that it has complied with a stricter duty to state reasons where it has made use of paragraph 37 of the Fining Guidelines, departing from the usual methodology of calculating fines. In this regard, the Court stated in *Icap* that:

(...) [t]hose reasons must be all the more specific because paragraph 37 of the Guidelines simply makes a vague reference to “the particularities of a given case” and thus leaves the Commission a broad discretion where it decides to make an exceptional adjustment of basic amount of the fines to be imposed on the undertakings concerned. In such a case, the Commission’s respect for the rights guaranteed by the EU legal order in administrative procedures, including the obligation to state reasons, is of even more fundamental importance.

As Barbier de La Serre and Lagathu correctly point out, this reasoning by the Court can be traced back to the Court’s judgment in *Technische Universität München* regarding the duty to state reasons where it held that:

(...) the statement of reasons must disclose in a clear and unequivocable fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and to enable the Court to exercise its supervisory jurisdiction.

Thus, it appears hazardous to base the cooperative case resolution mechanisms suggested in this study on paragraph 37 of the Fining Guidelines. To avoid both legitimacy problems and more Court appeals, the cooperative case resolution mechanism based on the ARA case suggested in this chapter should be subject to a formal provision in Regulation 1/2003 or Regulation 773/2004. Such a provision could be placed either in the provision defining an ‘ordinary’ infringement decision, such as Article 7 of Regulation 1/2003. Or, it would be possible to introduce a specific provision for each of the tiers of the enforcement pyramid proposed above, as is the approach currently used for

---

1177 In this regard, see for example the reasoning in: Tom R Tyler, *Why People Obey the Law* (New edn, Princeton University Press 2006) 270–72.
1178 Case T-180/15 *Icap plc and Others v European Commission* (n 227) para 289.
cartel settlements in Article 10a of Regulation 443/2004. A concrete analogy can be drawn to the *ARA* case. A comparison of the requirements set out in the Settlement Notice and the submissions made in *ARA* are informative in this respect:

**Settlement Notice**

20. (...). The settlement submission(...) should contain:
(a) an acknowledgement in clear and unequivocal terms of the parties' liability for the infringement summarily described as regards its object, its possible implementation, the main facts, their legal qualification, including the party's role and the duration of their participation in the infringement in accordance with the results of the settlement discussions;
(b) an indication of the maximum amount of the fine the parties foresee to be imposed by the Commission and which the parties would accept in the framework of a settlement procedure;
(c) the parties' confirmation that, they have been sufficiently informed of the objections the Commission envisages raising against them and that they have been given sufficient opportunity to make their views known to the Commission;
(d) the parties' confirmation that, in view of the above, they do not envisage requesting access to the file or requesting to be heard again in an oral hearing, unless the Commission does not reflect their settlement submissions in the statement of objections and the decision;

**ARA**

(19) The Cooperation Submission contains:
(a) an acknowledgement in clear and unequivocal terms of *ARA*'s liability for the infringement of having negligently refused access to the essential household collection infrastructure summarily described as regards the main facts, their legal qualification and the duration of the infringement;
(b) an indication of the maximum amount of the fine it anticipates to be imposed by the Commission and which it would accept in the framework of cooperation;
(c) its confirmation that it has received the SO and the two LoF, that it has had full access to the Commission’s file at the time of the SO, that it has subsequently been granted sufficient opportunity to have access to the evidence supporting the Commission's objections and that it has been given sufficient opportunity to make its views known to the Commission;
(d) its agreement to receive the final Decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in English; and
(e) its acknowledgement that the divestiture of the part of the *Austrian household collection infrastructure which *ARA* owns is necessary and proportionate to effectively terminate the
Comparing these two texts, it is obvious that the settlement procedure used by the Commission when it adopted its decision in ARA has been a great source of inspiration. Taking into account the specificities of that case, the only significant addition to the settlement procedure is sub-point (e), the acknowledgement of the necessity and proportionality of the remedy made binding on ARA. Thus, taking the settlement procedure as a template for the cooperative case resolution mechanisms suggested in the lower two tiers of the enforcement pyramid, the legislative changes needed would relate to Regulation 773/2004, which is an implementing Regulation, making it easier for the Commission to make the necessary changes. Ideally, Article 10a and, consequently, the Settlement Notice, would be repealed. Subsequently, two new provisions outlining the case resolution mechanisms in the lower two tiers of the enforcement pyramid would be added. These two provisions should explicitly include the requirement of adopting a CCP as well as reference as to how compliance with this requirement would be monitored.

The previous practice of the Commission of adopting a guideline or notice to explain its policy choices, such as the Settlement Notice, would also be suitable for the responsive case resolution system proposed here. Such a notice would, for example, include details concerning the cooperation required to receive a reduction of the fine as well as regarding an eventual market. The Commission would also need to clarify its policy regarding the adoption or upgrade of CCPs.

Further, the Commission would need to repeal the Leniency Notice to the extent that the possibility to receive immunity from fines is removed and focus is on the detection of cartels ex officio and via complaints or whistleblowers. The Leniency Notice in its current form, where one undertaking

---

1182 ARA Foreclosure (n 150) para 19.
1183 Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 6) art 33.
1184 See section 6.5.4.
1185 See sections 6.3.2 and 6.5.4.
1186 European Commission, ‘Cartels: Anonymous Whistleblower Tool’ (n 187).
can receive full immunity from fines,\footnote{Commission Notice on immunity from fines and reduction of fines in cartel cases (n 27) para 21.} could not be sustained if undertakings who have not previously infringed competition law and who cooperate with the Commission were not fined. Such a possibility would remove any incentive of applying for immunity, at least for undertakings with no previous infringement record. With regard to the Leniency Notice’s provisions on the reduction of fines, these could \textit{mutatis mutandis} be used for cooperation on evidence suggested in this chapter.

With regard to the Fining Guidelines, the aggravating factor referring to recidivism would need to be broadened so as to include all repeat infringements of Articles 101 and 102 TFEU. This is to eliminate the problem already pointed out in chapter 4 with regard to the calculation of fines that are both retributive and deterrent.\footnote{See sections 4.1.2.8 and 6.5.3.3.} Further, this change aligns the criterion of infringement history with that of a repeat infringement in the Fining Guidelines.

The legislative changes outlined here can be summarised as follows:

<table>
<thead>
<tr>
<th>Regulation 1/2003</th>
<th>No changes necessary. Article 9 could be repealed if so desired.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regulation 773/2004</td>
<td>Introduction of two new provisions outlining the case resolution mechanisms in the lower two tiers of the enforcement pyramid. Article 10a should be repealed.</td>
</tr>
<tr>
<td>Notice on a Responsive Case Resolution System</td>
<td>To be issued. This Notice should, \textit{inter alia}, include information on the functioning of the enforcement pyramid, procedures for each tier of the pyramid, required cooperation and fine reductions.</td>
</tr>
<tr>
<td>Leniency Notice</td>
<td>Should be repealed. Provisions on fine reductions could be utilised in the Notice on a Responsive Case Resolution System.</td>
</tr>
<tr>
<td>Settlement Notice</td>
<td>Should be repealed.</td>
</tr>
<tr>
<td>Fining Guidelines</td>
<td>Amend the aggravating factor referring to recidivism to include all repeat infringements of Article 101 and 102 TFEU.</td>
</tr>
</tbody>
</table>
Table 3 Legislative changes necessary for a responsive case resolution system

What has not been addressed yet are the legal consequences that the publication of the responsive case resolution system proposed here would have for the Commission’s discretion when choosing what case resolution mechanism to employ in a given case. Currently, the Commission has a broad discretion in choosing the case resolution mechanism it deems most suitable to resolve a given case. However, the Commission has in some respects restricted its own discretion through the adoption of implementing legislation and soft law guidelines. As has been described earlier, soft law is not formally binding for third parties. However, the Commission binds itself with the soft law instruments it issues. It is thus likely that legitimate expectations would be created among undertakings regarding the case resolution mechanism to be used as well as the criteria to be fulfilled for a fine reduction should they become subject to a Commission investigation. However, there would probably be no such legitimate expectations created regarding the use of ‘informal settlements’ before the opening of proceedings, as no clear criteria for such a resolution have been set.

A question that may be asked in this connection is whether the fact that the majority of this policy would be communicated by way of soft law guidelines raises any concerns. Previously, the Court has allowed the Commission broad discretion when changing competition policy. It is possible that undertakings would doubt whether they would be able to trust the Commission’s soft law with regard to the responsive approach set out therein as the Court has previously allowed the Commission to apply its Fining Guidelines in a retroactive manner. However, fully introducing the responsive case resolution system proposed here in legally binding documents appears both difficult to implement and impractical as this would require numerous and detailed changes to Regulation 773/2004 that would not match

---

1189 Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri A/S (C-189/02 P), Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others (C-202/02 P), KE KELIT Kunststoffwerk GmbH (C-205/02 P), LR af 1998 A/S (C-206/02 P), Brugg Rohrsysteme GmbH (C-207/02 P), LR af 1998 (Deutschland) GmbH (C-208/02 P) and ABB Asea Brown Boveri Ltd (C-213/02 P) v Commission of the European Communities (n 140) para 211; See further: Ştefan (n 140) 185–187.

1190 See for example: Case T-329/01 Archer Daniels Midland Co. v Commission of the European Communities (n 260) paras 38-50; Case C-510/06 P Archer Daniels Midland Co. v Commission of the European Communities (n 259) paras 66-67.

1191 Case C-510/06 P Archer Daniels Midland Co. v Commission of the European Communities (n 259) paras 66-67.
the current nature of that legislative instrument. Rather, introducing the proposed case resolution mechanisms in the lower two tiers of the enforcement pyramid in an amendment of Regulation 773/2004 would give undertakings a basic understanding of the responsive approach to be used by the Commission. This would subsequently be complemented with soft law.

Besides the legitimate expectations potentially created by a responsive case resolution system, it is relevant to shortly address the extent to which the Commission decisions made under the proposed approach would be reviewable by the Court. According to Article 263 TFEU, a Commission decision can be reviewed by the Court if appealed by its addressee or a person directly and individually concerned by the decision. This is also the case for decisions where the undertaking addressed has cooperated with the Commission, but probably to a more limited extent. This issue has already been addressed with regard to negotiated remedies. With regard to the finding of an infringement, it appears difficult to contest such a finding if it is based on an undertaking’s admission. In the absence of case law concerning the lawfulness of a finding of an infringement based on a settlement, it remains to be seen whether the Court would in such cases adopt the same standard as in *Alrosa*, namely requiring that the Commission’s finding is *manifestly incorrect*.

6.10 Conclusions

The aim of this chapter has been to ‘translate’ research from regulatory enforcement to the sphere of case resolution mechanisms in EU competition law. More extensively, a prescriptive approach to the choice between case resolution mechanisms has been designed and assessed in the present chapter. The most prominent approach, responsive regulation, originally advanced by Ayres and Braithwaite was used as a basis for that design. However, that theory in itself had to be adapted to the particularities of the Commission’s enforcement of EU competition law which was not specifically designed to match responsive regulation.

To design a prescriptive approach based on the principles of responsive regulation, separate enforcement pyramids have been sketched for cartel type infringements of Article 101 TFEU, non-cartel type infringements of Article 101 TFEU and infringements of Article 102 TFEU. Separately, the issue of guidance has been addressed. Despite the differences between case types, the finding here is that it is actually possible to design a single enforcement

---

1192 See section 6.6.5.
1193 Case T-170/06 *Alrosa Company Ltd v Commission of the European Communities* (n 245) para 42.
pyramid for all of these case types by adjusting the case resolution mechanisms utilised. As a result, an enforcement pyramid with four tiers is designed, whereas the three upper tiers are to be used after proceedings are opened. The lowest tier aims to secure compliance by persuasion before proceedings are opened. The case resolution mechanisms in the three upper tiers all include the finding of an infringement. On the lower two of these three tiers, settlements as well as cooperation on remedies and evidence are included. Furthermore, these two tiers include the introduction/upgrade of a CCPs as a standard part. In these tiers, fines imposed on undertakings are reduced or removed under strictly defined circumstances.

