7. Competition law remedies in Europe

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> The most important thing to say [about the law of remedies] is that there is no law of remedies[1]

I. INTRODUCTION

Competition law remedies have recently become the focus of academic scholars with a number of publications dedicated to this topic in the United States (US)[2] and in the European Union (EU).[3] The *Microsoft* litigation was the catalyst of this evolution, as designing adequate remedies constituted one of the most controversial aspects of the case in Europe and the US.[4] Commitment decisions in the EU have also generated a lot of

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[1] Wright, C.A. (1955), 'The Law of Remedies as a Social Institution', *U Detroit L Rev*, **18**, 376.

[2] See, the extensive bibliography by Fox, E. and P. Sirkis. (2005), 'Antitrust Remedies – Selected Bibliography and Annotations', *American Antitrust Institute Working Paper No. 06-01*, http://ssrn.com/abstract=1103601 (last accessed 19 June 2013); Barnett, T.O. (2009), 'Section 2: Remedies: What to do after Catching the Tiger by the Tail', *Antitrust Law Journal*, **76** (1), 31–41; Cavanagh, E. (2005), 'Antitrust Remedies Revisited', *Oregon Law Review*, **84**, 147–226; Weber-Waller, S. (2008), 'Remedies for Monopolization and Abuse of Dominance: A Little History and Some Thoughts on Disclosure and Access' http://www.biicl.org/files/3412_antitrust_marathon_(weber_weller).pdf, (last accessed 19 June 2013).

[3] See, Hellström, P., F., Maier-Rigaud and D. Wenzel Bulst (2009), 'Remedies in European Antitrust Law', *Antitrust Law Journal*, **76** (1), 43–63; Lianos I. (2012), 'Competition Law Remedies: in Search of a Theory', in Lianos I. and D. Sokol (eds), *The Global Limits of Competition Law*, Stanford: Stanford University Press, pp. 177–204; Sullivan E.T. (2003), 'Antitrust Remedies in the E.U. and U.S.: Advancing a Standard of Proportionality', *Antitrust Bulletin*, **48** (2), 377–425.

[4] See, Rubini L. (ed.) (2010), *Microsoft on Trial: Legal and Economic Analysis of a Transatlantic Antitrust Case*, Cheltenham, UK and Northampton,

debate on the proportionality of remedial action, in view of the differing standards of judicial scrutiny to which these are subject to, in comparison to infringement decisions.[5] Finally, it is clear that the topic presents important empirical and theoretical challenges. First, it requires an analysis of the practice of the European Commission, as remedies for the same statutory violation may vary considerably. Second, the EU includes both common law and civil law jurisdictions, and the concept of 'remedies' has not necessarily being theorized as a distinct topic (from that of substantive law) to the same extent in each of these broad legal families, but also within the civil law family, as the French and the German legal traditions can instruct us. Third, it has been a clear trend in the jurisprudence of the EU courts and also most recently of the Treaty that remedies should be "sufficient to ensure effective legal protection in the fields covered by Union law"[6]. However, it is unclear what exactly is meant by "effective"

MA, USA: Edward Elgar; Economides, N. and I. Lianos (2010), 'A Critical Appraisal of Remedies in the EU Antitrust Microsoft Cases', *Columbia Business Law Review*, (2), 346–420.

[5] See, Pera A. and M. Carpagnano (2008), 'The Law and Practice of Commitment Decisions: A Comparative Analysis', *European Competition Law Review*, **29** (12), 669–85; Schweitzer. H. (2012), 'Commitment Decisions: An Overview of EU and National Case Law', *eCompetition Bulletin*, http://www.concurrences.com/english/bulletin/special-issues/commitments-decisions/ (last accessed 19 June 2013); Temple Lang, J. (2006), 'Commitment Decisions and Settlements with Antitrust Authorities and Private Parties under European Antitrust Law', in *Annual Proceedings of the Fordham Corporate Law Institute 2005*, v. 32, Transnational Juris: The Hague, pp. 265–324; Waelbroeck, D. (2009), 'The Development of a New "Settlement Culture" in Competition Cases: What is Left to the Courts?', in Gheur C. and N. Petit (eds), *Alternative Enforcement Techniques in EC Competition Law*, Brussels: Bruylant, pp. 220–60; Wagner von Papp, F. (2012), 'Best and Even Better Practices in the European Commitment Procedure after Alrosa: The Dangers of Abandoning the Struggle for Competition Law', *Common Market Law Review*, **49** (3), 929–70; Wils, W.P.J. (2008), 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles', *World Competition*, **31** (3), 335–52.

[6] Article 19(1) TEU as introduced by the Treaty of Lisbon. See also Article 47 of the Charter of Fundamental Rights (right to an effective remedy and effective judicial protection). The jurisprudence of the European Courts also requires Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective protection of individuals' rights under EU law, and hence put in place effective remedies for violations of EU law. When adjudicating the protection of EU rights in private legal disputes, the CJEU has mostly relied on its 'effectiveness and equivalence' test to assess national procedures, "effectiveness" referring to the requirement that national procedural rules should not make the enforcement of EU rights impossible or excessively difficult. In his opinion in Case C-536/11 *Donau Chemie* [June 6th 2013, not yet published], Advocate General

remedial protection. It is clear that the concept of "effective" remedies does not entail the power to impose *any* remedy. The issue of "effective remedy" is thus closely interrelated to the question of the remedial discretion of competition authorities and the judiciary in competition law cases. This issue raises the degree to which corrective justice or efficiency concerns may drive the remedial action of competition authorities and courts. Public lawyers may also take different perspectives on the limits to remedial discretion and thus on what may constitute an "effective remedy" in this context than private lawyers. Hence the need for an approach that would integrate both the public and the private law dimensions of "effective" competition law remedies, particularly in view of the increasing interaction between public and private enforcement of competition law in Europe.

Of course, competition law remedies have long been a well-examined topic in merger control, as both the US and the EU have published discussion papers and guidelines providing information on their practices and explaining how different types of remedies interact with each other in this area.[7] However, no such effort of systematization has been made until recently in the area of antitrust law and few studies have examined the possibility of a unifying model, applicable to all kinds of competition law 'wrongs' (anti-competitive mergers or antitrust infringements).

The study proceeds as following. We will first examine the 'received view' of the taxonomy of competition law remedies and describe their legal framework in both EU antitrust and merger control. We will then take a critical perspective on the existing typology, which to our view is intellectually sterile, and will integrate the topic of competition law remedies in the broader theoretical framework of remedies in the private and public law traditions. The fit between the remedy and the competition law

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Jääskinen examined the scope of Article 19(1) TFEU advancing the view that 'in the light of that Treaty provision, the standard of effective judicial protection for EU based rights seems to be more demanding than the classical formula [of the 'effectiveness' principle] referring to practical impossibility or excessive difficulty. In my opinion, this means that national remedies must be accessible, prompt, and reasonably cost effective' (para 47). The CJEU did not follow the AG's approach on this issue and retained its previous definition of the principle of effectiveness.

[7] See, ICN Merger Working Group: Analytical Framework Subgroup 92005), Merger Remedies Review Project, http://www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf (last accessed 19 June 2013); Wang W. and M. Rudanko (2012), 'EU Merger Remedies and Competition Concerns: An Empirical Assessment', *European Law Journal*, **18** (4), 555–76; Davies S. and B. Lyons (2007), *Merger and Merger Remedies in the EU*, Cheltenham, UK and Northampton MA, USA: Edward Elgar.

wrong it aims to redress and, more generally, the question of the remedial discretion of the Commission, national competition authorities and courts in EU competition law enforcement will offer a common narrative that would exemplify the specificities of the public and private law accounts of the concept of remedy. We will explore next the dichotomy between voluntary and coercive remedies, recently introduced by the case law of the European Courts in order to increase the remedial discretion of the Commission. The final part will conclude.

II. CONCEPT, LEGAL FRAMEWORK, TAXONOMY

A. The Emergence of the Concept

The concept of 'remedies' is a recent addition to EU competition law jargon. The EU courts employed the concept for the first time in the *Microsoft* case, the General Court observing that:

> (w)here remedies are provided for in the decision, the undertaking concerned is required to implement them – and to assume all the costs associated with their implementation – failing which it exposes itself to liability for periodic penalty payments imposed pursuant to Article 16 of Regulation No 17.[8]

In the same judgment, the Court noted that the remedial power of the Commission is subject to the principle of proportionality:

> The case-law shows [. . .] that the Commission does not have unlimited discretion when formulating remedies to be imposed on undertakings for the purpose of putting an end to an infringement. In the context of the application of Article 3 of Regulation No 17 [now replaced by Regulation 1/2003], the principle of proportionality requires that the burdens imposed on undertakings in order to bring an infringement to an end do not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed.[9]

There is no occurrence of the concept of 'remedies' in the older case law of the EU courts. This might be explained by the fact that Regulation 17/62 on the implementation of what are now Articles 101 and 102 TFEU did not employ the word remedy, Article 3 of Regulation 17 simply noting that when the Commission finds the existence of an infringement of these

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[8] Case T-201/04, *Microsoft Corp. v Commission* [2007] ECR II-3601, para. 1256.

[9] Ibid., para. 1276.

provisions, it may require by decision the undertakings concerned 'to bring such infringement to an end'. The concept of remedy was indeed unknown as such to the Continental civil law systems that formed the European Communities at the time. The concept was still under-developed in English law, as the first efforts of rationalization and classification of remedies date from the 1970s.[10] The case law of the EU courts, prior to *Microsoft*, employed the expression 'bringing an infringement to an end' for both declarations of incompatibility of a specific practice to EU competition law and for positive or negative duties imposed to the undertakings having infringed these provisions.

In *Commercial Solvents*, Advocate General (hereinafter AG) Warner noted that 'the reason why Article 3(1) was left in general terms was that infringements of Articles [101] and [102] can take so many forms that it would have been impossible for the authors of the (R)egulation to provide a catalogue of the measures capable of being ordered by the Commission in order to bring such infringements to an end'.[11] The AG accepted the practice of the Commission in this case to accompany its finding of an infringement of Article [102 TFEU] by the Commercial Solvents group with a positive obligation imposed on the dominant undertaking to supply within a given time a given quantity of a given product at a maximum price to its competitor, Zoya. Although, Article 3 of Regulation 17/62 did not explicitly recognize the possibility for the Commission to impose an injunction, for the AG a 'cease and desist' order would be pointless if this were not followed by a 'specific recommendation'. AG Warner suggested nevertheless the annulment of the Commission's decision as the latter had imposed on the dominant undertaking duties that went beyond the scope of its infringement of Article 102 TFEU.[12]

The Court of Justice of the EU (CJEU) agreed with the AG on the broad interpretation of the expression 'bringing the infringement to an end', noting the following:

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[10] See Lawson, F.H. (1972), *Remedies of English Law*, London: Penguin Books.

[11] Opinion AG Warner, in Case 6-7/73, *Instituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission* [1974] 1 C.M.L.R. 309, pp. 331–5.

[12] The Commission could order the dominant company to resume supplies to Zoya only in so far as the cessation of such supplies might affect trade between Member-States, a constitutive element of the prohibition of an abuse of dominant position. However, according to the AG, the obligation imposed by the Commission to the Commercial Solvents groups did not make the distinction between the actual sales of Zoja destined for the Common Market and those destined for third countries, for which there would not be any effect on trade (according to the definition of this concept at the time).

> this provision must be applied in relation to the infringement which has been established and may include an order to do certain acts or provide certain advantages which have been wrongfully withheld as well as prohibiting the continuation of certain action, practices or situations which are contrary to the Treaty. For this purpose the Commission may, if necessary, require the undertaking concerned to submit to it proposals with a view to bringing the situation into conformity with the requirements of the Treaty.
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> In the present case, having established a refusal to sell incompatible with Article [102 TFEU], the Commission was entitled to order certain quantities of raw material to be supplied to make good the refusal of supplies as well as to order that proposals to *prevent* a repetition of the conduct complained of be put forward. In order to ensure that its decision was effective the Commission was entitled to determine the minimum requirements to ensure that the infringement was made good and that Zoja was protected from the consequences of it. In choosing as a guide to the needs of Zoja the quantity of previous supplies the Commission has not exceeded its discretionary power.[13]

However, the CJEU rejected the narrow view of its AG on the scope of the specific duty imposed to the Commercial Solvents group. Indeed, since the aim of the conduct complained of was to eliminate one of the principal competitors of the Commercial Solvents group within the Common Market, 'it was above all necessary to *prevent* such an infringement of Community competition by adequate measures'.[14] Hence the scope of the duty imposed on Commercial Solvents was at 'the root of the litigation' as it ensured that Zoja would not be excluded from the market.

The case illustrates that the concept of remedies may encompass not only measures that redress but also measures that prevent competition law infringements. According to a well-established case law, the Commission must be able to exercise the right to take decisions conferred upon it 'in the most efficacious manner best suited to the circumstances of each given situation',[15] this implying for the Commission a 'right to order such undertakings to take or refrain from taking certain action with a view to bringing the infringement to an end'.[16] However, as has also been noted by the EU courts, the obligations imposed on the dominant undertaking

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[13] Case 6-7/73, *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission* [1974] 1 C.M.L.R. 309, paras 45–46 (emphasis added).

[14] Ibid., para. 49.

[15] Case 792/79R, Order of the Court, *Camera Care Ltd v Commission* [1980] ECR 119, para. 17 (providing the possibility for the Commission to adopt interim measures).

[16] Case T-76/89, *Independent Television Publications Ltd v Commission* [1991] ECR II-575, para. 70.

should be justified in 'light of the purpose' of bringing the infringement to an end.[17]

For example, in *Magill*, the requirement imposed on the dominant undertakings to supply on request and on a no-discriminatory basis their weekly listings with a view to their publication in a comprehensive TV guide, was found, in view of the constitutive elements of the infringement, to be 'the *only means* of bringing that infringement to an end'.[18] Referring to remedies as 'burdens imposed on undertakings in order to bring an infringement of competition law to an end', the CJEU confirmed the position of the General Court and noted that these 'must not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed'.[19]

In contrast to the few instances in which the concept of 'remedy' was employed by the EU courts, the concept has featured in many decisions of the Commission in the context of EU merger control[20] and the implementation of Articles 101[21] and 102 TFEU.[22] The Commission was the first competition law jurisdiction globally to issue guidelines on merger

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[17] Ibid.

[18] Ibid. Emphasis added.

[19] Joined Cases C-241/91 P and C-242/91 P, *RTE & ITP v Commission* [1995] ECR I743, para 93.

[20] See, for instance the recitals of the EC Merger Regulation 4064/89, [1990] OJ L 357/13 noting that 'this Regulation cannot, because of the diversity of national law, fix a single deadline for the adoption of remedies'; Commission Decision 96/648/EC of 24 April 1996 (Case No IV/M. 269 – *Shell/Montecatini*), [1996] OJ L 294/10, para. 20.

[21] Commission Decision 94/601/EC of 13 July 1994 (IV/C/33.833 – *Cartonboard*) [1994] OJ L 243/1, para. 165 *et seq*.; 97/780/EC: Commission Decision of 29 October 1997 relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement (Case No IV/35.830 – *Unisource*) (Only the Dutch, English and Swedish texts are authentic) (Text with EEA relevance) [1997] OJ L 318/1, para. 98 (referring to civil remedies for anti-competitive practices in front of national courts).

[22] 85/609/EEC: Commission Decision of 14 December 1985 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.698 – *ECS/AKZO*) (Only the Dutch text is authentic) [1985] OJ L 374/1, para. 96 *et seq*. (including under the title of remedies, sanctions and termination of the infringement); 88/138/EEC: Commission Decision of 22 December 1987 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.787 and 31.488 – *Eurofix-Bauco v Hilti*) [1988] OJ L 065/19, para 99 *et seq*. (sanctions and termination of the infringement); 88/518/EEC: Commission Decision of 18 July 1988 relating to a proceeding under Article 86 of the EEC Treaty (Case No IV/30.178 *Napier Brown – British Sugar*) (Only the English text is authentic) [1988] OJ L 284/41, para 83 *et seq*. (fines and termination of infringement).

remedies,[23] the aim of the notice being to set out clearly and objectively not only the procedural, but also the substantive principles guiding the Commission's assessment.[24] Adopting a functional perspective, the Commission considered in this Notice as remedies the modifications to concentrations provided by the undertakings concerned in their commitments, 'since their object is to eliminate the competition concerns identified by the Commission'.[25]

B. An Introduction to the Legal Framework

Merger remedies may be suggested by the parties (commitments) on an informal basis, even before notification of the projected merger to the Commission[26] and in the course of phase I of merger control (leading to an Article 6(2) Regulation 139/2004 decision). As the aim of phase I remedies is to provide 'clear-cut' answers to a 'readily-identified competition concern', only limited modifications of the transaction can be accepted in the proposed commitments. According to the Notice, in merger control, 'the Commission is not in a position to impose unilaterally any conditions to an authorization decision, but only on the basis of the parties' commitments'.[27] Remedies can also be proposed by the parties in phase II within the legal deadline set in order to secure the clearance of the merger by the

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[23] Commission notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 ([2001] OJ C 68) revised in 2008: Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, [2008] OJ C 267/1 (hereinafter, Commission Notice on remedies 2008).

[24] Report from the Commission – XXXth Report on competition policy, 2000/SEC/2001/0694 final/, paras 234 and 268–277.

[25] Commission Notice on remedies 2008, para 2. The Commission defines 'competition concerns' as 'serious doubts or preliminary findings that the concentration is likely to significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position'. The Commission proceeded further by establishing in 2000 an enforcement unit within the Merger Task Force dedicated to advising on the acceptability and implementation of remedies in merger cases in order to ensure that the general principles set out in the remedies notice are applied as consistently as possible while taking account of the specific requirements of each case: Report from the Commission, XXXIst Report on Competition Policy 2001, /SEC/2002/0462 final, para. 290.

[26] Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, [2008] OJ C 267/1, para. 78.

[27] Ibid., para. 85.

Commission pursuant to Article 8(2) of the Merger Regulation 139/2004. If, however, the parties do not propose remedies adequate to eliminate the 'competition concerns', the Commission's only option is to adopt a prohibition decision.

The procedure is formalized as the parties are required to provide the Commission with detailed information on the content of the commitments offered and the conditions for their implementation, thus showing their suitability to remove any significant impediment to effective competition. The parties provide this detailed information in a Form RM.[28] Remedies provided in the context of merger control have thus a strong consensual element, as they emanate from the parties, in both form and substance, being accessory to a conditional clearance decision and resulting from a discussion between the Commission and the parties, under the shadow of a possible prohibition decision. The only possibility for the Commission to impose unilaterally remedies in the context of merger control is provided for in Article 8(4) of Regulation 139/2004, which acknowledges the power of the Commission to dissolve an already consumed concentration or to 'restore the situation prevailing prior to the implementation' of a concentration that was declared incompatible with the common market or implemented in contravention of a decision under Article 8(2) of Regulation 139/2004.

Remedies are more formalized in the context of the implementation of the *ex post* control of Articles 101 and 102 TFEU. Article 7 of Regulation 1/2003 made for the first time explicit provision of the Commission's power to impose 'remedies' to undertakings having being found to infringe Articles 101 and 102 in order to bring the infringement to an end. The Commission also refers to them as 'coercive measures'.[29] While in its previous decisional practice the Commission included fines and injunctions within the category of 'termination of the infringement', Regulation 1/2003 establishes a clear distinction between the two. According to recital 12 and Article 7, the Commission may impose on infringers 'behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end'. Structural remedies are subject to a stricter proportionality requirement as they can only be imposed 'either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would

[28] Annex IV, Commission Regulation (EC) No. 802/2004 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, [2004] OJ L 133/39, amended by Commission Regulation (EC) No. 1033/2008, [2008] OJ L 279/3.