The guiding aim when designing the responsive case resolution system designed here has been to consider what type of instrument should be employed against what type of infringement and what infringing undertaking, in order to reach the objective of bringing infringements to an end and secure compliance in the long run. While the objectives of punishing offenders and creating a basic deterrent effect have not been suspended, these have been given less priority in view of their limitations with regard to undertaking’s future behaviour. Concerning the prevention of future infringements, general deterrence has been supplemented by the introduction of CCPs into the case resolution mechanisms used against infringements of Article 101 and 102 TFEU. This measure will neither reach all undertakings subject to competition law nor prevent all future infringements. But, CCPs can be a useful complement to the deterrent effect created by law enforcement, especially for undertakings that are not essentially immoral calculators. It has in this chapter been extensively shown how CCPs can be employed as an accessory in competition authority’s regulatory enforcement.

If the current system of case resolution mechanisms could be viewed from two perspectives, one enforcement-oriented perspective and one regulation-oriented perspective, the approach developed in this chapter merges these two perspectives. In view of the findings of chapter 5, a division of case resolution mechanisms into two categories was not viable in any case. The contribution of the present chapter has been to suggest how different case resolution mechanisms for the resolution of different types of infringements of Articles 101 and 102 TFEU could be designed, taking the nature of the infringements, undertaking’s motives, constitutional restraints and the objectives outlined in chapter 3 into account. Furthermore, the responsive case resolution system provides a model of how the choice between these different case resolution mechanisms should be made.

It is evident that the responsive case resolution system could be criticised from various points of view. Much of this criticism has its basis in different views on how broad the margin of discretion afforded to a law enforcer should be and different prioritisations with regard to the objectives outlined in chapter
3. A prescriptive approach to the choice between case resolution mechanisms such as suggested in this chapter leaves less discretion to the Commission and thereby favours a view that compliance with Articles 101 and 102 TFEU should be pursued in a formalised manner. With regard to the prioritisations among the objectives made, for instance, a possibly higher investigatory burden is justified with the need to avoid suboptimal resolution of cases. In other words, different preferences and prioritisations would lead to a different enforcement approach than the one proposed here.

Overall, it has been shown that a responsive case resolution system could be implemented in EU competition law enforcement, subject to certain changes of legislation, also resolving some of the weaknesses of the current case-by-case approach with regard to the choice what case resolution mechanism should be employed in what case and thereby also aiming to improve the achievement of the objectives set out in chapter 3.
7 Concluding Analysis

This study began with a quote by Edward Thurlow on the impossibility of punishing soulless undertakings. As this study has shown, securing such corporate compliance is a complex and multi-faceted task that reaches far beyond the question of punishing undertakings. In this regard, the focus here has been on the case resolution mechanisms employed to secure compliance. For this purpose, four research questions were posed at the beginning of this study:

1. What are the objectives pursued by the Commission by the system of case resolution mechanisms used to enforce Articles 101 and 102 TFEU?
2. To what extent do the case resolution mechanisms used by the Commission reflect, pursue and reach their objectives?
3. Can viewing the different case resolution mechanisms through the lenses of regulatory enforcement styles provide new perspectives on and thereby improve our understanding of these mechanisms and the way they are currently employed by the Commission?
4. How might a system of case resolution mechanisms be designed based on responsive regulation theory with a view to securing better compliance with Articles 101 and 102 TFEU?

Importantly, this study has viewed the pursuit of compliance expressed in the system of case resolution mechanisms used against suspected infringements of Articles 101 and 102 TFEU through the lens of regulatory enforcement theory. Thereby, this study provides several new insights. Firstly, viewing the different case resolution mechanisms as regulatory enforcement styles provides a multi-faceted picture of case resolution mechanisms that does not only make reference to their formal design. Rather, case resolution mechanisms can for instance be viewed with reference to the assumptions they make about undertakings’ motives for compliance or how they are perceived by undertakings. Secondly, reference to regulatory enforcement theory and in particular to responsive regulation theory provides a framework within which it is possible for a law enforcer to take regard of undertaking’s motives for compliance when choosing how to resolve a case. Using insights from regulatory enforcement theory, it is argued here, may contribute to better compliance with Articles 101 and 102 TFEU.
This study shows that responsive regulation can be utilised in competition law enforcement, despite this not being the primary target of responsive regulation, which was originally developed for more traditional fields of regulation. However, as shown here, responsive regulation is a rather flexible theory that can be adjusted to the particular characteristics of a specific field of law. For example, in the design of the different enforcement pyramids, due regard was taken of the objectives of the current system of case resolution mechanisms as well as to the constitutional restraints applicable to EU competition law enforcement.

In addition, the responsive case resolution system proposed in this study addresses certain criticisms pertaining to whether responsive regulation takes due regard of the seriousness of different infringements and separate purposes of different instruments of law enforcement. These problems can, for example, be avoided by creating different enforcement pyramids for different types of law infringements and by leaving some discretion within the different enforcement instruments that allow enforcers to take account of the seriousness of different infringements. Further, certain tiers of the enforcement pyramid may be reserved for certain parts of an enforcement procedure. Admittedly, the responsive case resolution system proposed here departs from the model proposed by Ayres and Braithwaite on some points, but it is submitted here that the ‘spirit’ of responsive regulation is retained at the overall level.

On the basis of this study and its findings, a similar analysis as to the one carried out in this study could be performed with reference to the resolution of infringements of competition law in another jurisdiction with the aim of implementing a responsive approach to case resolution in that jurisdiction. Self-evidently, modifications would need to be made depending on the legal framework within which competition law is enforced in that jurisdiction, in particular with reference to whether competition law is enforced in an administrative or in a judicial model.

In the following sections, a summary of findings answering the research questions posed as well as a further analysis of these findings in the context of the broader themes running through this study are presented. Besides the

---

1194 See section 6.2.
1195 Compare: Braithwaite (n 886) 491–92.
1196 See section 6.2 and 6.4.
1197 See sections 6.4 and 6.6.3.
1198 See section 6.8
1199 See section 6.9.
1200 It can for example be noted that some NCAs in EU Member States, for example Sweden, retain a judicial system that requires the competition authority to prosecute undertakings in Court.
overarching theme of securing compliance, the examination conducted in this study relates to three further themes: the objectives pursued by the system of case resolution mechanisms, the design of such mechanisms and the choice of case resolution mechanism in any given case. These themes are analysed further below, and conclusions are also drawn based on the findings of this study. Finally, this study concludes with an outlook on future directions for research on the themes examined here.

7.1 Summary of findings

The answer to the first research question also sets out the framework for the analysis carried out throughout the rest of this study. The doctrinal legal analysis carried out in chapter 3 shows that the main objectives pursued by the system of case resolution mechanisms at the Commission’s disposal are: to bring infringements to an end, to punish and deter infringers, to prevent infringements and to clarify competition rules. These objectives shall be achieved in an effective and efficient manner.\textsuperscript{1201}

The above objectives are subsequently utilised to assess to what extent the case resolution mechanisms employed by the Commission, namely Article 7 decisions, cartel settlements and Article 9 decisions, meet their objectives. Given its nature, there is no simple answer to this second research question.\textsuperscript{1202} Rather, the findings that emerge from the assessment carried out in chapter 4 show a considerable variation between the degree to which the different objectives are reflected, pursued or achieved by the different case resolution mechanisms. The findings made also vary in their conclusiveness due to differences in the available studies and data where an attempt has been made to measure the fulfilment of objectives empirically. Deficiencies identified concerning the extent to which different case resolution mechanisms reflect, pursue or fulfil the relevant objectives can be traced back to different sources: Firstly, the Commission is constrained in the achievement of certain objectives, such as bringing infringements to an end, by the legal framework in Regulation 1/2003 and by the application of constitutional restraints.\textsuperscript{1203} Secondly, there are conceptual and/or practical problems associated with the fulfilment of certain objectives that render their realisation difficult, for example, deterring infringers and preventing infringements by the use of fines.\textsuperscript{1204} Thirdly, as different case resolution mechanisms are geared toward

\textsuperscript{1201} See sections 3.1 and 3.2.
\textsuperscript{1202} For a detailed summary of findings, see section 4.4.1.
\textsuperscript{1203} See section 4.1.1.1.
\textsuperscript{1204} See section 4.1.2.9 and 4.1.3.1.
different objectives, what type of case is resolved by what mechanism has an important impact on whether the relevant objectives can be fulfilled in any given case. The choice of case resolution mechanism may not be well suited to the characteristics of a case, creating obstacles to the fulfilment of the objectives.\textsuperscript{1205}

In this regard, the introduction of Article 9 decisions, and subsequently of cartel settlements, now allows the Commission to choose between two case resolution mechanisms in any given case. That ability and in particular the introduction of Article 9 decisions as a case resolution mechanism also open the possibility of considering the relevance of an adjacent field of research: regulatory enforcement theory. In regulatory enforcement theory, there is \textit{inter alia} research distinguishing different regulatory enforcement styles as well as research considering how enforcers should act in a situation where they have several different instruments to enforce the law at their disposal.\textsuperscript{1206} The challenge posed to enforcers in choosing between different enforcement styles with the aim of securing compliance with the law can be summarised in the question \textit{when to punish and when to persuade}.\textsuperscript{1207}

Considering the existing theory on regulatory enforcement styles, the \textit{third research question} requires an attempt to categorise different case resolution mechanisms in terms of different regulatory enforcement styles. Article 7 decisions, formally the most coercive instrument at the Commission’s disposal, can be used in an almost judicial, adversarial manner. However, the Commission can also use them in a very cooperative way if it chooses to.\textsuperscript{1208} Settlements allow less leeway with regard to the Commission’s conduct of the procedure, because that procedure is, for efficiency reasons, constrained by very specific requirements in this respect.\textsuperscript{1209} Article 9 decisions can be seen as a mechanism of enforced regulation, but the mix of self-regulation and state regulation present in this enforcement style can be perceived as both cooperative and coercive by undertakings.\textsuperscript{1210} This categorisation shows that while the different case resolution mechanisms can be conceptualised in terms of regulatory enforcement styles, it is difficult to place them on a clear-cut continuum between coercion and cooperation. The different mechanisms can indeed be used in different ways, and how coercive they are considered to be

\textsuperscript{1205} See sections 4.2.3, 4.3.2 and 4.3.3.1.
\textsuperscript{1206} See sections 5.1 and 6.
\textsuperscript{1207} See also section 6.1.
\textsuperscript{1208} See section 5.2
\textsuperscript{1209} See section 5.3
\textsuperscript{1210} See section 5.4
does not only depend on their attributes but also on, for example, undertakings’ motivations and perceptions.\textsuperscript{1211}

In view of these results, the \textit{fourth research question} relates to how a system of case resolution mechanisms could be designed on the basis of responsive regulation theory. A ‘responsive case resolution system’, as termed here requires amendments both to the legal framework currently governing the enforcement of Articles 101 and 102 TFEU as well as to the theory of responsive regulation.\textsuperscript{1212} A possible enforcement pyramid for case resolution mechanisms used against potential infringements of Articles 101 and 102 TFEU can subsequently be designed and assessed.