[29] Recital 14, Regulation 1/2003.

be more burdensome for the undertaking concerned than the structural remedy'. Fines are dealt in Article 23, under a chapter titled 'penalties' and cannot exceed 10 percent of the total turnover of the undertaking the preceding business year, thus introducing a quantitative measure of proportionality. There is no reason given for the introduction of this differentiation on the qualitative or quantitative expression of the proportionality principle, although it may be explained by the different forms of judicial scrutiny of fines and remedies. According to recital 33, all decisions of the Commission are subject to review by the Court of Justice yet the Court is given unlimited jurisdiction in respect of decisions by which the Commission imposes fines, according to Article 261 TFEU, which provides the possibility for the EU Institutions to expand the jurisdiction of the Court for 'penalties'. This provision was implemented for Articles 101 and 102 infringements by Article 31 of Regulation 1/2003 and for merger control by Article 16 of Regulation 139/2004. In contrast, other 'remedies' are subject to the normal jurisdiction of the Court. It seems that the punitive character of fines explains why they are subject to this more extensive judicial scrutiny than remedies.[30] The distinction between remedies and fines also appears in some OECD documents, where it is recognized that:

> [t]ypically, remedies aim to stop a violator's unlawful conduct, its anticompetitive effects, and their recurrence, as well as to restore competition. Sanctions are usually meant to deter unlawful conduct in the future, to compensate victims, and to force violators to disgorge their illegal gains.[31]

According to this view and that of Regulation 1/2003, the legal category of 'remedies', comprises only permanent injunctions[32] which should be distinguished from fines, penalties or sanctions[33].

The concept of remedies has also been used to describe the various civil consequences of competition law infringements in national courts.

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[30] For the distinction between 'penalties' and remedies see Article 5 Regulation 1/2003 referring to fines, payments or penalties as a different category of decisions that those 'requiring that an infringement be brought to an end', the latter category including structural and behavioral remedies.

[31] OECD (2006) 'Remedies and Sanctions in Abuse of Dominance Cases', available at http://www.oecd.org/dataoecd/20/17/38623413.pdf, (last accessed 19 June 2013) at p. 18.

[32] Permanent injunctions should be distinguished from interim or preliminary injunctions, which are dealt, under Regulation 1/2003, by Articles 5 and 8 (interim measures) and commitments, which are dealt by Article 9 of Regulation 1/2003.

[33] For a similar distinction between 'remedies' perceived as measures (and including damages) and 'sanctions', see Directive 2004/48/EC on the enforcement of intellectual property rights, [2004] OJ L 195/16, chapters II and III.

These include the nullity of a contract found to infringe Article 101 (according to Article 101(2)), damages for EU competition law infringements[34] and injunctive relief by the civil courts.[35] The Commission has used the term 'remedies' to describe the damages actions for breach of EU antitrust rules.[36] Some AGs have also occasionally referred to 'remedial relief' for competition law damages and injunctions.[37] It seems, therefore, that there are, at least, some indications that the EU authorities adopt a broader definition of remedies than the one suggested in Article 8 of Regulation 1/2003. They have included under the category of remedies, injunctions and fines, as well as 'civil law' remedies (such as damages and injunctions imposed by the judiciary). No specific criteria are nevertheless offered for defining the category of 'remedies', the EU institutions having taken approaches that might appear contradictory. Hence the need for an effort of legal taxonomy with the aim to build a coherent theory of competition law remedies, for descriptive but also normative purposes.

C. An Effort of Legal Taxonomy

A possible source of inspiration for this taxonomy might be the approach followed in the legal systems of the EU Member States. The analysis of various national practices shows that the concept of 'remedies' is not known in a number of civil law systems and is even contested in Anglo-American law (1). For this reason, we will proceed to a functional definition of the term (2).

1. The concept of 'remedy' in the legal systems of EU Member States

(a) Remedies in the common law tradition In a well-known study of remedies in English law, Rafal Zakrzewski noted the absence of a 'stable core meaning' of remedies, noting that the term 'is used synonymously with a wide range of different terms and what is probably worse, by way of con-

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[34] Case C-453/99, *Courage and Crehan* [2001] ECR I-6297; Joined Cases C-295–298/04, *Manfredi* [2006] ECR I-6619.

[35] Which according to AG Jacobs should be subject to the same reasoning as damages: see Case C-264/01, *AOK Bundesverband* [2004] ECR I-2493, para. 104.

[36] See, Commission Staff Working paper, Annex to the Green paper – Damages actions for breach of the EC antitrust rules, SEC(2005) 1732; COM(2005) 672 final, paras 17–18, 20.

[37] Opinion of AG Jacobs, in Joined Cases C-264/01 and 306/01, C-354–355/01, *AOK Bundesverband* [2004] ECR I-2493, para. 21.

trast to an equally long and diverse list'.[38] Peter Birks found the term 'chameleonic, for as the context shifts its meaning takes on different colours', for example, 'in the medical world, a remedy may be either curative, therapeutic or both';[39] Waddams noted that '(t)heoretically, almost every legal question could be posed in terms of remedies, but this would give the word so wide a meaning as to be useless'.[40] Undeniably, any attempt to provide a more precise legal definition of the term has faced important conceptual difficulties. The concept of remedies has multiple meanings, some of which overlap: remedies may be corrective or preventive (the broad functional definition of the remedy) or they may be considered as an action or a cause of action, a substantive right, a court order, a final outcome.[41]

The taxonomies of remedies proposed depend on the selected criteria for classification: (i) coercive versus non-coercive (declaratory, constitutive) remedies; (ii) substitutionary (remedies for performance, such as damages) versus specific remedies (injunctions); (iii) remedies classified according to their function (compensation, restitution, punishment, coercion and declaratory relief); there are different possibilities of classification.[42]

Zakrzewski adopts a narrow definition of 'remedy' as a concept to be distinguished from substantive rights (primary and secondary), the criterion of the distinction being a purely formal one, the involvement of a court order: 'remedies are the rights that arise from a particular class of events, namely, the making of certain judicial commands or statements'.[43] Based on this definition, and rejecting a 'goal-based' taxonomy of compensation, restitution and punishment,[44] he distinguishes between remedies replicating substantive rights and remedies that 'modify or transform the parties' substantive rights to a significant extent'.[45]

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[38] Zakrzewski, R. (2005), *Remedies Reclassified*, Oxford: Oxford University Press, p. 2.

[39] Parker, K. E. (1975), *Modern Judicial Remedies: Cases and Materials*, Boston: Little Brown, p. 10; see also Birks, P (2000), 'Rights, Wrongs, and Remedies' *Oxford Journal of Legal Studies*, **20**, 1, 9 ('anything that alleviates, eliminates, or prevents can be referred to as a remedy').

[40] Waddams, S.M. (1983), 'Remedies as a Legal Subject', *Oxford Journal of Legal Studies*, **3** 113.

[41] Zakrzewski (2005), n. 38 above, pp. 11–22.

[42] Ibid., pp. 23–42.

[43] Ibid., pp. 46–47.

[44] Zakrzewski explains this choice by the fact that one cannot construct an adequate goal-based series to cover all remedies and that the goals of remedies are too diverse and some remedies may be counted in in many categories if a goal-based classification were adopted (ibid., p. 78).

[45] Ibid., p. 60.

The new taxonomy introduced by Zakrzewski, which he claims may extend to non-civil remedies, is intrinsically linked to the relationship to and the effect the remedies have on the substantive rights, prior to the court (or authority) ordering the remedy.[46] A remedy may replicate the substantive right, in the sense that the claimant is not getting anything to which he or she did not have a substantive right prior to the court's order, which either evaluated the right in a quantitative form (for example, damages) or rendered the right more precise and restated it in an injunction, but it may also provide the courts discretion to 'fashion remedies that do not resemble any substantive rights which the claimant can be said to have had before the order was made'.[47]

Transformative remedies may create *de novo* or extinguish existing rights. Although discretion is not the distinguishing criterion, as damages in English law are provided for by common law and are subject to detailed rules of causation, remoteness and mitigation, while specific performance which is an equitable remedy, is not subject to these rules, it plays an important role in Zakrzewski 's taxonomy. Transformative remedies 'often' involve a degree of discretion, as they involve 'a choice as to whether to create the remedy and what content it should have'.[48] In other words, 'the remedial discretion usually associated with transformative remedies is discretion to create a remedy which bears little resemblance to the claimant's substantive rights'.[49] Some may find these duties or rights-creating power of the judge, inherent in the concept of transformative remedies, to amount to some form of law-making 'at the instance-specific level' ('or remedy level'), thus raising important rule of law issues. Transformative remedies promote of course on the one side flexible decision-making and a case-by-case approach, but they can also generate, on the other side, uncertainty as to the predictability of decisions and equality before the law. Indeed, the rule of law implies that society administers justice by fixing standards that provide like treatment to similar cases and that individuals may determine prior to the litigation.

(b) Remedies in the civil law tradition The legal concept of remedy is generally foreign to civil law tradition.[50] In French law, the concept

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[46] Ibid., pp. 78–79

[47] Ibid., p. 80.

[48] Ibid., p. 97. According to Zakrzewski, to the difference of the discretion existing for replicative remedies, which cannot order something that is not defined by the substantive right, the discretion involved in transformative remedies carries a choice to order something, not defined by substantive law (ibid., p. 98).

[49] Ibid., p. 102.

[50] For an interesting comparative analysis, see Adar, Y. and G. Shalev

has no legal definition. If one adopts a functional definition of a remedy as something that aims to redress a 'wrong', the French legal system has not developed a general theory of remedies for the violation of civil obligations, no equivalent concept existing as such in French law, but incorporates the issue of remedial action in the substantive law of obligations with regard to contractual and tort liability, thus building an intrinsic relation between the remedy and the right or the wrong to be repaired.[51] A similar situation occurs in German law, although the reform of the law of obligations in 2002 seems to have led to important changes by establishing a system of rules structured primarily according to the types of legal remedies available to redress the 'violation of an obligation'.[52]

The concept of remedies is more familiar in public law, in view of the principle of effective judicial protection, a general principle of EU law stemming from the constitutional traditions common to the Member States and mentioned in Article 47 of the Charter of Fundamental rights, which requires Member States to establish a system of legal remedies and procedures ensuring respect for the rights recognized by EU law and guaranteeing that the detailed procedural rules governing actions for safeguarding an individual's rights under EU law are no less favourable than those governing similar domestic actions (principle of equivalence) and do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).[53]

In view of the vagueness of the existing definitions of the legal concept of a remedy in EU law as well as in various national legal systems, a functional definition of this concept may provide some useful insights.

(2008),'The Law of Remedies in a Mixed Jurisdiction: The Israeli Experience', *Electronic Journal of Comparative Law* **12** (1), 111–41.