In basic terms, the responsive case resolution system as set out in this study entails the use of one enforcement pyramid for all types of infringements of Articles 101 and 102 TFEU.\textsuperscript{1213} That enforcement pyramid contains three tiers of case resolution mechanisms to be employed depending on the cooperation of the undertaking and its infringement history.\textsuperscript{1214} The lower two of these tiers are based on cooperation by undertakings and as such demand different types of cooperation, including the admission of an infringement, the negotiation of remedies, in particular the introduction of a CCP, and cooperation on evidence. In these tiers of the enforcement pyramid, no fine or a reduced fine is imposed.\textsuperscript{1215} In addition, the enforcement pyramid also includes a bottom tier to be used to persuade undertakings to comply with competition rules.\textsuperscript{1216}

The main aim of the presented model is to ensure that case resolution mechanisms are designed and allocated to cases so that they can actually fulfil the objectives set for the respective mechanism. In the proposed responsive case resolution system, there is an emphasis on the objectives of bringing infringements to an end, preventing infringement and clarifying competition rules. In the design of the different case resolution mechanisms, it is ensured that each mechanism relates to these objectives.\textsuperscript{1217} The criteria employed for choosing what case resolution mechanism to utilise relate to an undertaking’s motives for (non-)compliance, meaning that punishment and deterrence as objectives are only pursued in the upper tiers of the enforcement pyramid.\textsuperscript{1218} At the same time, the case resolution mechanisms lack elements identified as leading to suboptimal outcomes. Most notably, all case resolution mechanisms

\begin{itemize}
\item \textsuperscript{1211} See section 5.7.
\item \textsuperscript{1212} See section 6.2.
\item \textsuperscript{1213} See section 6.9.
\item \textsuperscript{1214} See sections 6.2.1 and 6.5.3.
\item \textsuperscript{1215} See sections 6.5.3.3 and 6.6.3.
\item \textsuperscript{1216} See section 6.8.
\item \textsuperscript{1217} See section 6.4.
\item \textsuperscript{1218} See section 6.5.3.
\end{itemize}
used once a case has officially been opened must include the finding of an infringement. This is to avoid remedies that are not directly related to or go beyond the competition problem at issue and to ensure the continual development of competition law, while still allowing cooperation on the design of remedies.\textsuperscript{1219}

The findings made in this study are further analysed below with regard to the broader themes touched by this study.

### 7.2 Securing compliance with EU competition law

As already submitted above, this study makes an important contribution to research on how compliance with the law can best be secured, both with regard to compliance with Articles 101 and 102 TFEU and with regard to competition rules more generally. This contribution stems from the regulatory enforcement perspective that has been adopted in this study.

What has been observed with regard to the current approach to the resolution of cases is a certain shift in how the Commission aims to secure compliance by undertakings. Previously, the resolution of cases where there was a suspected infringement of what are now Articles 101 and 102 TFEU was dominated by prohibitions of such conduct and the imposition of fines.\textsuperscript{1220} In other words, compliance was sought by means of proscriptive action. While the notifications of potentially anti-competitive agreements submitted provided an opportunity for the Commission to prescribe certain behaviour to undertakings, it has already been noted that most notifications provided to the Commission did not raise any actual competition concerns.\textsuperscript{1221} The shift in the approach now followed by the Commission can be identified based on three elements: the use of specific, prescriptive remedies, the use of cooperative case resolution mechanisms as well as the toolbox approach taken to the resolution of cases.\textsuperscript{1222}

Specific remedies that prescribe future conduct have mainly been used by the Commission in Article 9 decisions, but an indication that the Commission wishes to employ such remedies also in Article 7 decisions has been given by the introduction of the ‘cooperation framework’ first used in the \textit{ARA} case.\textsuperscript{1223}

Specific remedies aim to affect the future behaviour of an undertaking and

\begin{itemize}
\item \textsuperscript{1219} See sections 6.6.5 and 6.9.1.
\item \textsuperscript{1220} See: Regulation 17/62 First Regulation implementing Articles 85 and 86 of the Treaty (n 169) art 3.
\item \textsuperscript{1221} See section 2.2.1.
\item \textsuperscript{1222} See section 4.4.2.
\item \textsuperscript{1223} See section 5.6.2.
\end{itemize}
thus also aim to secure future compliance with competition rules. This is in contrast to the more traditional approach of securing compliance with competition rules which consist of the imposition of a cease-and-desist order and a fine on an undertaking found in infringement of Article 101 or 102 TFEU.\textsuperscript{1224} One approach prescribes certain actions while the other prescribes certain actions, but both aim to secure compliance. However, as shown in chapter 4, the Commission can be criticised both for the types of remedies it has made binding within the scope of Article 9 decisions and for the procedures used to negotiate such remedies.\textsuperscript{1225}

The use of cooperative case resolution mechanisms partly intertwines with the use of prescriptive remedies but also constitutes a shift in the approach to securing compliance in its own right. With regard to the conduct of the procedure leading to the adoption of an Article 9 decision, the adoption of specific remedies is dependent on cooperation by the undertaking. More generally, cooperative case resolution mechanisms rely on a certain type of cooperation by the undertaking to enable the adoption of a Commission decision. An underlying assumption that can be identified in these mechanisms is that undertakings agreeing to cooperate with the Commission actually wish to comply with competition rules. In cartel settlements, undertakings who admit an infringement are assumed to have ‘learned their lesson’ resulting in future compliance with Article 101 TFEU. In Article 9 decisions, it is assumed that undertakings that agree to change their behaviour in line with remedies that are binding, actually wish to comply with Article 101 or 102 TFEU in the future.\textsuperscript{1226}

A more general shift is that the formalisation of different case resolution mechanisms now offers the Commission a choice: what case resolution mechanism should be used in what case? That choice can be made based on different considerations. As shown in chapter 4, the use of different mechanisms may be more or less suited to the characteristics of different cases with a view to achieving the objectives pursued.\textsuperscript{1227} Further, different case resolution mechanisms may be matched to an undertaking’s motives for compliance.\textsuperscript{1228} While ‘amoral calculators’ may only be persuaded by the imposition of a deterrent fine, other undertakings may comply because they consider it to be the right thing to do.

However, the Commission does not currently appear to choose what case resolution mechanism to use in what case in a strategic manner that refers to either consideration outlined above. Rather, it would seem that the dominating

\textsuperscript{1224} See section 4.4.2.
\textsuperscript{1225} See sections 4.3.1.2 and 4.3.1.3.
\textsuperscript{1226} See sections 5.3 and 5.4.
\textsuperscript{1227} See sections 4.3.2 and 4.3.3.2.
\textsuperscript{1228} See sections 5.2, 5.3 and 5.4.
motivation for the Commission’s use of these mechanisms highlighted publicly is efficient enforcement. For instance, stated in paragraph 1 of the Settlement Notice:

The settlement procedure may allow the Commission to handle more cases with the same resources, thereby fostering the public interest in the Commission's delivery of effective and timely punishment, while increasing overall deterrence.\(^{1229}\)

Unfortunately, the findings in chapter 4 show that the Commission only partially achieves this efficiency objective, namely with regard to cartel settlements, but not with regard to Article 9 decisions.\(^{1230}\) Nevertheless, it should be underlined that the mere fact that a choice between case resolution mechanisms exists marks a shift in the approach taken to the resolution of cases towards a toolbox approach.\(^{1231}\)

Returning to Dunne’s distinction between competition law enforcement and regulation,\(^{1232}\) it is possible to observe that the use of different case resolution mechanisms against suspected infringement of Articles 101 and 102 TFEU exhibits at least two characteristics traditionally associated with regulation: the use of prescriptive remedies which also aim to ensure future compliance with competition rules.\(^{1233}\) Furthermore, a toolbox approach using several different enforcement instruments can be associated with research conducted in the field of regulatory enforcement, as shown in chapters 5 and 6. Thus, the resolution of suspected infringements of Articles 101 and 102 TFEU by the Commission is formally characterised by, on the one hand, retention of the traditional enforcement approach reflected in Article 7 decisions and, on the other hand, Article 9 decisions, that use elements more traditionally associated with regulation.

This two-dimensional view is complicated by the assessment made in chapter 5 showing that the different case resolution mechanisms can be utilised in different ways by the Commission, especially showing that Article 7 decisions can be used in a coercive or cooperative manner \textit{vis-à-vis} undertakings. This ambiguity present in the different case resolution mechanisms represents a problem in itself. It remains unclear what objectives are pursued in the

\(^{1229}\) 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 (n 26) para 1; See, for further examples: Case C-441/07 P \textit{European Commission v Alrosa Company Ltd} (n 232) para 35; Vestager (n 792).

\(^{1230}\) See sections 4.2.2 and 4.3.4.

\(^{1231}\) See section 5.

\(^{1232}\) Dunne, ‘Commitment Decisions in EU Competition Law’ (n 74) 411–13.

\(^{1233}\) See section 4.3.1.
resolution of an individual case and how compliance shall be achieved in that case. This problem can for example be illustrated by reference to different types of remedies that have previously been made binding in Article 9 decisions. On the one hand, very detailed remedies, such as in Samsung, may give the impression that compliance shall be achieved by dictating a certain conduct to undertakings. On the other hand, a remedy that is equivalent to a cease-and-desist order, such as in the e-Books cases, may give the impression that compliance is expected of the undertaking’s own accord. This situation creates a certain ambiguity in how Article 9 decisions should be perceived by undertakings which is in itself problematic because it deprives undertakings of foreseeability and may as a consequence have a negative effect on future compliance. The use of cooperative case resolution mechanisms such as Article 9 decisions also creates a related problem, namely that much needed guidance as to how to comply with Articles 101 and 102 TFEU may not be available.

To address the problems pointed out above, it is submitted here that a clearer connection should be established between the design of case resolution mechanisms, their objectives and the decision of what case resolution mechanism to choose in any given case. In other words, the resolution of cases should be conducted more transparently and strategically. Responsive regulation, as applied to the resolution of cases in chapter 6, provides an example of how the problems pointed out above can be resolved: Case resolution mechanisms shall be used in a strategic manner depending on the undertakings’ (presumed) motives and according to specific objectives. This structure creates more predictability and legal certainty in the resolution of cases as it allocates the different case resolution mechanisms to cases according to a previously set order.

As much as it would be desirable to present an ideal model of how compliance with EU competition law could be achieved by way of Commission enforcement, such a model is, and will probably remain, utopian. A likely scenario is that the pursuit of compliance will still be a question of trial-and-error. However, the regulatory enforcement perspective adopted here can help analyse and understand the advantages and disadvantages of different approaches to securing compliance as well as the trade-offs faced in choosing one approach over the other.

Moving on to more specific conclusions that can be drawn from this study, both the design and the choice of case resolution mechanism for resolving a

---

1234 See sections 4.3.1.3 and 4.3.2.
1235 Commitments in Samsung - Enforcement of UMTS standard essential patents (n 670).
1236 Commitments in E-Book MFNs and related matters (n 400); e-Books (n 683).
1237 See sections 4.3.1.3 and 4.3.3.3.
1238 See section 6.
particular case have an impact on whether and how the objectives pursued are met and therefore, also on the objective of securing compliance. Consequently, before considering conclusions that be drawn regarding the design of case resolution mechanisms and the choice between them further, the objectives that ought to be pursued in the resolution of cases of suspected infringements of Articles 101 and 102 TFEU must be discussed.

7.3 The objectives pursued in the resolution of cases

The assessment of the case resolution mechanisms currently used by the Commission on the basis of the objectives they shall fulfil conducted in chapter 4 allows a number of conclusions to be drawn.

Firstly, reliance on deterrence, both general and specific, to secure compliance is deeply flawed. Even though deterrence is one factor contributing to an undertaking’s compliance with the law, it is far from the only relevant factor.\(^{1239}\) A particular problem in this regard is the focus on the calculation of fines that reach a sufficient magnitude so as to act as a deterrent. Concerning undertakings that have infringed the law, the exact amount appears near impossible to calculate and concerning undertakings that have not (yet) infringed the law, the perceptions held by that undertaking rather than the exact amount of the fine are of importance.\(^{1240}\) Therefore, it is argued here that fines should retain their objective of preventing infringements, but attempts to arithmetically calculate the exact amount of the fine that acts as a specific deterrent appears misguided. Rather, it seems that more research on the functioning of general deterrence in competition law enforcement is needed to enable competition authorities to pursue the objective of deterrence on a more solid basis.\(^{1241}\)

In the calculation of fines for infringing undertakings, greater reliance should be placed on the retributive aim of fines. It appears to this author that retribution is a more suitable aim, both with regard to the practical calculation of fines, but also with regard to marking the culpability of different undertakings. For example, pursuing a retributive aim provides clear support for punishing repeat offenders more harshly, instead of being caught up, as in the case of deterrence, in the question of whether a fine is under- or over-deterrent to begin with.\(^{1242}\) As shown in chapter 4, the retributive aim is already reflected in the Commission’s current Fining Guidelines. In addition, it would

\(^{1239}\) See section 4.1.3.3.
\(^{1240}\) See sections 4.1.2.5 and 4.1.3.1.
\(^{1241}\) See further: Schell-Busey and others (n 551).
\(^{1242}\) See section 4.1.2.3.
not seem that pursuing retribution would inhibit the Commission’s ability to impose fines of the same magnitude as is the case today. Indeed, the principle of proportionality limiting the magnitude of a retributive fine is already considered by the 10% fine ceiling established in Article 23(2) of Regulation 1/2003.1243

Furthermore, focusing on efficiency with reference to cooperative case resolution mechanisms does not pay due regard to securing compliance in a cooperative manner, but rather directs attention back to the Commission’s capacity to resolve cases and thereby back to deterrence as illustrated by the quote from the Settlement Notice above.1244 Therefore, it is argued here, case resolution mechanisms that include elements of cooperation should also emphasise the aim of resolving cases in a cooperative spirit. Consequently, the assumption that undertakings participating in such a mechanism intend to comply with competition rules in the future should also be underlined.

As has already been argued when explaining the reasoning behind the responsive case resolution system sketched in chapter 6, focus should be placed on bringing infringements to an end, preventing their occurrence in the future and clarifying competition rules so as to ensure the existence of a coherent system of competition rules.1245 In a nutshell, bringing infringements to an end and preventing new infringements are the objectives most closely related to the overarching objective of securing compliance. Given the limited functionality of fines as a means of bringing infringements to an end and of preventing new infringements, it is important to consider how infringements can be brought to an end and prevented by other means. The coherence of competition rules is seen as important in this context because it contributes to legal certainty and therefore both to an undertaking’s ability to comply of their own accord and to the legitimacy of EU competition law enforcement overall.

The above-named objectives can be achieved in different ways, which is why they are analysed further in the section concerning the design of case resolution mechanisms below.

### 7.4 The design of case resolution mechanisms

The question of how different case resolution mechanisms should be designed has been viewed from different angles in this study: firstly, as regards different  

---

1243 See section 4.1.2.2.
1244 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 (n 26) para 1; See, for further examples: Case C-441/07 P European Commission v Alrosa Company Ltd (n 232) para 35; Vestager (n 792).
1245 See section 6.4.
objectives as well as constitutional restraints and secondly, as regards the regulatory enforcement style employed in a case resolution mechanism, also considering undertaking’s motives for compliance. For the purposes of this study, different types of cooperation between the Commission and undertakings have examined in particular. In addition, given that is has been argued above that the objectives of bringing infringements to an end and preventing new infringements should be underlined, these objectives deserve more consideration with regard to their implications on the design of case resolution mechanisms.

7.4.1 Balancing objectives and constitutional restraints

When considering the design of a case resolution mechanism whose application is meant to reach certain objectives, it is essential to bear in mind that certain objectives may in combination delimit the extent to which they can be achieved by a case resolution mechanism. In other words, the achievement of one objective may hamper the achievement of the other. Further, constitutional restraints may limit the extent to which certain objectives can be achieved.

The clearest illustration of these delimitations can be found in Article 7 decisions. On the one hand, the Commission may impose substantial fines on undertakings as a punishment. However, this power is dependent on the finding of an infringement on the part of the Commission. On the other hand, the fact that the Commission does find an infringement in Article 7 decisions also delimits its power to impose specific remedies, because the remedies imposed by the Commission must be both proportionate and in compliance with the freedom to conduct a business. Therefore, the Commission is prevented from bringing infringements to an end by specific remedies in most Article 7 decisions. Thus, even though the objective of bringing infringements to an end is not in direct contradiction to the objective of punishing infringers, their parallel achievement requires that a case resolution mechanism contain certain elements that delimit the achievement of the objective of bringing infringements to an end.

Considering Article 9 decisions, the Commission has far broader discretion as to the remedies that can be made binding and thereby more flexibility regarding how a potential infringement should be ended, potentially also preventing further infringements. However, as a trade-off, the Commission

---

1246 See section 4.1.1.1.
cannot pursue the objective of punishing or deterring an undertaking in an Article 9 decision, given that no infringement has been established.\textsuperscript{1247}

With regard to clarifying competition rules, the trade-off between Article 7 decisions and Article 9 decisions has already been elaborated upon above.\textsuperscript{1248} The basic requirement for a case resolution mechanism pursuing this objective is that it contains the finding of an infringement. Therefore, this objective cannot be achieved where cases are resolved without such a finding, or may even be perverted, as the analysis on Article 9 decisions shows.\textsuperscript{1249}

To resolve the above-mentioned trade-offs, the balance struck between the different objectives in chapter 6, is to combine fines as a means of punishment and the design of specific remedies with the assistance of undertakings as a way of bringing infringements to an end.\textsuperscript{1250} The mechanisms proposed as part of the enforcement pyramid above aim to reach a compromise between Article 7 decisions and Article 9 decisions, just as the Commission appears to do in its ‘cooperation framework’.\textsuperscript{1251} On the one hand, the finding of an infringement would enable the Commission to impose fines and to ensure that competition law is further developed. On the other hand, the cooperation provided by the undertaking would allow somewhat more discretion in the design of remedies, even though that discretion cannot be considered to stretch as far as in Article 9 decisions, because the principle of proportionality would still need to be observed.\textsuperscript{1252}

In sum, when designing case resolution mechanisms, it is necessary to consider trade-offs naturally following the combination of different objectives and their interaction with constitutional restraints. Yet, this is not to say that the design of one ‘perfect’ case resolution mechanism should be the aim. Rather, different case resolution mechanisms taking account of different motives for compliance should be designed. In this context, it is important to discuss how the different motives should be taken into account and how the Commission should cooperate with undertakings.

7.4.2 Cooperation and an undertaking’s motives for compliance

Responsive regulation, as explained, is based on the assumption that most undertakings wish to comply with the law. Underlying this assumption are a number of compliance theories seeking to explain why undertakings comply

\textsuperscript{1247} See section 4.3.1
\textsuperscript{1248} See section 4.3.3.
\textsuperscript{1249} See section 4.3.3.2.
\textsuperscript{1250} See section 6.5.1 and 6.6.1.
\textsuperscript{1251} See section 5.6.
\textsuperscript{1252} See section 6.6.5.
with the law. One of the theories presented above suggests that undertakings act out of calculation. Others refer to social as well as moral reasons for complying with the law. Furthermore, some undertakings may not comply due to ignorance.\footnote{\textsuperscript{1253} See section 1.3.4.}

As has already been observed above, Article 9 decisions and cartel settlements can already be said to include underlying assumptions as to an undertaking’s motives for compliance. These case resolution mechanisms are based at least in part on the assumption that the undertaking in question wishes to comply with competition rules.\footnote{\textsuperscript{1254} See sections 5.3 and 5.4.} However, securing compliance does not appear to be the main focus of how the Commission conceives these mechanisms, at least not from what can be gleaned from public statements. Rather, focus is on procedural efficiency.\footnote{\textsuperscript{1255} 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 (n 26) para 1; See, for further examples: Case C-441/07 P \textit{European Commission v Alrosa Company Ltd} (n 232) para 35; Vestager (n 792).}

What is argued here is that case resolution mechanisms should more clearly relate to different regulatory enforcement styles in the sense of whether they rely predominantly on cooperation or coercion. In this way they would also relate to different motives for compliance. Accepting that undertakings may infringe competition rules for other reasons than ‘amoral calculation’, it appears logical that undertakings with no previous history of infringements that also wish to cooperate with the Commission should not be subject to a coercive resolution of their case. Rather, they should be granted the ‘benefit of doubt’ and a cooperative resolution of the case should be pursued. From the perspective of the enforcer, such a resolution of the case shall induce future compliance, considering that an undertaking that has understood its mistake is more likely to comply than one that has simply been scared by a fine that may or may not act as a deterrent.

A question that can be raised in this regard is how the cooperation between enforcer and undertaking should be carried out in a credible manner, in particular given the superior bargaining power of the enforcer. As observed with regard to Article 9 decisions, a law enforcer such as the Commission can misuse that power by securing disproportionate cooperation from undertakings, for example, in the form of disproportionate commitments.\footnote{\textsuperscript{1256} See section 4.3.1.2.} Arguably, the \textit{Microsoft (tying)} case was such an instance.\footnote{\textsuperscript{1257} See section 4.3.1.3.} From the findings of this study, it is not possible to draw concrete conclusions regarding

\footnote{See section 1.3.4.}
\footnote{See sections 5.3 and 5.4.}
\footnote{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 (n 26) para 1; See, for further examples: Case C-441/07 P \textit{European Commission v Alrosa Company Ltd} (n 232) para 35; Vestager (n 792).}
\footnote{See section 4.3.1.2.}
\footnote{See section 4.3.1.3.}
an optimal procedure for completely avoiding the risk of disproportionate remedies as a result of negotiations. A partial solution suggested in chapter 6 is to require that each Commission decision resolving a case includes the finding of an infringement.1258 However, in reality, the form of cooperation is likely to be subject to ‘regulatory conversations’ where the concrete interaction between the Commission and the undertaking will vary from case to case.1259

Exactly how cooperation should be conducted by the Commission should thus be subjected to further consideration. Indeed, there also exists significant research on the influence of procedural justice and legitimacy and on the objective of securing compliance with the law.1260 In this context, it is also pertinent to point out that legal culture and institutional design have a role to play in shaping outcomes of a legal framework aiming to secure compliance with a given law.1261

7.4.3 Bringing infringements to an end and preventing infringements

Above, it has been argued that preference should be given to the objectives of bringing infringements to an end and the prevention of infringements. In the responsive case resolution system sketched in chapter 6, these objectives are pursued with negotiated remedies and CCPs, supplemented by fines in cases of undertakings which appear to be ‘amoral calculators’. Reliance on negotiated remedies and CCPs as a means of bringing infringements to an end and preventing infringements also indicates that the assumption is that undertakings wish to comply with the law.1262 It is worth noting here that it was suggested in chapter 6 that CCPs could be used as a remedy aimed at preventing infringements, which is why they are included in the ambit of ‘negotiated remedies’ below.1263

1258 See section 6.6.4.
1259 See section 5.2.
1260 See, for example: Tyler (n 1177); Simonsen (n 19); Mike Hough, Jonathan Jackson and Ben Bradford, ‘Legitimacy, Trust and Compliance: An Empirical Test of Procedural Justice Theory Using the European Social Survey’ in Justice Tankebe and Alison Liebling (eds), Legitimacy and Criminal Justice: an International Exploration (Oxford University Press 2014).
1262 See section 6.6.4.
1263 See section 6.5.4.
As already noted, concerning the use of negotiated remedies, there is a lively discourse in legal doctrine concerning the question of whether such remedies exhibit a ‘regulatory’ tendency. Some commentators consider that certain remedies imposed within the scope of Article 9 decisions have been disproportionate in relation to the competition concerns held by the Commission and/or that they pursue goals of sector-specific regulation. In this regard, it must be held here that viewing the enforcement of EU competition law through a regulatory enforcement lens as done in this study does not suggest that EU competition law should be construed as sector-specific regulation in substance. As Ibáñez Colomo aptly puts it:

‘criticism about the application of competition law as regulation are not formal but substantive ones and have to do with the risk that the law is instrumentalised to meet the objectives of sector-specific regimes.’