[51] David René (1980), *A Law of Remedies and a Law of Rights, in English Law and French Law: A Comparison in Substance*, London: Stevens & Sons, ch. 1, pp. 1–15.

[52] Zimmermann, R. (2006), *The New German Law of Obligations: Historical and Comparative Perspectives*, Oxford: Oxford University Press.

[53] Case C-213/89, *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1990] ECR I-2433; Case C-50/00, [2002] ECR I-6677, para. 41 ('it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection'); Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-2271, paras 42–44.

2. A functional definition of the legal concept of remedy in EU competition law

Taking stock of the absence of a clear definition of the concept of 'remedy' in EU competition law and in view of the unsettled position of the concept in national legal systems, a functional definition may offer the only way out of this definitional conundrum. The focus should be on the principal functions of the remedial process, as it is generally conceived in various legal systems and in the decisional practice of EU institutions, which, as we have hinted at earlier, can be perceived broadly as compensation, restitution, punishment and prophylaxis (prevention). It is generally argued that competition law remedies are adopted with the principal aim to restore competition in the market.[54] However, this objective may be conceived broadly as including first the 'micro' goals of putting the infringement to an end, compensating the victims,[55] and curing the particular problem as to competition, but also the 'macro' goal of putting incentives in place 'so as to minimize the recurrence of just such anti-competitive conduct' (preventive remedies or remedies aiming at deterrence).[56] Different types of remedies may perform various overlapping functions.

Looking more specifically to these 'micro-goals', remedies seek generally to restore 'the plaintiff's rightful position, that is, the position that the plaintiff would have occupied if the defendant had never violated the law' or 'to restore the defendants to the defendant's rightful position, that is, the position that the defendant would have occupied absent the violation'.[57] In other words, remedies are perceived as a cure to a 'wrong' the infringer committed, 'in contravention of some legally-recognized right of the plaintiff's'[58] or of the category of right-recipients that the legislator intended to protect (e.g. consumers). The wrong of the defendant gives rise to the enforceable right of the plaintiff (or any other protected category the plaintiff represents) to impose on the defendant a correlative

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[54] See Melamed, A. D. (2009), 'Afterword: The Purposes of Antitrust Remedies', *Antitrust Law Journal*, **76**, 359.

[55] Taking illegal gains away from the law violators and 'restore those monies to the victims' constitutes a principal goal of competition law remedies. Pitofsky, R. (2002), 'Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies', *Georgetown Law Journal*, **91**, 169, 170).

[56] Fox, E. M. (2005), 'Remedies and the Courage of Convictions in a Globalized World: How Globalization Corrupts Relief', *Tulane Law Review*, **80**, 571, 573.

[57] Laycock, D. (1994), *Modern American Remedies: Cases and Materials*, Boston: Little Brown, p. 2.

[58] Tilbury, M, M. Noone, and B. Kercher (2000), *Remedies: Commentary and Materials*, London: LBC Information Services. LBC Information Services.

duty to stop the illegal behaviour, pay damages, make restitution, or adopt a specific behaviour. Article 7 of Regulation 1/2003 does not oppose this conceptualization of remedies, as it links the adoption of a remedy to the end of the infringement, a concept that might be understood narrowly, the termination of the illegal conduct, but also, more broadly, as outcome-oriented, thus requiring the reversal of the effects of the illegal conduct. Following the imposition of a remedy, the infringer will be asked to commit negative acts (a requirement not to act in a certain way) and/or positive acts (a requirement to act in a certain way). Curing the competition law 'wrong' committed or providing recovery for the primary and secondary rights violated may take the form of restitution (which involves gain-based recovery) and/or compensation (which involves loss-based recovery). Restitution and compensation may thus be considered as the two facets of the 'curing' function of the remedial process, as opposed to the punishing and prophylactic one.

Among the remedies available for 'curing' the competition law violation, one may distinguish between administrative remedies, imposed by the Commission and other national competition authorities, and civil law remedies, which are the province of national courts.

Among the administrative remedies, one could list the remedial injunctions of Article 7 of Regulation 1/2003, negative (termination of the infringement) or positive (structural and behavioural remedies), the decisions of Articles 6(2) and 8(2) of Regulation 139/2004 that lead to a prohibition of anti-competitive mergers (negative obligation) or their conditional clearance (positive obligation) and possibly fines under Article 23 of Regulation 1/2003, to the degree that fines may be considered as a substitutionary remedy compensating the 'general public' for the distortion of the competitive process. The remedy of disgorging illegal profits is not available, as such, in EU competition law, although it remains possible under some national competition law systems.[59] As fines in EU competition law are assessed with reference to the value of sales to which the infringement directly or indirectly relates in the relevant geographic market in the EU and the degree of gravity of the infringement multiplied

[59] See, for instance, in Germany, where the FCO may skim-off economic benefits related to the infringement. This is possible for both proceedings concerning administrative fines (Section 81-4 GWB post-2005 or Section 81-2 GWD pre-2005) applying to cartels and administrative proceedings for non-cartel activity (which are dealt under section 34 GWB). The economic benefits to be disgorged not only encompass the net revenue generated because of the infraction, but also (the monetary value of) any other benefits such as the improvement of an undertaking's market position.

by the number of years of the infringement, they may also be considered as exercising a partial and implicit disgorgement function. One could finally list measures that are accessory to the principal curative remedies because they facilitate their enforcement, such as interim measures (which aim to ensure interim relief) and periodic penalties (in order to compel the infringers to comply with the prohibition and/or the positive requirements-injunctions imposed by the Commission and NRAs).

Civil remedies 'curing' the competition law violations include the nullity of agreements and decisions prohibited by Article 101 TFEU, according to Article 101(2), the award of damages for the violation of Articles 101 and/or 102 TFEU (either compensatory and/or restitutionary) and injunctions (prohibitory or mandatory) with the aim of terminating the infringement and restoring the competitive process or the situation of the parties prior to the infringement.

The punishment of the competition law infringer is certainly an objective pursued by competition law remedies. We consider that punishment constitutes one of the three remedial functions, broadly perceived, as it aims to cure the violation of the moral rights of the communities affected by the competition law infringement and constitutes a ritual of justice. Punishment is certainly the main function of fines imposed in the context of Article 23 of Regulation 1/2003, in view of the 'aggravating' circumstances taken into account in their calculation for recidivists, instigators or leaders of competition law infringements and undertakings obstructing the Commission's investigations,[60] as well as the specific 'increase for deterrence' that the Commission may impose to infringers. The explicit acknowledgment in the Commission's Guidelines on the methods of setting fines that it will increase the fine 'in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount', is an additional indication of this punitive function.[61] In contrast to some national legal systems, there are no criminal or individual sanctions imposed in EU competition law. Civil remedies aiming to punish may include the possibility of punitive or exemplary damages.[62] However, some recent proposals envision the possibility

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[60] European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2) of Regulation No 1/2003, [2006] OJ C 210/2, para. 28.

[61] Ibid., paras 30–31.

[62] See, in the UK, the situation following the High Court's decision in *Devenish Nutrition Limited and others v Sanofi-Aventis SA and others* [2007] EWHC 2394 (Ch). The availability of exemplary damages has not been appealed to the Court of Appeal in this case, Exemplary damages are in theory available for infringements of the competition rules when it is necessary to punish the infringer but their award

for double or multiple damages for competition law infringements, thus introducing an additional punitive civil remedy to the arsenal available to national courts.[63] Yet, it should remain clear that punitive damages and fines cannot be combined as this might jeopardise the principle that a wrongdoer ought not to be punished twice for the same wrong. In *Devenish*, the English High Court excluded the possibility of punitive damages where fines have already been imposed upon a defendant (or would have been imposed were it not for a successful leniency application) by an EU or UK competition authority, as this would run contrary to the obligation of national courts to take decisions that conflict with Commission's decisions, as expressed in Article 16 of Regulation 1/2003.

Competition law remedies may also have a prophylactic (preventive) aim. They seek to ensure that there remain no practices likely to result in distortions of competition and infringements in the future. The preventive function is fulfilled in a different way than for curative and punitive remedies, which may also indirectly affect the incentives of market actors to act in a specific way in the future. First, preventive remedies aim directly at specific or general deterrence. Specific deterrence can be defined as the impact of the remedy on the incentives of those apprehended (the infringers) to adopt similar illegal behaviour in the future. General deterrence focuses on the public at large. Second, remedies may have a pure prophylactic function. Prophylactic remedies can be distinguished from specific deterrence as they affect the ability (and not the incentive) of the infringers to commit equivalent anti-competitive practices in the future by focusing on specific facilitators of potential infringements. These may not be illegal practices in themselves, but in the specific circumstances of the case, they may facilitate illegal conduct. By prohibiting these practices, the decision-maker's objective is not to deter the potential infringers from adopting such conduct, as this is not illegal, but to reduce their ability to commit illegal practices.

Specific deterrence is certainly a difficult venture that requires from the courts a guessing exercise linked to a counterfactual and some prospective analysis of the situation in the market with and without the specific competition law violations. This is particularly true in complex and dynamically evolving markets, where static models cannot easily predict the various incentives of the different market actors in the future. Specific deterrence

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is discretionary and the courts must exercise their discretion with caution. See also *Albion Water Limited v Dŵr Cymru Cyfyngedig* [2011] CAT 18.

[63] European Commission, Green Paper – Damages actions for breach of the EC Antitrust Rules, COM(2005) 672 final, Section 2.3 (option 15).

may be achieved with administrative remedies, such as declaratory relief, positive injunctions (forward-looking structural and behavioural remedies aiming not only to cure the competition law wrong but also to design the market interactions in such a way that the problem does not occur again in the future), civil mandatory injunctions (although these are rarely provided for by the civil courts[64]) and restitutionary damages. General deterrence may be achieved with a wider array of measures, such as fines, restitutionary and punitive damages and harsh (in the sense of imposing an important burden to the infringer) mandatory remedies (in particular structural remedies or heavy-handed behavioural remedies). Table 7.1 summarizes the classification of competition law remedies according to their function.