Consequently, the concern that is relevant for the purposes of this study is that the negotiation of remedies may result in remedies that do not address the competition problem at hand in a proportionate manner. This is especially important to point out, given that this study proposes that the Commission take inspiration from the field of regulatory enforcement in its enforcement of competition rules. However, it is important to distinguish between the desire to introduce sector-specific regulation in a field of law, which is certainly not the proposal here, and the desire to learn from an adjacent field of research, such as regulatory enforcement theory, as undertaken in this study.

In this context it should be pointed out that CCPs have in this study been proposed as a remedy that would be aimed at preventing further infringements, without any direct relation to the specific infringement committed. In this sense, the enforcement of EU competition law would become more ‘regulatory’. But, it is submitted here, in a positive sense. Indeed, the use of CCPs is here considered a valuable instrument that can be added to the

1264 See section 4.3.1.3 and 6.6.5
1265 See further: Larouche (n 1126) 285ff; Pablo Ibáñez Colomo, ‘On the Application of Competition Law as Regulation: Elements for a Theory’ (n 74) 270; Giorgio Monti, ‘Managing the Intersection of Utilities Regulation and EC Competition Law’ (n 1126) 21–22.
1266 Ibáñez Colomo, ‘On the Application of Competition Law as Regulation: Elements for a Theory’ (n 74) 277.
1267 It must be noted in this regard that the use of the terms ‘regulatory competition law’ and ‘regulatory remedies’ are not unproblematic given that there is no universally agreed definition of the term ‘regulation’ as shown in section 1.3.3. See also: Dunne, *Competition Law and Economic Regulation: Making and Managing Markets* (n 25) 69–70; von Kalben (n 79) 205–09.
enforcement of competition rules without for that sake transforming competition law into sector specific regulation.

As regards other negotiated remedies in the responsive case resolution system sketched out in this study, the requirement of finding an infringement in each case shall prevent the imposition of disproportionate remedies. However, as an appeal to the Court is unlikely where both the Commission and the undertaking agree on a remedy. In this situation, it is difficult to ensure that remedies actually stand in proper relation to the infringement found. As long as there are negotiated remedies, it is impossible to exclude this potential problem fully. Conversely, as the assessment of ‘ordinary’ Article 7 decisions shows, hardly allowing for the imposition of specific remedies is not an ideal solution either, since this would leave the Commission with the imposition of fines as the only way of securing compliance.

Where a cooperative case resolution mechanism also requires the establishment of an infringement, it would remain to be seen whether undertakings would agree to cooperate with the Commission to the extent that would avoid appeals to the Court. It appears doubtful, at least to this author, that undertakings would agree to disproportionate remedies if it is unclear whether the behaviour they are engaging in is in fact contrary to Article 101 or 102 TFEU. In that situation, an open question is how careful the Commission would become regarding opening proceedings unless it is reasonably certain that it can prove an infringement. It might be argued that if the Commission is too careful with regard to the cases where it chooses to open proceedings, this may lead to under-enforcement. However, there is nothing forcing the Commission to adopt a restrictive attitude to the opening of proceedings. After all, it may always drop a case where it cannot establish an infringement. When proceedings have been opened in a case where the Commission finds that no infringement has in fact been committed, an Article 10 decision may be adopted. Such a result would indeed be in line with what was suggested in chapter 6, namely that the Commission should also provide positive case-specific guidance where possible.

7.5 The choice of case resolution mechanism

Turning from the design of case resolution mechanisms to the choice of case resolution mechanism, it would seem that the adoption of Regulation 1/2003...
paved the way for the formalisation of several distinct case resolution mechanisms, namely Article 7 decisions, cartel settlements and Article 9 decisions. However, it appears that the use of these mechanisms is largely determined on a case-by-case basis, rather than with the use of a strategic approach in order to meet the objectives that can be achieved with these mechanisms.1272 The proposed course of action in this study is to consider how the case resolution mechanisms available could be employed in a more strategic manner. A model of how such a prescriptive approach to the choice of case resolution mechanisms could be designed is presented in this study. In this regard, the general considerations that can be taken into account when deciding whether to adopt a case-by-case or a prescriptive approach to the choice of case resolution mechanism can be elaborated further.1273

The Commission generally enjoys a broad margin of discretion when choosing what case resolution mechanism to employ in any given case. At the same time, the Commission can and has restricted that discretion, mainly by introducing soft law instruments. For example, the Settlement Notice states that settlements shall only be used for cartel cases.1274 Yet, the application of the new ‘cooperation framework’ in cases such as ARA shows that a settlement-like procedure can be used by the Commission also for non-cartel cases.1275 In effect, the Commission has circumvented the limitations it set up for itself with regard to settlements.

Overall, the approach the Commission currently uses for the resolution of suspected infringements of Articles 101 and 102 TFEU is characterised by the Commission’s discretion. In other words, focus is on what mechanism the Commission considers most suitable in any given case. Unfortunately, as also shown in this study, the choice of case resolution mechanism does not always appear to be driven by the characteristics of that case and by the objectives that can be achieved by the choice of case resolution mechanism. Rather, in some cases, the pursuit of a certain mechanism appears to serve the aim of simply resolving a case. This tendency can be identified in particular with regard to Article 9 decisions. With regard to Google Search, for instance, it can be argued that the Commission’s attempt to resolve the case with an Article 9 decision in three rounds was at least partially driven by uncertainty.

1272 See section 4.4.
1273 Indeed, it can be observed that the question of discretionary versus prescriptive enforcement of competition law also appears more broadly in scholarly commentary. See: Ibáñez Colomo, ‘Discretionalists vs Legalists in Competition Law’ (n 1174).
1274 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 (n 26) para 1.
1275 ARA Foreclosure (n 150); European Commission, ‘Cooperation - FAQ’ (n 789).
as to whether an Article 7 decision would withstand Court review. Indeed, it has been argued above that the Google Search case should have been pursued using an Article 7 decision from the outset due to the novel elements of the case. These findings also reveal a clear disadvantage in a discretionary approach to case resolution: While the Commission may choose the most appropriate mechanism in any given case, it can be led astray, especially if some mechanisms, such as Article 9 decisions, are associated with powerful incentives (no need to prove an infringement, no Court review, broad discretion to accept commitments) that are difficult to resist.

In contrast, the responsive case resolution system outlined here generally restricts the Commission to one case resolution mechanism to be used in any given case, unless the undertaking does not cooperate as expected. The model set out in chapter 6 thus represents a prescriptive approach to competition law enforcement as compared to the more discretionalist, case-by-case approach currently applied. The aim of that approach is to limit the choices that can be made by the Commission in favour of aiming to achieve the objectives set out in chapter 3 in a more targeted manner. A natural disadvantage of such an approach is that the most appropriate mechanism with regard to the characteristics of a case may not always be chosen. Any system of law enforcement that prescribes choices to be made by the enforcer before the fact will fail to foresee all possible circumstances that may occur in real-life situations. For example, in the responsive case resolution system designed above, it is possible that an identified infringement would have been easy to bring to an end with a specific remedy that could have been agreed upon in a cooperative procedure. However, such a case may nevertheless be resolved at the top of the enforcement pyramid because the undertaking is unwilling to cooperate with the Commission if an infringement is also established.

This study thus prioritises foreseeability over flexibility concerning the question of how the case resolution mechanism to be employed in any given case should be chosen. Logically, following on from this choice, is the question of what the criteria for choosing a case resolution mechanism should be.

As explained at length in chapter 6, responsive regulation proposes that the choice of the enforcement instrument to be used by a law enforcer should be based on the cooperation offered by the undertaking, assuming that most undertakings wish to comply. Such an approach has also been supported here in arguing that there should be a connection between the design of a case resolution mechanism and the motives of an undertaking. In chapter 6, the

1276 See section 5.6.1.
1277 Hart, The Concept of Law (n 249) 130–31. Compare also section 2.3.3.
1278 See section 6.1.
cooperation of an undertaking and its infringement history have been proposed as criteria. However, the design of the case resolution mechanisms has also considered the nature of infringements of Articles 101 and 102 TFEU and thereby the seriousness of these infringements.

Basing the choice of case resolution mechanism on the (presumed) motives held by an undertaking raises the question of how an authority may discern such a motive. Complicating this challenge is the empirical evidence cited above showing that undertakings do not only hold a single motive for compliance, but that they pursue mixed motives. Furthermore, it is important to remember that the assumption with regard to undertakings is that they seek to make profits, meaning that a calculating component is unlikely to be fully absent from their motives.

Consequently, cooperation by an undertaking is not a certain indicator of an undertaking’s motive. A case in point is the ARA case which shows that the acknowledgement of an infringement does not guarantee that an undertaking actually considers that it has done something wrong. While no generalisations should be made with regard to the motivations of undertakings when cooperating on cases with the Commission, this example goes to show that it is impossible to discern the motives of undertakings by viewing their cooperation alone. In chapter 6, it has been suggested that an undertaking’s motive may in part be discerned by its willingness to adopt a CCP. An undertaking that is unwilling to comply may not either want to invest the time, effort and money necessary to implement a CCP.

Responsive regulation solves this dilemma by beginning with the assumption that undertakings wish to comply, escalating up the enforcement pyramid if the enforcement authority is not met by a cooperative attitude. However, as already noted, there is little empirical work on the question of how well responsive regulation works in practice, in particular when used in the context of the enforcement of competition law.

Given this rather unequivocal conclusion, the question of when law enforcers should choose what style of regulatory enforcement should be illuminated from additional perspectives.

1279 See section 1.3.4.
1280 Wollmann (n 866) 168–169.
1281 See section 6.5.3.2.
1282 See section 6.1.
7.6 The next bit of the compliance puzzle: legitimacy

As already pointed out, there is unlikely to be a perfect answer to the question of how compliance with Articles 101 and 102 TFEU can be secured. However, this study has pointed out a number of deficiencies in the Commission’s current approach and submitted proposals that can improve compliance with Articles 101 and 102 TFEU. This study has focused on the instruments, in other words the case resolution mechanisms, which are used to secure compliance. To provide a more complete and multi-faceted answer to the question of how compliance can be secured, this question should be studied from additional perspectives.

One perspective on securing compliance that has already been touched upon in the present study appears particularly promising with regard to further research. This relates to the question of how the legitimacy of enforcement affects compliance with the law. Firstly, the Commission has been criticised in this study for resolving certain cases in a manner that may not be legitimate. Secondly, Braithwaite considers that responsive regulation, given its pyramidal enforcement structure, will be perceived as ‘fairer’ and therefore as more legitimate than other enforcement approaches. However, it has not been explored in depth here what impact legitimacy of legal rules or procedures has on the objective of securing compliance.