III. REMEDIAL DISCRETION AND ITS BOUNDARIES

Both competition authorities and courts dispose of some discretion in fashioning competition law remedies. However important this discretion is, it should not lead to 'discretionary remedialism'.[65] 'Discretionary remedialism' is the view that courts and competition authorities have discretion to award the 'appropriate' or optimal remedy in the circumstances of each individual case rather than being limited to specific (perhaps historically determined) remedies for each category of causative events.[66] In an

[64] For an interesting analysis, see Peyer, S. (2011), 'Injunctive Relief and Private Antitrust Enforcement', CCP Working Paper No. 11-7. Available at SSRN http://ssrn.com/abstract=1861861 (last accessed 19 June 2013) (noting the prevalence of permanent (as opposed to interim) injunctive relief in Germany, while UK courts prefer the award of damages). Although courts may provide injunctive relief in France, this remedy has rarely been used by judges, as no text provides explicitly for the possibility of mandatory injunctions for the courts in the area of competition law, while there exists a specific legal basis for the law of restrictive trade practices (unfair competition): Sofianatos, G.A. (2009), *Injonctions et Engagements en Droit de la Concurrence*, Paris: LGDJ, pp 109–143; Claudel E. (2005), 'Injonctions' *Les Petites Affiches*, **394** (14), 23–30.

[65] A term first employed in the context of restitution by Professor Birks: Birks, P. (2000), 'Three Kinds of Objection to Discretionary Remedialism', *University of Western Australia Law Review*. **29**, 1, who was a fervent critic of 'discretionary remedialism'.

[66] Evans, S (2001), 'Defending Discretionary Remedialism', *Sydney Law Review*, **23**, 463, 463. For a general discussion; see Jensen, D.M. (2003), 'The Rights and Wrongs of Discretionary Remedialism', *Singapore J. Legal Studies*, 178–208.

Table 7.1 Function of the remedies

Function of the remedies	Curative	Punishing	Preventive
Administrative remedial process	• Termination of the infringement • Behavioural remedies • Structural remedies • Fines (to a certain extent) • Accessory remedies	• Fines	SPECIFIC DETERRENCE • Fines • Termination of the infringement • Forward looking structural and behavioural remedies GENERAL DETERRENCE • Fines • Structural remedies • Heavy-handed long duration behavioural remedies PROPHYLACTIC REMEDIES
Civil remedial process	• Declaratory relief • Prohibitory injunctions • Mandatory injunctions • Compensatory damages • Restitutionary damages	• Exemplary (punitive damages) • Criminal and individual sanctions	SPECIFIC DETERRENCE • Mandatory injunctions • Restitutionary damages • Exemplary (punitive) damages GENERAL DETERRENCE • Restitutionary damages • Exemplary (punitive) damages • Harsh mandatory injunctions PROPHYLACTIC REMEDIES

economically oriented competition law, the definition of what is 'optimal' or 'appropriate' may be influenced by the view economists have on optimal deterrence (the optimal deterrence model) and on how the market equilibrium existing prior to the competition wrong may be improved by subsequent remedial action. The remedy may thus offer the opportunity to design a new market equilibrium, more competitive than the one following the infringement, but also, in some circumstances, more competitive than the one existing prior to the infringement. This understanding of 'optimal' remedies seems in conflict with the dominant views in both public and private law on the purpose and the scope of remedial action.

This section aims to examine the degree of remedial discretion decision-makers have been recognized in EU competition law. In order to examine this question, it is important to clarify conceptually the inherent limits of remedial discretion in the way these are generally conceived in private and public law. Our assumption is that the legal concept of remedies and hence the scope of remedial discretion is profoundly influenced by the doctrines of private and public law that have shaped our understanding, as lawyers, of the boundaries of remedial discretion. Competition law is enforced by administrative authorities and civil courts, and it is possible that each of them may have different perspectives on the concept of remedy and what this entails in terms of remedial discretion, the institutional and legal setting to which they are incorporated inevitably influencing their conception of the boundaries of their remedial power. Hence, the need to take a short deviation from the development of the concept of remedy in competition law in order to explore how these accounts may restrict the remedial decision-making space of competition authorities and courts in both public and private enforcement of competition law. The section relies on legal theory of private and public law in order to understand the essence of remedial discretion, in particular as competition law remedies may fit in both the public and the private law traditions. Those more interested in the practical dimension of how remedial discretion operates in the context of EU competition law may skip the most important part of this section and continue reading from section III.B.2. and after.

A. A private law account of competition law remedies and remedial discretion

In private law, remedies are usually perceived as intrinsically related to rights. The linkage of remedies to rights is exemplified by the maxim, *ubi jus, ibi remedium*, which assumes that rights are legal prerequisites for remedies while, at the same time, a right (and its corresponding duty) defines a remedy. This has important implications for remedial discretion.

It is, however, important to examine if rights and remedies are independent concepts, and if this is the case, define the nature of their relationship.

1. Rights/wrongs and remedies: monist versus dualist views

Rights and remedies may be viewed as related (not entirely independent) concepts. Some have opposed a monist to a dualist view, the monist one integrating the right and the remedy and treating the latter as the 'mirror image or reflex of the right', while the dualist view separating the right and the remedy and postulating that the decision-maker, in determining the remedy, 'chooses from the basket of all potential remedies the context-specific one that is most appropriate in the circumstances'.[67] The monist conception amounts to a 'unity of the right-remedy model', which assumes that the remedy constitutes an integral part of the right and that a remedy (or lack of it) is an attribute of the legal right.[68] Under this approach, a right would be classified as weak or strong, according to the effectiveness of remedies available for its protection. A right protected by punitive damages would thus be stronger than one protected by compensatory damages.[69] Yet, this approach does not explain the discretion decision-makers enjoy in choosing different remedial strategies for the violation of the same right, in which case the strength and the nature of the right might only be defined *ex post*. Some other authors advance the view that remedies are secondary rights 'of instrumental character': they imply the existence of primary rights that are conferred 'for the better protection and enforcement of those other rights and duties whose existence they so suppose'.[70] This approach relies on the existence of a close connection between the substantive right and the remedy. The latter is conceived as a secondary right, superimposed to the superstructure of the primary right that has been violated (wrong). Wrongs are violations of primary rights that give rise to secondary rights, whose nature may be sanctioning (preventive) or purely remedial (reparative).

A wrong gives rise to a secondary (remedial) right if there is a legal cause of action. The concept of legal cause of action breaks the direct causality

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[67] On this opposition see Weinrib, E.J. (2008), 'Two Conceptions of Remedies', in Rickett, C.E.F. (ed), *Justifying Private Law Remedies*, Oxford: Hart Publishing, p. 33.

[68] Friedmann, D. (2005), 'Rights and Remedies', in Cohen, N. and E. McKendrick (eds), *Comparative Remedies for Breach of Contract*, Oxford: Hart Publishing, pp. 3–17, at p. 10.

[69] Ibid., at p. 11.

[70] Austin, J. (1885), *Lectures on Jurisprudence or the Philosophy of Positive Law*, Campbell, R. (ed.), London: John Murray, p. 762.

chain between primary rights and remedies implied by the maxim *ubi jus, ibi remedium*. A specific remedy does not necessarily follow the violation of the primary right. The relation between these three concepts has been explained in the following terms:

> Primary rights describe a person's initial legal entitlement. Secondary rights describe the remedies to which he is entitled if the primary right is violated. When this violation takes place (for example, a tort is committed or contract breached), we talk of there being an injustice and a legal cause of action. Causes of action describe those events which consist in the violation of private law rights, or, to use different words of my own, primary injustices. Remedies constitute the law's response to such events and describe a secondary level of entitlement, substituted by the law for the first. Causes of action provide us with answers to the question when legal relief is to be given; remedies answer the question how it is to be given.[71]

The reference to 'causes of action' provides an intermediary step between primary rights and remedies, thus making clear that the two concepts should be distinguished from each other. The criteria used to define the violation of the primary right are not similar to those giving birth to the secondary right. The two can indeed operate independently of one another. The violation of a primary right may yield a whole range of responses: different types of secondary rights, which do not necessarily have any logical connection to the specific wrong, or violation of the primary right. Courts usually enjoy a broad discretion as to the choice of the remedy to be granted, with the consequence that different remedies may be used for the violation of the same primary right: 'as a jellyfish trails its tentacles in the warm sea, so from many civil wrongs dangle a plurality of remedial strings'.[72] Hence, law treats substantive rights and remedies as distinct concepts. At the same time, employing the terminology 'causes of action' indicates that the concept of remedy should not be confined to 'forms of action', that is legal claims that are channelled through (and understood by reference to) prescribed forms of action.[73]

A similar result as to the independence of the concepts of right and remedy may be achieved with the 'acoustic separation model', suggested by some commentators.[74] According to this model, legal rules are divided

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[71] Barker, K. (1998), 'Rescuing Remedialism in Unjust Enrichment Law: Why Remedies Are Right', *Cambridge Law Journal*, **57**, 301, 319.

[72] Birks (2000), n. 65 above, 1, 7.

[73] Barker (1998), n. 71 above, 312.

[74] Friedmann (2005), n. 68 above, 12 (building on the work of Cohen, M.D. (2002), *Harmful Thoughts: Essays on law, Self and Morality*, Princeton: Princeton University Press).

into 'conduct rules' that are intended to guide private actors in their conduct, and 'decision rules' which regulate the activity of the officials implementing the law. The private actors are only aware of the conduct rules and ignore the decision rules, which are applied by the decision-maker once the conduct rule has been violated. The model assumes that each type of rule is animated by different values and is subject to different constraints and that it might make sense in some circumstances to construct a conduct rule broadly (so as to deter harmful behaviour) and a decision rule narrowly (the decision-maker taking into account other considerations, such as concerns of administrability of the remedy, likely chilling effects, administrative costs, and so on). The acoustic model provides a convenient way to cope with the different constraints to which conduct and decision rules are subject, while at the same time recognizing that rights and remedies are intrinsically related, the direction of the interaction being a matter left to each legal system, as either decision rules will embody conduct rules or decision rules will follow conduct rules.

Alternatively, it is possible to consider that a remedy is 'an action, or the law's configuration of the actionability of a claimant's story' and thus to establish a strict separation between the concept of remedy and that of the violation of the primary right (or secondary right) and the wrong committed.[75] The term remedial will be used in this context essentially as a synonym of discretionary.[76] This position conceptualizes remedies as a specific form of judicial decision-making. Zakrzewski distinguishes clearly between substance (primary and secondary rights) and remedies, in view of his narrow definition of the remedy as 'rights arising from certain judicial commands or statements'.[77] The court or the authority's order signals the end of substance and the beginning of the remedial realm.[78] The remedies will be in the decision-maker's discretion according to the criteria of appropriateness. The substantive rights identified in the liability phase and the remedies are thus understood as separate concepts although 'liability triggers the court's discretion in the matter of the remedy'.[79] Rejecting the existence of a connection between primary/secondary rights and remedies, the theory of discretionary remedialism tolerates few limits to remedial discretion. Remedies can be replicative of the substantive rights or transformative, the degree of discretion of the judge (or decision-maker) being wider in the second category.

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75 Birks, P., n. 65 above, 10.
76 Ibid., 17.
77 R. Zakrzewski (2005), n. 38 above, p. 61.
78 Ibid., p. 53.
79 Birks (2000), n. 65 above, 23.

Such a conception of remedies may lead to increased uncertainty and unpredictability. Uncertainty and unpredictability are certainly to be avoided with regard to the areas of law that rely on private governance (that is, contracts and torts), where the aim is to facilitate the exercise of private choice in the most efficient way.[80] But is predictability and certainty necessary to the same extent within a regime of public governance, such as competition law? For example, it is possible to argue that greater predictability of the competition law remedy might facilitate the breach of the primary right, as it would be possible for the undertaking to calculate precisely the costs and benefits resulting from the violation and therefore to make sure that the breach of the primary right is profitable. However, contrary to what might happen in regimes of private governance,[81] a breach of the primary right can never be efficient in competition law, as efficiency is one of the criteria for defining the existence of a breach. Remedial discretion and the consequent unpredictability of the remedy are therefore tolerated, as long as it is within acceptable limits from the point of view of the rule of law. Discretion will be constrained by rules, but these rules do not provide a stable basis for predicting legal outcomes and the way these rules apply owe much to variable and discretionary factors.

In conclusion, there are inherent risks in adopting a strict separation of primary rights and remedies, and the strong discretionary remedialism that ensues. Remedies have a purpose and this purpose is inevitably defined, at least with regard to the primary (or secondary) rights that have been violated or the wrong that has been committed. It is impossible to totally disconnect remedies from rights/wrongs, even if they are subject to different criteria. It follows that there must be some degree of logical connection between primary rights/wrongs and remedies, without that, however, leading to question the existence of two separate legal categories. As Kit Barker rightly observes:

> the way in which the primary right is described tends to suggest a certain logical range of responses to its violation: to adumbrate a range of viable secondary

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[80] On the classification of the legal system in regimes of private and public governance, see Ogus, A. (2006), *Costs and Cautionary Tales: Economic Insights for the Law*, Oxford: Hart Publishing, pp. 71–86.

[81] For example, the breach of a contract might be efficient because the profit of the breach would exceed the profit from completion of the contract. See, for instance, Goetz, C.J. and R.E. Scott (1977), 'Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and A Theory of Efficient Breach', *Columbia Law Review*, **77**, 554 and the discussion in Posner, R.A. (2003), *Economic Analysis of Law*, New York: Aspen Publishers, p. 120.

> rights [. . .] The criteria which set up the primary right none the less remain distinct from those which weigh upon a court's decision how to respond, when it is violated.[82]

In conclusion, substantive rights (or wrongs) and remedies are distinct concepts but they should not be construed in isolation from each other. Their relationship with remedies is reflexive.[83]

2. A reflexive relation between rights/wrongs and remedies

Assuming that rights and remedies are distinct/separate concepts, one could conceive that rights precede remedies or that remedies precede rights.

Under the 'primacy of the remedy model', 'it is the potency of the remedy and its availability which determines the nature of the legal right and, indeed, its very existence'.[84] The absence of a remedy will indicate the non-existence of the right. Yet, there are different views over the linkage of remedies and rights in this context. One way to view the remedy primacy model is that only remedies, that is the legal consequences of the violation of a right, count, freedom of action (for the defendant) being maintained in the absence of a remedy. Some may also advance that the violation of the right (the wrong) is not the cause of the remedy[85] but the condition for the remedy to be imposed, the decision-maker stating the circumstances under which this remedy is available.[86] Others advance that the nature of the remedy (property rights or liability) should be a criterion for the classification of rights,[87] emphasizing the centrality of the remedy to the understanding of the nature of the legal right (although this view deviates from the strict remedy primacy model, as it assumes that 'decisions as to entitlement, namely allocation of legal rights, must precede the determination as to their protection via the law of remedies'[88]). This view of the relation between remedies and rights implies that remedies may ignore or go beyond the wrong (or violation of the legal right) that forms the condition of their intervention or more broadly occasions them.

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[82] Barker (1998), n. 71 above, 320.

[83] Ibid., 323.

[84] Friedmann (2005), n. 68 above, pp. 3–4.

[85] The nature of the plaintiff's infringed right defines the nature of the remedy.

[86] One the opposition between the cause and the condition conceptions of remedies see, Weinrib (2008), n. 67 above, pp. 3–8.

[87] Calabresi, G. and D. Melamed (1972), 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral', *Harvard Law Review*, **85**, 1089.

[88] Friedmann (2005), n. 68 above, p. 6.

The 'primacy of the right model' assumes that the right precedes the remedy 'both in time and in importance'.[89] Hence, an effort of legal classification will start by defining the right before moving to the remedy, the right being the cause of the remedy. The violation of the defendant's right by the plaintiff is the causative event, the reason for the particular remedy: 'what the defendant has done to the plaintiff determines what the judge requires the defendant to do for the plaintiff'.[90] The remedy is perceived as replicating/matching the nature of the right, defined here as the structure of the relation between the plaintiff and the defendant (or wrong), prior to the violation. This restoration should take either a qualitative form (which requires from the plaintiff to restore to the defendant the subject matter of the violated right) or a quantitative form, with an award of damages, which restores to the defendant the monetary value of the subject matter of the right.[91]

The opposition between the 'primacy of the remedy' and the 'primacy of the right' models may explain the classification of remedies as replicative and transformative in some recent efforts of legal taxonomy in private law.[92] As mentioned earlier, this effort of taxonomy classifies remedies according to their relationship to the rights which existed prior to the finding of an infringement.

According to this rather formalistic view, replicative remedies are simply 'restatements' of the substantive rights existing independently before them; transformative remedies generate 'something which is quite different from the rights and duties which already pertained between the parties'.[93] For replicative remedies, the claimant does not get 'anything to which he or she did not have a substantive right before coming to court'.[94] Replicative remedies are further divided in remedies replicating primary rights (specific performance), those replicating secondary rights (substitutionary remedies).[95] Remedies replicating primary rights aim either to prevent the continuance of an infringement to a right (prohibitory injunctions) or to redress a past infringement of a primary right by compelling the doing of an act that will realize that right (mandatory injunctions). Replicative remedies of secondary rights (for example, award of damages) 'restate, liquidate and replace' the pre-existing secondary rights.[96] The

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89 Ibid., p. 8.
90 Ibid., p. 4.
91 Ibid., p. 13.
92 Zakrewski (2005), n. 38 above.
93 Ibid., p. 78.
94 Ibid., p. 80.
95 Ibid., p. 81.
96 Ibid., p. 171.

pre-existing secondary right may be a right to restitution, a right to compensation or a right to punish and deter.

In contrast, transformative remedies modify the legal relations between the parties existing prior to the litigation. They give rise to legal relations that 'significantly' differ from any legal relation that existed before the court (or other public authority) order was made.[97] By their essence, these remedies provide 'fairly strong' remedial discretion,[98] compared to replicative remedies, for which discretion is limited by the fact that the remedies should replicate the legal relation existing prior to the infringement of the substantive right. The scope and nature of the pre-existing substantive right forms the boundary of the discretion. Yet, the analysis offered stays silent on the possible limits (or not) on the exercise of remedial discretion by decision-makers for transformative remedies, for which the scope and nature of the pre-existing substantive right is irrelevant, as by essence their function is to modify them. For example, if we follow this analysis, what would be the limits of the discretion of the courts and other decision-makers to impose prophylactic remedies?

Consequently, however clear and useful for descriptive purposes the taxonomy of remedies in replicative or transformative is, it cannot provide an answer to the question of the possible boundaries of the remedial discretion of judges and decision-makers. Other options should be explored, hence the need to analyze the constraints to remedial discretion emanating from the private or public law nature of the disputes.

3. The limits to remedial discretion set by the nature of private law disputes

(a) Correlativity and corrective justice as central features of private law disputes According to Ernest Weinrib, 'correlativity' constitutes the central feature of private law. Correlativity perceives the parties' relationship as a 'bipolar unit in which each party's normative position is intelligible only in the light of the other's'.[99] The reason why correlativity is central to private law is that the private law embodies the concept of corrective justice. The main function of corrective justice is to preserve entitlements against wrongful infringement. Yet, claiming Aristotle, Weinrib links the

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[97] Ibid., p. 203.
[98] Ibid., p. 206.
[99] Weinrib, E.J. (2012), *Corrective Justice*, Oxford: Oxford University Press, p. 2.

concept of corrective justice to 'the relational structure of reasoning in private law', which 'conceptualizes the parties on the active and passive poles of the same injustice (as the doer and the sufferer of injury)'.[100]

Corrective justice disqualifies any reasoning inconsistent with the bipolar relational structure of private law: instrumental considerations, such as distributive justice and efficiency are excluded from consideration, according to this view, as 'for although these may refer to both of the parties, they relate the two parties not to each other but to the goal that both parties serve'.[101] The distinction between distributive justice and corrective justice can be explained by the different emphasis given in each theory of justice. Distributive justice describes a morally required distribution of shares of resources among members of a given group, either because of their membership to that group or in accordance with some measure of entitlement which applies to them in virtue of their membership. This is understood dynamically, that is across various situations in the specific jurisdiction. Corrective justice describes a moral obligation of repairing the harm caused to another person: it is thus more static as it concerns the specific transaction. Rights and duties in distributive justice are 'agent-general', while in corrective justice, 'they are agent-specific'.[102]

For Weinrib, instrumentalist goals imply considerations of collective welfare and thus 'naturally lead to construing private law not as distinctive moral ordering but as a variety of public regulation'.[103] Commentators have emphasized the bipolar relationship between the claimant and the defendant as one of the distinguishing features of private law.[104] The centrality of corrective justice also explains why the duty of one party is the mirror image of the other party's right. Indeed, 'only through this bipolarity can the injustice of the causative event (of the infringement of the right) be a fully adequate reason for a response that links the defendant to the plaintiff'.[105] The structure of the remedy should 'reflect the structure of the injustice, retracing and reversing the movement between the parties'.[106]

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[100] Ibid., p. 2.