Legitimacy is generally divided into normative and empirical legitimacy, the former with regard to whether certain objective criteria for legitimacy are fulfilled and the latter viewing legitimacy ‘as a matter of fact’ or as perceived by a specific target group. There are different suggestions in the academic discourse as to the factors that influence empirical legitimacy. Tyler contends that compliance with the law hinges to a large degree on procedural justice, which he considers the central element of legitimacy. He finds that the subjects of law comply more readily with laws if the latter are enforced by way of just procedures. Parker, specifically researching the enforcement of competition law, contends that the legitimacy of authority enforcement is

1284 See section 5.6.2.
1285 Braithwaite (n 886) 486–87; See also Tyler (n 1177) 168–69.
1287 Tyler (n 1177) 161–63.
1288 ibid 165.
hampered if the substance of the rules is ambiguous or contested by businesses.\footnote{Parker, ‘Effective and Legitimate Enforcement of Competition Law: A Riddle Wrapped in a Mystery Inside an Enigma?’ (n 567); See also: Simonsson (n 19).} Thus, there appears to be different, complementary, sources of empirical legitimacy. As Hough et al. point out, the criteria that define empirical legitimacy must be linked to that of normative legitimacy, as an assessment of legitimacy needs to take both aspects of legitimacy into account.\footnote{Hough, Jackson and Bradford (n 1260) 330–31.}

As shown in this study, how a competition authority resolves suspected competition law infringements is an important factor concerning whether overall compliance can be secured, both with regard to the design of case resolution mechanisms and the choice of case resolution mechanism in any given case. However, it may be possible to shed more light on the question of how compliance can be secured by exploring if and how considerations of legitimacy impact compliance with Articles 101 and 102 TFEU. The underlying question is whether and to what extent legitimacy impacts compliance with EU competition law. In this context it can be inquired what factors impact whether legal rules and their enforcement are perceived legitimate. Such relevant factors may \textit{inter alia} be the design of legal rules, procedures and institutional arrangements.

\footnote{Parker, ‘Effective and Legitimate Enforcement of Competition Law: A Riddle Wrapped in a Mystery Inside an Enigma?’ (n 567); See also: Simonsson (n 19).}
\footnote{Hough, Jackson and Bradford (n 1260) 330–31.}
Sammanfattning

Den centrala frågan i denna avhandling är hur Europeiska Kommissionen (kommissionen) kan säkerställa företags efterlevnad av artiklarna 101 och 102 i Fördraget om Europeiska unionens funktionssätt (FEUF). Artiklarna 101 och 102 FEUF, som förbjuder konkurrensbegränsningar på unionens inre marknad, utgör grunden för EU:s konkurrenslagstiftning. Medan artikel 101 FEUF omfattar konkurrensbegränsande avtal, tillämpas artikel 102 FEUF huvudsakligen på ensidiga konkurrensbegränsningar genom missbruk av ett företags dominerande ställning.

Överträdelser av artiklarna 101 och 102 i FEUF orsakar betydande skador på EU:s ekonomi och drabbar såväl företag som konsumenter. Karteller beräknas till exempel höja priserna på de produkter som omfattas av en kartell med mellan 20 och 30 procent jämfört med vad som istället varit konkurrenskraftiga priser.1 Att förebygga konkurrensbegränsningar och se till att konkurrensreglerna får genomslag är därför en viktig uppgift som kommissionen utför.

Trots intensifierad tillämpning av artiklarna 101 och 102 i FEUF och ständigt stigande böter för överträdelser upptäcker kommissionen regelbundet nya otillåtna konkurrensbegränsningar, vilket tyder på låg grad av efterlevnad.2 Detta aktualiserar frågan om kommissionens tillämpning av Artiklarna 101 och 102 FEUF är ändamålsenlig för att uppnå en tillfredsställande efterlevnad av artiklarna 101 och 102 i FEUF. För att svara på den frågan analyser avhandlingen de förfaranden som kommissionen har till sitt förfogande för att hantera misstänkta överträdelser av artikel 101 eller 102 i FEUF.

Eftersom denna avhandling använder termen ”förfarande” på ett särskilt sätt, är det viktigt att termen förklaras från första början. De förfaranden som är av intresse här är de beslutsvägar som kommissionen använder för att fatta beslut i ärenden där kommissionen anser att en överträdelse av artikel 101 eller 102

---


Syfte och forskningsfrågor

Hur konkurrensmyndigheter, såsom kommissionen, kan säkerställa att företag följer konkurrensreglerna är en komplex fråga som kan undersökas ur olika infallsvinklar och med utgångspunkt i olika vetenskapliga discipliner. Den föreliggande avhandlingen närmar sig frågan om att säkerställa regel制订levnad genom att fokusera på de förfaranden som kommissionen använder vid tillämpningen av artiklarna 101 och 102 i FEUF. Avhandlingens syfte är att kartlägga den nuvarande utformningen av de förfaranden som kommissionen tillämpar och att bedöma om dessa förfaranden återspeglar, eftersträvar och uppnår målsättningen om att säkerställa efterlevnad av artiklarna 101 och 102 i FEUF. Denna avhandling syftar vidare till att undersöka om det är möjligt att identifiera potentiella förbättringar i utformningen av förfarandena.

Fyra forskningsfrågor konkretiserar de ovan angivna syftena:

1. Vilka mål förväntas de förfaranden som kommissionen använder för att tillämpa artiklarna 101 och 102 FEUF uppnå?
2. I vilken utsträckning återspeglar, följer och uppnår de förfaranden som kommissionen använder de förväntade målen?
3. I vilken grad kan de olika förfarandena utvärderas i ljuset av olika typer av regleringsstilar och kan en sådan utvärdering ge nya perspektiv på och

---

förbättra vår förståelse av dessa förfaranden samt deras nuvarande och potentiella användning av kommissionen?

4. Hur kan ett system av förfaranden baserat på teorin om följsam reglering (*responsive regulation*) utformas på ett sätt som tar sikte på att förbättra efterlevnad av artiklarna 101 och 102 FEUF?

Avhandlingens analytiska del är uppdelad i fyra kapitel (kapitel 3-6), där varje kapitel var för sig besvarar en av de forskningsfrågorna som presenterats ovan.

**Metod**

Avhandlingens ämne är i huvudsak rättsvetenskapligt. Metoden som används består emellertid inte enbart av en etablerad juridisk metod. Istället använder avhandlingen sig av ett antal metoder som är specifikt anpassade för att bäst kunna besvara forskningsfrågorna. I vissa delar bygger denna avhandling på forskningsrön som genererats inom andra forskningsdiscipliner, särskilt inom ekonomi, sociologi, kriminologi och statsvetenskap. Användning av forskningsrön från andra vetenskapliga discipliner än juridik ställer krav på att en juridiker kan anpassa sig till de vuxna problem och frågor. Särskilt viktigt i användningen av forskningsresultat från andra vetenskapliga discipliner är att hitta relevant material för att besvara frågan som ställs, att utvärdera kvalitén av materialet som hämtats samt att på ett rättvisande sätt ”översätta” resultaten till den juridiska kontexten.

Den första forskningsfrågan, rörande vilka mål som förväntas uppnås av förfarandena kan besvaras genom att använda rättsdogmatisk metod. För att finna förfarandens syfte (*telos*) analyseras olika rättskällor såsom EU-fördraget, lagstiftning, praxis från EU-domstolen, uttalanden från kommissionen samt relevant doktrin.

Att besvara den andra forskningsfrågan kräver en utvärdering av de olika förfaranden i relation till de mål som fastställts under den första forskningsfrågan. Eftersom dessa mål skiljer från varandra, kräver utvärderingen av olika mål också skilda ansats och metod. Medan vissa mål går att utvärdera med rättsdogmatisk metod, har andra mål definerats med utgångspunkt i andra vetenskapliga discipliner. När målen utgår från andra vetenskapliga discipliner än juridik, använder sig denna avhandling av forskningsresultat från dessa discipliner samt av tillgängliga statistiska data.

Den tredje forskningsfrågan behandlas genom att kategorisera de olika förfaranden i enlighet med vilken typ av regleringsstil de tillhör. Olika

---

regleringsstilar har utvecklats inom teoribildningar om reglering och regelefterlevnad. För att besvara frågan krävs det att teorierna som har bildats om varje respektive regleringsstil ”översätts” till den juridiska kontexten av tillämpningen av konkurrensreglerna med hänsyn till, exempelvis, terminologi och användningssätt.

I den fjärde forskningsfrågan undersöks om och i sådant fall hur en särskild regleringsmodell – så kallad följsam reglering7 – skulle kunna användas i tillämpningen av artiklarna 101 och 102 FEUF. Följsam reglering är en regleringsmodell som baseras på dialog och samarbete mellan företag och regleringsmyndigheter. För att kunna besvara den fjärde forskningsfrågan krävs en undersökning av följsam reglering som teori är applicerbar inom ramen för det gällande regelverket som för närvarande styr tillämpningen av artiklarna 101 och 102 FEUF. Detta syftar till att avgöra i vilken grad teorin om följsam reglering skulle kunna användas för tillämpningen av artiklarna 101 och 102 FEUF och till att identifiera vilka modifikationer som behöver göras för att applicera följsam reglering.

Resultat

Svaret på den första forskningsfrågan - vilka mål som förväntas uppnås inom ramen för de olika förfarandena som kommissionen tillämpar vid misstänkta överträdelser av artikel 101 eller 102 FEUF - utgör ramverket för analysen i de efterföljande delarna av avhandlingen. Avhandlingen identifierar följande mål: att överträdelser ska upphöra, att straffa och avskräcka företag som begär överträdelser, att förebygga överträdelser och att klargöra innebörd av konkurrensreglerna. Utöver att tillämpningen av de enskilda förfarandena bör särskilja måluppfyllelse, ska förfarandena även genomföras på ett processeffektivt sätt. Vidare måste relevanta konstitutionella begränsningar beaktas, särskilt principerna om likabehandling, rättssäkerhet, proportionalitet och grundläggande rättigheter.

Med hänsyn till den andra forskningsfrågan kommer avhandlingen fram till följande resultat: För det första, vad gäller artikel 7-beslut, finner avhandlingen att kommissionen har begränsat utrymme för att införa specifika åtgärder med syfte att säkerställa att överträdelser upphör. Att straffa företag som har begått överträdelser genom böter grundas både på straffteorier om vedergällning samt teorier om särskild prevention (dvs. att böter ska ha en avskräckande effekt). Att beräkna böternas storlek med syfte att dessa ska ha en avskräckande effekt är dock svårt, givet de många antaganden och uppskattningar som måste göras i en sådan beräkning. Vidare identifieras

7 Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (Oxford University Press 1992).
vissa motsättningar inom den etablerade ekonomiska teorin som tillämpas för att beräkna avskräckande böter. Att förebygga framtida överträdelser av företag är ett mål som delvis kan uppnås genom den avskräckande effekten av böter, men kommissionen borde ta hänsyn till fler medel som kan förebygga överträdelser.

För det andra finner avhandlingén att kartellförlökningar uppnår högre processuell effektivitet jämfört med artikel 7-beslut. Denna effektivitet har emellertid inte lett till att kommissionen har avslutat fler kartellärenden sett till det totala antalet ärenden som kommissionen avslutat. Kartellförlökningar som blandas med ”vanliga” artikel 7-beslut (så-kallade hybridförfaranden) kan vidare komplicera förfarandet för kommissionens del, eftersom särskild hänsyn då måste tas till rättigheter för de företag i kartellen som inte är inblandade i förlökningen.