[101] Ibid., p. 4.

[102] See Perry, S. (2000), 'On the Relationship between Corrective and Distributive Justice', in Horder, J. (ed.) *Oxford Essays in Jurisprudence*, Oxford: Oxford University Press; Klimchuk, D. (2003), 'On the Autonomy of Corrective Justice', *Oxford Journal of Legal Studies*, **23**, 49–64.

[103] Weinrib, E.J. (1995), *The Idea of Private Law*, Oxford: Oxford University Press. p. 49.

[104] See, for instance, Lucy, W. (2006), *The Philosophy of Private Law*, Oxford: Oxford University Press, pp. 433–4.

[105] Weinrib (2008), n. 67 above, p. 4.

[106] Ibid., p. 5.

The relation between the parties as doer and sufferer of the same injustice explains why 'the parties' relationship is mirrored in the structure of the remedial response, for in the absence of the parties' being directly linked through the event that causes liability, the law would have no reason to respond with a remedy that also directly links them'.[107]

This view relies on the understanding that from the perspective of private law, parties are regarded 'solely as persons who interact with each other through their self-determining capacity to set and pursue their own ends, rather than as subject to obligatory ends set by personal morality or social goals'.[108] Indeed, if the law required the parties to act with some social or moral good in mind, for example the promotion of competition, this goal would 'mediate the parties' relationship so that they would be connected not directly to each other but indirectly through the social good that they and others would share'.[109] For this reason, courts constitute the appropriate institutions for the implementation of corrective justice (Weinrib considers the courts as 'agents of corrective justice'[110]), while distributive justice is implemented by institutions of the political realm. Although both corrective and distributive justice relate to the allocation of resources, under distributive justice an individual's entitlements are not correlative to another individual's obligations.[111]

In private law disputes losses by the claimants are correlative to gains by the infringer. Courts may effectively exercise their adjudicatory function to determine, based on the evidence heard on the structure of the pre-existing relation between the claimant and the defendant, the appropriate relational structure post-infringement, with the understanding that this should be equivalent to that prior the infringement. Determining the just distribution of entitlements between different societal groups is nevertheless a role that courts are not traditionally expected to perform in their adjudicatory function, either because this would require from them access to evidence and knowledge that would not relate to the relation between the parties to the dispute (for example, the distributive impact on other individuals forming part of the categories to which the plaintiff and the defendant belong) or because it would be incompatible to the democratic principle and/or the separation of powers, although it is clear that one

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[107] Ibid., p. 9.
[108] Ibid.
[109] Ibid., p. 10.
[110] Weinrib (1995), n. 103 above, p. 65.
[111] Cane, P. (1996), 'Corrective Justice and Correlativity in Private Law', *Oxford Journal of Legal Studies*, **16**, 471–88, at 472.

cannot entirely exclude that adjudication may produce some polycentric effects.[112]

Weinrib's account of private law has been criticized by other commentators for being reductionist, and more specifically, for ignoring the centrality of distributive justice concerns in some areas of private law (for example, contract law).[113] Yet, as Peter Cane observes, this criticism may be valid for 'productive or facilitative rules' only.[114] The latter should be distinguished from 'protective or remedial rules'. They establish a framework within which productive activities are to be conductive, while remedial rules concern, inter alia, the provision of remedies and sanctions against unacceptable interference with the entitlement established by facilitative rules.[115] It follows that Weinrib's linkage of corrective justice with private law adjudication remains undisputed as far as this concerns the conception of remedial rules in private law.

The court's or other decision-maker's discretion is thus bound in the context of private law resolution of disputes when they impose prophylactic or transformative remedies by the fact that these should seem to implementing the principle of corrective justice, and hence should not go beyond the structure of the pre-existing relation between the correlative entitlements and obligations of the parties to the dispute. A corrective justice theory of private law adjudication preserves the decision-maker from the risk of discretionary remedialism. It does not deny the possibility for creative remedies but these should always be imposed within the boundariesof corrective justice. The private law analogy to competition law is certainly justified in view of the increasing importance of private enforcement and of the need to establish causation between the damage and the competition law violation in damages claims for competition law infringements.

(b) The tension between optimal enforcement theory and corrective justice There is an inherent tension between this view of private law adjudication and that advanced by the tenants of the optimal deterrence model, which is popular with economists and more specifically economic analysis of competition law.

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[112] Fuller, L. and K. I. Winston (1978), 'The Forms and Limits of Adjudication', *Harvard Law Review*, **92** (2), 353–409, at 397, 398 (noting that 'concealed polycentric elements are probably present in almost all problems resolved by adjudication').

[113] Cane (1996), n. 111 above, 472.

[114] Ibid., 475 *et seq*.

[115] Ibid., 476.

The optimal deterrence model and more generally optimal enforcement theory shares with economic efficiency theory the belief that the aim of the legal system is to promote wealth maximization. This objective should transcend both the liability and the remedial stages.[116] This duty to act in conformity to the principle of wealth maximization may potentially confer an important remedial discretion, as it would be possible to impose remedies that would achieve wealth maximization, without these remedies being necessary from a corrective justice perspective.[117] It is possible to adopt remedies that impose a better, from a wealth maximization perspective, competitive equilibrium than the one existing prior to the occurrence of the specific illegal practice, hence modifying the structure of the parties' pre-existing entitlements to a significant extent. This would be in opposition to the principle of corrective justice.

For example, the counterfactual to compute damages in case of an exclusionary abuse of dominant position may be that of a perfect competition or oligopoly equilibrium in which the competitors of the liable firm obtain profits and set up the investments to properly serve the market, whereas the situation, prior to the violation was that of a dominant firm with a competitive fringe equilibrium. In this case, the remedy would have altered the pre-existing entitlements of the dominant firm and the structure of its relation with the competitive fringe.

In an economic efficiency inspired legal framework for protective rules, it would also be theoretically possible not to adopt a remedy, if its effect was to jeopardise a new distribution of entitlements that would be less efficient from the one pre-existing the violation. Corrective justice would be set aside, if its implementation would have led to reduce the aggregate total welfare, compared to the situation before the occurrence of the competition law violation.

Optimal enforcement theory also views remedies as mainly a deterrent

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[116] Posner, R.A. (1981), 'The Concept of Corrective Justice in Recent Theories of Tort Law', *Journal of Legal Studies*, **10**, 187–206, 201 (noting that 'in [the economic theory of law], laws is a means of bringing about an efficient [in the sense of wealth maximizing] allocation of resources by correcting externalities and other distortions in the market's allocation of resources. The idea of rectification in the Aristotelian sense is implicit in this theory'. For a criticism of this view of the Aristotelian theory of corrective justice, see Shaw, B. and M.W. Martin (1999), 'Aristotle and Posner on Corrective Justice: The Tortoise and the Hare', *Business Ethics Quarterly*, **9**, 651–657.

[117] It is interesting here to compare the almost unlimited discretion for imposing remedies under this conception with the limited scope of the liability if one uses the concept of causation. See Shavell, S. (1980), 'An Analysis of Causation and the Scope of Liability in the Law of Torts', *Journal of Legal Studies*, **9**, 463–516.

device directed against potential offenders with the view to ensure that the offender (specific deterrence), but also any other potential offender (general deterrence), would be given sufficient disincentive to be discouraged to engage in this harmful activity in the future (the optimal deterrence model).[118] Penalties should be sufficient to induce offenders to internalize the full social costs of their behaviour (the internalization thesis). This assumes that if there is perfect detection and no social cost of imposing punishment, the optimal sanction will be equal to the net social (efficiency) loss post violation, compared to the situation prior to the violation.[119] The penalty should thus be equal to the net harm to everyone but the offender.[120] For cartels, the optimal penalty is equal to the deadweight welfare loss plus the wealth transfer to the cartel from purchasers. This penalty only deters those instances of the offense in which the deadweight welfare loss exceeds any savings in production costs to the cartel. Accordingly, if the enforcement costs are positive and the probabilities of detection and punishment are less than perfect, optimal penalties should, according to the optimal deterrence model, exceed the social (efficiency) cost of the violation so as to correspond to the efficiency loss caused. The minimum punishment for deterrence to work will be equal to the expected gain from the violation (including interest) multiplied by the inverse of the probability of the punishment being effectively imposed. The idea behind is that the penalty must be sufficient to render the expected value of the violation equal to zero. By imposing this cost, the offence will be deterred. The internalization approach limits theoretically the discretion of the authorities to impose penalties, if it will lead to a less satisfactory, from an efficiency perspective, equilibrium than that existing prior to the violation.

At the same time, if the aim is to ensure that the offender will be given sufficient disincentive to be discouraged from engaging in the activity in the future, the expected value of the violation would be negative (pure deterrence thesis) In this case, it would make sense to include all possible losses, including those of the competitors of the offender that were, for example, foreclosed from the market, for the long term effects persisting after the practice has been terminated, or those of upstream suppliers for lost sales, which, as Hovenkamp observes, are 'potentially unlimited'

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[118] The issue is more complicated in competition law (as in all areas of commercial law) as one should also examine the question of the efficient allocation or mix of deterrence between the corporation and individuals acting on its behalf.

[119] Becker, G.S. (1968), 'Crime and Punishment: an Economic Approach', *Journal of Political Economy*, **76**, 169–217.