För det tredje finner avhandlingén att artikel 9-beslut i bästa fall kan leda till åtaganden som effektivt undanröjer kommissionens misstankar om möjliga överträdelser av artiklarna 101 och 102 i FEUF. Förfarandet som leder till åtaganden har emellertid vissa svagheter som kan vara ett hinder för att det tillämpas på ett effektivt sätt. Vidare kan användningen av artikel 9-beslut vara ett hinder för att målet att klargöra konkurrensreglerna ska kunna uppnås när överträdelsen består av nya beteenden eller grundas i nya skadetortor. Artikel 9-förfarandet är, i motsats till förlökningar, inte mer processeffektivt än artikel 7-beslut, åtminstone med avseende på den tid det tar att avsluta förfarandet.

Generellt måste understyckas att alla förfaranden vare sig kan eller är avsedda att uppnå alla mål. Det förfarande som kommissionen väljer för att avgöra ett ärende har emellertid en betydande inverkan på de mål som kan uppnås i det enskilda ärendet. Om kommissionen väljer förfaranden som inte lämpar sig för enskilda ärenden finns det en risk ändamålen inte uppnås på ett övergripande plan.

De resultat som sammanfattats ovan visar att det finns behov att undersöka förfarandena som används av kommissionen från andra forskningsperspektiv för att få djupare insikter i hur efterlevnad av artiklarna 101 och 102 TFEU kan säkerställas. Avhandling undersöker därför kommissionens förfaranden utifrån ett regleringsperspektiv. Detta är lämpligt eftersom förfarandena som kommissionen tillämpar upvisar vissa kännetecken som traditionellt förknippas med reglering, framförallt användningen av åtaganden som reglerar företags framtida beteende. Vidare behandlar avhandlingen frågan om hur regleringsmyndigheter ska välja mellan flera olika förfaranden för att säkerställa företags regelefterlevnad, en fråga som behandlas ingående inom regleringsteori.

Därför undersöker den tredje forskningsfrågan i vilken mån de olika förfarandena kan kategoriseras i enlighet med olika regleringsstilar. Artikel 7-beslut är ett förfarande som kan användas på varierande sätt. Artikel 7-beslut
kan användas på ett mycket tvingande sätt, men kommissionen kan också använda förlikningar, inom ramen för ett artikel 7-förfarande, i samarbete med företaget under utredning. Förlikningar ska utföras på ett kooperativt sätt i samarbete med företaget. Samtidigt medger förlikningar mindre utrymme för kommissionen att variera förfarandet, eftersom förlikningsförfarandet av effektivitetsskäl ställer väldigt specifika krav på både kommissionen och företaget under utredning.

Artikel 9-beslut kan betraktas som ett förfarande som blandar självreglering och offentlig reglering. Som sådant har artikel 9-beslut stor potential för att uppnå målen med konkurrenslagstiftningen på ett flexibelt sätt. Den kan emellertid också ställa till problem för både kommissionen (p.g.a. asymmetrisk information) och företag (p.g.a. asymmetrisk förhandlingsstyrka).

Vad som kan observeras är att kommissionen för närvarande sällan använder andra åtgärder än böter för att förebygga nya överträdelser. Exemplet är att det möjligt för kommissionen att ge vägledning till företag om hur konkurrensreglerna ska tillämpas, exempelvis genom artikel 10-beslut, men detta förfarande har kommissionen aldrig använt. Inte heller använder kommissionen medel som syftar till självreglering, såsom efterlevnadsprogram (corporate compliance programs).

Med hänsyn till såväl målen som de processuella ramarna för de befintliga förfarandena undersöker avhandlingen i den fjärde forskningsfrågan hur ett systematiskt sätt att välja och tillämpa de olika förfarandena skulle kunna utformas. Teorin som ligger till grund för detta system betecknas som ”följsam reglering” (responsive regulation). Teorin för följsam reglering på samarbete mellan företag och regleringsmyndighet och på att regleringstillämpning sker inom en hierarkiskt uppbyggd så-kallad ”tillämpningspyramid”. Tanken bakom tillämpningspyramiden är att hanteringen av ärenden ska anpassas efter företags motivering att följa regelverk, under antagandet att företag inte bara är motiverade av vinstmaximering, utan att de också är motiverade av moral, gruppträck eller oförstånd. Den lägsta nivån av pyramiden består av åtgärder som bygger på samförstånd och kan exempelvis bestå av informerande åtgärder. Ju högre upp i pyramiden en myndighet rör sig, desto mer tillämpas tvingande åtgärder. Teorin är att de flesta företag kommer att välja efterlevnad i de lägre nivåerna och att tillämpningen bara behöver bli succesivt mer tvingande om företaget inte följer lagen på eget beväg.  

Att implementera en ansats som bygger på följsam reglering i kommissionens förfaranden kräver att den underliggande teorin anpassas något. Dessa anpassningar är nödvändiga för att säkerställa att EU:s grundläggande principer och rättigheter tas i beaktande. Vidare ska de mål som ställts upp i

8 ibid 35–37.
svaret till den första forskningsfrågan beaktas i utformningen av följsam reglering. I detta avseende förespråkar denna avhandling att fokus flyttas delvis bort från straff och avskräckning till målen att överträdelser ska upphöra och att framtida överträdelser ska förebyggas samt att konkurrensreglerna ska klargöras och vidareutvecklas. På grundval av detta utvecklas ett följsamt system för förfarandena, som bygger på olika tillämpningspyramider för kartellmål, överträdelser av artikel 101 FEUF som inte är karteller, samt överträdelser av artikel 102 FEUF. Valet av vilket förfarande som används i varje ärende kommer att bestämmas av ett företags tidigare historia av överträdelser samt av deras samarbetsvilja gentemot kommissionen.


Tillämpningspyramiderna för överträdelser av artikel 101 FEUF som inte är karteller och överträdelser av artikel 102 i FEUF är identiska. Dessa inkluderar också tre nivåer vars åtgärder är i stort sett samma som för tillämpningspyramiden i kartellärenden. Förutom kravet på att introducera ett efterlevnadsprogram, så inkluderar de nedre två nivåerna också samarbete om utformningen av specifika åtgärder för att överträdelsen ska upphöra. Det konstateras att det är möjligt att sammanföra dessa olika tillämpningspyramider i en enda pyramid som kan användas för alla typer av överträdelser av artiklarna 101 och 102 FEUF.

Tillämpningspyramiden som beskrivits ovan förutsätter att ett ärende redan har initierats. Kommissionen undersöker dock vanligtvis ärenden innan ett beslutsförfarande formellt inleits, för att fastställa att det föreligger en tillräcklig misstanke om en överträdelse. Förslaget i denna avhandling är att ytterligare en nivå kan läggas till nederst i tillämpningspyramiden då kommissionen i undantagsfall informellt kan avgöra sådana ärenden med företag, exempelvis i fall då ett problematiskt beteende snabbt och enkelt kan åtgärdas i samarbete med företaget. Vidare bör kommissionen, när det gäller individuell vägledning, överväga att utfärda sådan vägledning där det finns
verklig rättsosäkerhet gällande om vissa beteenden är förenliga med konkurrensreglerna eller inte.

Avslutningsvis konstaterar avhandlingen att det inte finns ett perfekt sätt som säkerställer företagens efterlevnad av artiklarna 101 och 102 FEUF. Denna avhandling identifierar emellertid vissa svagheter i de förfaranden som kommissionen för tillfället använder för att säkra regelefterlevnad. Avhandlingen använder sig av regleringsteori för att påvisa fördelar och nackdelar angående utformningen av olika förfaranden och förbättringsmöjligheter. Slutligen förespråkar avhandlingen även ett systematiskt tillvägagångssätt för valet av förfarande för att fatta beslut i ett ärende som baseras på teorin om följsam reglering. Detta syftar till att säkerställa att de relevanta mål som förfarandet strävar efter kan uppnås. Vidare ska förfarandena vara anpassade till företags vilja att samarbeta och incitament för regelefterlevnad.
Tables of Materials

Treaties, Legislation and Other Official Documents

**Treaties**

- General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 187 (GATT 1947)
- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

**EU Regulations and Directives**

- Regulation 17/62 First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204
- Commission Regulation 773/2004/EC, of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L 123/18


Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11/3

Commission Notices and Guidelines

Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] OJ C 101/5

Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases [2004] OJ C 101/6


Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C 101/81

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

Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/17


Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C 208/6

Other Documents from the Commission

Policy Documents and Reports


**Annual Reports on Competition Policy**


321
Press Releases


Speeches


Other


National Legislation

Australia

Competition and Consumer Act 2010

Germany

Gesetz gegen Wettbewerbsbeschränkungen (GWB)

Gesetz über Ordnungswidrigkeiten (OWiG)

Documents from National Competition Authorities

Australia


Canada

France


United Kingdom


Other Documents


Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17

Rules of Procedure of the General Court [2015] OJ L 105/1

Cases

Court of Justice of the European Union

Joined cases 56/64 and 58/64 Établissements Consten SàRL and Grundig-VerkaufsgmbH v Commission of the European Economic Community EU:C:1966:41

Case 48/69 Imperial Chemical Industries Ltd v Commission of the European Communities EU:C:1972:70


Joined cases 6/73 and 7/73 Istituto Chemioterapico Italiano S.pA and Commercial Solvents Corporation v Commission of the European Communities EU:C:1974:18

Joined cases 117/76 and 16/77 Albert Ruckdeschel & Co and Hansa-Lagerhaus Ströh & Co v Hauptzollamt Hamburg-St Annen and Diamalt AG v Hauptzollamt Itzehoe EU:C:1977:160

Joined cases 100 to 103/80 SA Musique Diffusion française and others v Commission of the European Communities EU:C:1983:158

Case 322/81 NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities EU:C:1983:313


Case C-62/86 AKZO Chemie BV v Commission of the European Communities EU:C:1991:286

Case C-322/88 Salvatore Grimaldi v Fonds des maladies professionnelles EU:C:1989:646

Case C-269/90 Technische Universität München v Hauptzollamt München-Mitte EU:C:1991:438

Case C-303/90 French Republic v Commission of the European Communities EU:C:1991:424

Joined cases C-241/91 P and C-242/91 P Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities (Magill) EU:C:1995:98

Case C-49/92 P Commission of the European Communities v Anic Partecipazioni SpA EU:C:1999:356

Case C-7/97 Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG EU:C:1998:569

Case C-119/97 Union française de l’express (Ufex), formerly Syndicat français de l’express international (SFEI), DHL International and Service CRIE v Commission of the European Communities and May Courier EU:C:1999:116
Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P
Dansk Rørindustri A/S (C-189/02 P), Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others (C-202/02 P), KE KELIT Kunststoffwerk GmbH (C-205/02 P), LR af 1998 A/S (C-206/02 P), Brugg Rohrsysteme GmbH (C-207/02 P), LR af 1998 (Deutschland) GmbH (C-208/02 P) and ABB Asea Brown Boveri Ltd (C-213/02 P) v Commission of the European Communities
EU:C:2005:408

Case C-289/04 P Showa Denko KK v Commission of the European Communities
EU:C:2006:431

Case C-3/06 P Groupe Danone v Commission of the European Communities
EU:C:2007:88

Case C-510/06 P Archer Daniels Midland Co v Commission of the European Communities
EU:C:2009:166

Case C-441/07 P European Commission v Alrosa Company Ltd
EU:C:2010:377

Case C-201/08 Plantanol GmbH & Co KG v Hauptzollamt Darmstadt
EU:C:2009:539

Case C-280/08 P Deutsche Telekom v Commission
EU:C:2010:603

Case C-209/10 Post Danmark A/S v Konkurrencerådet
EU:C:2012:172

Case C-389/10 P KME Germany AG, KME France SAS and KME Italy SpA v European Commission
EU:C:2011:816

Joined cases C-628/10 P and C-14/11 P Alliance One International Inc and Standard Commercial Tobacco Co Inc v European Commission and European Commission v Alliance One International Inc and Others
EU:C:2012:479

Case C-89/11 P EON Energie AG v European Commission
EU:C:2012:738

Case C-226/11 Expedia Inc v Autorité de la concurrence and Others
EU:C:2012:795

Case C-283/11 Sky Österreich GmbH v Österreichischer Rundfunk
EU:C:2013:28

Case C-508/11 P ENI SpA v European Commission
EU:C:2013:289

Case C-83/13 Fonnship A/S v Svenska Transportarbetareförbundet and Facket för Service och Kommunikation (SEKO) and Svenska Transportarbetareförbundet v Fonnship A/S
EU:C:2014:201

Case C-194/14 AG-Treuhand AG v European Commission
EU:C:2015:717

Case C-413/14 P Intel Corporation v European Commission
EU:C:2017:632

Case C-411/15 P Timab Industries and CFPR v European Commission
EU:C:2017:11

Case C-547/16 Gasorba SL and Others v Repsol Comercial de Productos Petrolíferos SA
EU:C:2017:891
General Court

Case T-24/90 Automec Srl v Commission of the European Communities EU:T:1992:97

Case T-69/91 Georgios Peroulakis v Commission of the European Communities EU:T:1993:16


Case T-86/95 Compagnie générale maritime and Others v Commission of the European Communities EU:T:2002:50

Case T-57/01 Solvay SA v European Commission EU:T:2009:519

Case T-66/01 Imperial Chemical Industries Ltd v European Commission EU:T:2010:255

Case T-203/01 Manufacture française des pneumatiques Michelin v Commission of the European Communities EU:T:2003:250

Case T-329/01 Archer Daniels Midland Co v Commission of the European Communities EU:T:2006:268

Case T-38/02 Groupe Danone v Commission of the European Communities EU:T:2005:367


Case T-13/03 Nintendo Co, Ltd and Nintendo of Europe GmbH v Commission of the European Communities EU:T:2009:131

Case T-53/03 BPB plc v Commission of the European Communities EU:T:2008:254

Case T-347/03 Eugénio Branco, Lda v Commission of the European Communities EU:T:2005:265


Case T-122/04 Outokumpu Oyj and Luvata Oy v Commission of the European Communities EU:T:2009:141

Case T-201/04 Microsoft Corp v Commission of the European Communities EU:T:2007:289

Case T-201/04 R Order of the President of the Court of First Instance of 22 December 2004 in Microsoft Corp v Commission of the European Communities EU:T:2004:372


Case T-38/05 Agroexpansión, SA v European Commission EU:T:2011:585
Case T-446/05 Amann & Söhne GmbH & Co KG and Cousin Filterie SAS v European Commission EU:T:2010:165

Case T-155/06 Tomra Systems ASA and Others v European Commission EU:T:2010:370

Case T-170/06 Alrosa Company Ltd v Commission of the European Communities EU:T:2007:220


Case T-110/07 Siemens AG v European Commission EU:T:2011:68


Case T-491/07 RENV Groupement des cartes bancaires (CB) v European Commission EU:T:2016:379

Case T-442/08 International Confederation of Societies of Authors and Composers (CISAC) v European Commission EU:T:2013:188

Case T-146/09 Parker ITR Srl and Parker-Hannifin Corp v European Commission EU:T:2013:258

Case T-286/09 Intel Corp v European Commission EU:T:2014:547


Case T-456/10 Timab Industries and Cie financière et de participations Roullier (CFPR) v European Commission EU:T:2015:296

Case T-76/14 Morningstar v Commission EU:T:2016:481

Case T-95/15 Printeos, SA and Others v European Commission EU:T:2016:722

Case T-180/15 Icap plc and Others v European Commission EU:T:2017:795


Advocate General Opinions

Opinion of AG van Gerven in Case C-159/90 The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others EU:C:1991:378
Opinion of AG Wahl in Case C-413/14 P Intel Corp v European Commission
EU:C:2016:788

Commission Decisions


Microsoft (Decision regarding trustees (establishment)) (Case COMP/37.792) Commission Decision C(2005) 2988 final, not published

Microsoft (Decision regarding trustees (repeal)) (Case COMP/37.792) Commission Decision of 04 March 2009, not published


Microsoft (imposition of periodic penalty payment) (Case COMP/37.792 Microsoft) Commission Decision C(2005) 4420 final, not published


European Court of Human Rights

A Menarini Diagnostics v Italy (app no 43509/08) ECtHR Judgment of 27 September 2011

National Courts

Germany

Sächsischer Holzstoff (RG 04.02.1897, RGZ 38, 155)

National Competition Authorities

Australia

Jordan Tatum Enterprises Pty Ltd - s87B undertaking (2007) D07/72952
Standard White Cabs Limited - s87B undertaking (2014) D14/139369

Sweden

Konkurrensverkets beslut av den 15 April 2015, Bookingdotcom (dnr 596/2013)

Germany

BKartA, 22 December 2015, B9-121/13 (Booking)
Bibliography

Literature


Ayres I and Braithwaite J, Responsive Regulation: Transcending the Deregulation Debate (Oxford University Press 1992)


Balasingham B, ‘Reconciling Effectiveness and Fairness in the EU Leniency Policy’ (DPhil Thesis, King’s College London 2016)

Barak A, Proportionality: Constitutional Rights and Their Limitations (Cambridge University Press 2012)


Bentham J, An Introduction to the Principles of Morals and Legislation (Clarendon 1879)


——, ‘The Development of Risk-Based Regulation in Financial Services: Just “Modelling Through”?’ in Julia Black, Martin Lodge and Mark Thatcher (eds), Regulatory Innovation: a Comparative Analysis (Edward Elgar 2005)


Christie N, Limits to Pain (Universitetsforlaget 1981)


Coglianese C and Mendelson E, ‘Meta-Regulation and Self-Regulation’ in Robert Baldwin, Martin Cave and Martin Lodge (eds), The Oxford Handbook of Regulation (Oxford University Press 2010)


Craig PP, EU Administrative Law (2nd edn, Oxford University Press 2012)

Crane DA, Regulation, Adjudication, and Administration (Oxford University Press 2011)


Duff A and Garland D, A Reader on Punishment (Oxford University Press 1994)


Edward G. Carmines and Richard A. Zeller, Reliability and Validity Assessment (Sage 1979)


Erp J van, ‘Naming and Shaming in Regulatory Enforcement’ in Christine Parker and Vibeke Lehmann Nielsen (eds), Explaining Compliance: Business Responses to Regulation (Edward Elgar 2011)


Forrester IS, ‘Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures’ (2009) 34 European Law Review 817


Gunningham N, ‘Strategizing Compliance and Enforcement: Responsive Regulation and Beyond’ in Christine Parker and Vibeke Lehmann Nielsen (eds), Explaining Compliance: Business Responses to Regulation (Edward Elgar 2011)

——, Grabosky PN and Sinclair D, Smart Regulation: Designing Environmental Policy (Clarendon 1998)


Haines F, Corporate Regulation: Beyond ‘Punish or Persuade’ (Clarendon 1997)


——, The Concept of Law (3rd edn, Oxford University Press 2012)


Hawkins K, Environment and Enforcement: Regulation and the Social Definition of Pollution (Clarendon 1984)


Heise DR, Surveying Cultures: Discovering Shared Conceptions and Sentiments (John Wiley & Sons 2010)


Hirsch A von, Censure and Sanctions (Clarendon 1993)


Hodges C, Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics (Hart 2015)


Hörnle T, Straftheorien (Mohr Siebeck 2011)


Hutter BM, Compliance: Regulation and Environment (Clarendon 1997)


——, The Shaping of EU Competition Law (Cambridge University Press 2018)


Kagan RA, ‘Regulatory Enforcement’ in David H Rosenbloom and Richard D Schwartz (eds), Handbook of Regulation and Administrative Law (Taylor & Francis 1994)


Larouche P, *Competition Law and Regulation in European Telecommunications* (Hart 2000)


Maher I, ‘Regulating Competition’ in Christine Parker and others (eds), *Regulating Law* (Oxford University Press 2004)


Marvão C, ‘The EU Leniency Programme and Recidivism’ (2016) 48 Review of Industrial Organization 1


Ogus A, Regulation: Legal Form and Economic Theory (Clarendon 1994)


—— and Lehmann Nielsen V (eds), Explaining Compliance: Business Responses to Regulation (Edward Elgar 2011)

Paternoster R, ‘How Much Do We Really Know about Criminal Deterrence’ (2010) 100 Journal of Criminal Law and Criminology 765


Poynder J, Literary Extracts, vol 1 (John Hatchard & Son 1844)


Rubini L, Microsoft on Trial: Legal and Economic Analysis of a Transatlantic Antitrust Case (Edward Elgar 2010)


Savigny FC von, System des Heutigen Römischen Rechts, vol 1 (Veit 1840)

Schell-Busey N and others, ‘What Works?’ (2016) 15 Criminology & Public Policy 387

Schinkel MP, ‘Effective Cartel Enforcement in Europe’ (2007) 30 World Competition 539

Schücking W, Die Organisation der Welt (A Kröner 1909)


——, H and Patel KK, ‘EU Competition Law in Historical Context: Continuity and Change’ in Heike Schweitzer and Kiran Klaus Patel (eds), The Historical Foundations of EU Competition Law (Oxford University Press 2013)


<https://campbellcollaboration.org/media/k2/attachments/Simpson_Corporate_Crime_Review.pdf> accessed 22 October 2018


Sinclair D, ‘Self-Regulation versus Command and Control - Beyond False Dichotomies’ (1997) 19 Law & Policy 529

Smits JM, The Mind and Method of the Legal Academic (Edward Elgar 2012)


Ştefan O, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union* (Kluwer Law International 2013)


Tombs S and Whyte D, ‘The Myths and Realities of Deterrence in Workplace Safety Regulation’ (2013) 53 The British Journal of Criminology 746


Tsoulfidis L, *Competing Schools of Economic Thought* (Springer 2009)


Vesterdorf B, ‘Theories of Self-Preferred and Duty to Deal - Two Sides of the Same Coin?’ (2015) 1 Competition Law & Policy Debate 4


Vranken J, ‘Exciting Times for Legal Scholarship’ (2012) 2 Law and Method 42


Whish R and Bailey D, Competition Law (9th edn, Oxford University Press 2018)


——, ‘Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003’ (2006) 29 World Competition 345


——, ‘Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis’ (2012) 35 World Competition 5

——, ‘Antitrust Compliance Programmes & Optimal Antitrust Enforcement’ (2013) 1 Journal of Antitrust Enforcement 52


——, ‘Government by Publicity Management: Sunlight or Spin?’ [2005] Public Law 360

Zweigert K and Kötz H, Introduction to Comparative Law (Tony Weir tr, Oxford University Press 2011)

Other


Wagner von Papp F, ‘How to Prevent Irreperable Harm to the Digital Economy’ (12th ASCOLA Conference, Stockholm, 15 June 2017) on file with the author
Between Enforcement and Regulation

A Study of the System of Case Resolution Mechanisms Used by the European Commission in the Enforcement of Articles 101 and 102 TFEU

Katharina Voss

Doctoral Thesis in European Law at Stockholm University, Sweden 2019

Department of Law

ISBN 978-91-7797-570-0