[120] Landes, W. M. (1983), 'Optimal Sanctions for Antitrust Violations', *University of Chicago Law Review*, **50**, 652, 656.

losses.[121] Of course, increased sanctions and excessive penalties may also deter efficient conduct and generate overinvestment in compliance, which might be inefficient. However, for the tenants of the pure deterrence thesis, that should not be a major issue, because of the future consequence of deterring harmful conduct (and therefore its future positive wealth maximization effects).[122]

Deterrence may also be an objective of corrective justice. One may distinguish between two forms of deterrence: deterrence as wealth maximization and deterrence as a moral requirement for corrective justice to work effectively. As Gardner forcefully explains, there is a distinction to be made between the moral content of corrective justice and the legal principle of corrective justice:

> [the legal principle of corrective justice] is supposed to be efficient at securing that people conform to certain [. . .] moral norm of corrective justice [. . .] As well as correcting torts that have already been committed, this legal principle is apt systematically to deter the commission of torts that have not yet been committed.[123]

Deterrence has a role to play even for those valuing only the moral principle of corrective justice and rejecting efficiency as a normative value (deterrence-based corrective justice approach). As with the pure deterrence wealth maximization model, there seem to be few limits to the discretion of authorities to impose far reaching remedies in this case.

Similar problems exist if one adopts a distributive justice account of facilitative rules. As was previously noted, corrective justice may be perceived as action-triggered and limited in scope to a specific transaction. The remedy is measured in terms only of the transaction, without regard to the extra-transactional material holdings of the parties.[124] What counts as a wrongful loss is not, however, something that is decided by corrective justice. Corrective justice is just the 'remedial arm' of distributive justice.[125]

As with rights and remedies, the relationship between the two concepts

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[121] Hovenkamp, H. (1989), 'Antitrust's Protected Classes', *Michigan Law Review*, **88**, 1–48.

[122] Wils, W.P.J. (2006), 'Optimal Antitrust Fines: Theory and Practice', *World Competition*, **29**, 183.

[123] Gardner, J. (2011), 'What is Tort Law For? Part 1. The Place of Corrective Justice', *Law and Philosophy*, **30**, 1, 26 and 29.

[124] Klimchuck, D. (2003), 'On the Autonomy of Corrective Justice', *Oxford Journal of Legal Studies*, **23**, 49, 52.

[125] Ibid., at 53.

may be put either in terms of normative priority or independence.[126] The priority view conceives that distributive justice is normatively prior to corrective justice. The consequence is that corrective justice will be instrumental to distributive justice and its normative character will derive entirely from it. The duty to repair, therefore, would be granted exclusively on distributive justice claims. If distributive justice and corrective justice have completely coextensive domains, then one should reject that corrective justice may limit remedial discretion for the reason that distributive justice is logically prior, in so far as 'there must be a distribution relative to which loss and compensation are measured'.[127] As Benson notes, unless claims of corrective justice are grounded on independent, non-distributive, measures of entitlement, corrective justice will inevitably collapse to distributive justice.[128] However, as the same author notes:

> what is to preclude the injury party from claiming that the infringement should be viewed simply as a redistribution of holdings in accordance with the same or a competing criterion of distribution? If the injury party can coherently frame the dispute in this way, the correction of the infringement should also properly be characterized as an act of distributive justice, seeing that it can be viewed as a decision made between two competing distributive claims.[129]

The wrongdoer could claim a different distributive claim, based, for example, on an alternative distributive measure (the so called Robin Hood defence). The only possibility, according to the same author, to avoid a counter-claim based on another distributive justice criterion is to presume that the distribution prior the commitment of the wrong was just and may thus bar the injuring party from framing the violation 'in terms of a competing distributive claim'.[130] However, it might be profoundly unjust and arbitrary to confer this presumption of validity to the pre-transactional allocation rather than to the new arrangement.[131] In conclusion, corrective justice is independent from distributive justice only if one assumes that the pre-transactional distribution is just. A similar conclusion is reached by Jules Coleman when he notes that 'if corrective justice provides moral reasons for repairing a loss, then the underlying claims sustained by

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[126] Walt, S. (2006), 'Eliminating Corrective Justice', *Virginia Law Review*, **92**, 1311–23.

[127] Alexander, L. A. (1987), 'Causation and Corrective Justice: Does Tort Law Make Sense?', *Law and Philosophy*, **6**, 1–23, 7.

[128] Benson, P. (1992), 'The Basis of Corrective Justice and its Relation to Distributive Justice', *Iowa Law Review*, **77**, 515.

[129] Ibid., at 530–1.

[130] Ibid., at 531.

[131] Ibid., at 532.

corrective justice must themselves express requirements of distributive justice [. . .] This relationship appears to rob corrective justice of its moral independence.'[132]

This debate is of particular interest for our discussion of discretionary remedialism. If corrective justice (the remedy) is derivative of distributive justice (determining the substantive right or the facilitative rule), the assumption being that the pre-transactional allocation of entitlements is just, then, the remedy cannot go further than restoring the pre-transactional situation. It cannot modify it to an allegedly superior distributive justice measure. In other words, the pre-transactional distributive justice entitlement would be the only measure of the remedy.

In contrast, proponents of the independence view advocate that corrective justice and distributive justice are normatively independent, in particular if an obligation of repair could apply without regard to the satisfaction of the demands of distributive justice. Steven Perry explains:

> Corrective justice is a general moral principle that is concerned, not with maintaining a just distribution, but rather with repairing harm. Individuals can be harmed in a number of different ways, and corrective justice accordingly protects a number of different kinds of interest and entitlement. Distributive justice often contributes to the legitimacy of an entitlement that corrective justice protects, and in that sense there is a normative connection between the two. But corrective justice does not protect the entitlement qua distributive share, and its purpose is not to maintain or preserve a distributive scheme as such. Rather it protects a legitimate entitlement because interference with the entitlement harms the entitlement-holder. In that sense, corrective and distributive justice are conceptually independent.[133]

This dissociation of corrective justice and distributive justice does not mean that corrective justice entails no distributive consequences, only that the preservation of distributive claims does not form part of its purpose. While corrective justice protects legitimate entitlements, this is because of a duty to repair a harm or wrong based on the principle of corrective justice. The concept of harm thus dissociates the concept of corrective justice from that of distributive justice. Perry observes that:

> (t)he moral focus of the victim's claim is the harm she has suffered. She is saying: you harmed me, and therefore you have a moral obligation to compensate me.

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[132] Coleman, J.L. (1992), *Risks and Wrongs*, Cambridge: Cambridge University Press, p. 342.

[133] Perry, S. (2000), 'On the Relationship between Corrective and Distributive Justice', in Horder, J. (ed.), *Oxford Essays in Jurisprudence*, Oxford: Oxford University Press, at p. 238.

> The injurer responds with the argument that, distributively speaking, it would be better if he did not have to pay compensation. At most we have two distinct kinds of moral claims which must be balanced against one another.[134]

The concept of harm responds to the inadequacy, according to this view, of applying the concept of distributive justice to momentary states, for the reason that distributive justice theories give rise to 'great deal of indeterminacy', as they operate through institutions and over time, that is, according to abstract and long-term patterns.[135] In contrast, corrective justice creates duties to repair that apply at particular moments and is thus normatively independent of distributive justice. Even if the concept of corrective justice is perceived as independent from that of distributive justice, the duty to repair is however limited by the 'harm' incurred by the injured party. It would not be possible to completely dissociate the remedy from the liability phase, as it is in the latter one that harm or wrong is defined.

In conclusion, it is only if one adopts a pure deterrence wealth-maximization view or a deterrence-based corrective justice view that discretionary remedialism would be almost unlimited. A corrective justice based private law dispute resolution approach reduces the risk of discretionary remedialism and offers a structured way forward in theorizing about remedies in competition law.

B. A Public Law Account of Competition Law Remedies

1. The specificities of the public law account of remedies

Competition law may be perceived as generating public law duties that are owed to individuals and thus give rise to corresponding individual entitlements. For example, according to a certain view of Article 102 TFEU, a dominant firm has a duty ('a specific responsibility') to protect competition,[136] this duty generating an entitlement for its actual and potential competitors to have an unrestrained access to the market. Others will replace the individual entitlement of competitors with an entitlement of consumers or the 'general public' to a competitive market process or to competitive market outcomes. In both instances, competition law imposes on public authorities an obligation to remedy for any breach of this duty owed to an individual or the general public. Public law aims to regulate the behaviour of public authorities and ensure that they

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[134] Ibid., at p. 259.
[135] Ibid., at p. 246.
[136] See, for instance, Case C-395/96 P, *Compagnie Maritime Belge* [2000] ECR I-1365, para. 37.

act legally, that is within the boundaries of the powers granted to them. Of course, the entitlements generated by these public law duties do not amount to an entitlement of each individual, if one adopts the first view, or the general public, if one follows the second view, to require public authorities to act and to remedy the violation of their substantive rights. Public authorities have some discretion, subject to the rule of law, to exercise their public law conferred powers to act. Instrumental objectives and priorities (for example, administrability concerns, efficiency, distributive justice) may impact on their decision. This is a major difference with the private law dispute resolution mechanism, in which civil courts have no discretion as to the exercise of their power to provide a remedy to the dispute between the parties, as this would indeed amount to a denial of justice.

Another important difference between the private and the public law accounts of the remedial process is that while the former is based on the idea of correlativity, the latter is by essence polycentric, because of the variety of interests to be considered by the public authority charged with the protection of the general interest, by essence a polycentric concept.[137] The traditional adjudicatory model of private law, designed according to the idea of correlativity, does not fit with the essence of public law litigation. The latter frequently entails 'negotiation, informal dialogue, ex parte communication, broad participation by actors who are not formally liable for the legal violations, and involvement of court (or public authority)-appointed officials to assist in the implementation',[138] or its 'forward-looking ad hoc' character.[139] As is noted by Sturm:

> (r)emedial decision-making in public law cases frequently differs dramatically from the traditional dispute resolution model of adjudication. In the public law context, the affirmative structural injunction tends to be the remedy of choice, rather than damages or a negative injunction. Public law cases concern ongoing violations of general aspirational norms grounded in statutes or the Constitution [. . .].[140]

Furthermore:

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[137] On the polycenticity of public law litigation see Fuller, L. (1978). 'The Forms and Limits of Adjudication', *Harvard Law Review*, **92**, 353, 395; Sturm, S.P. (1991), 'A Normative Theory of Public Law Remedies', *Georgetown Law Journal*, **79**, 1355, 1385.

[138] Sturm (1991), n. 137 above, 1355.

[139] Chayes, A. (1976), 'The Role of the Judge in Public Law Litigation', *Harvard Law Review*, **89**, 1981, 1984.

[140] Sturm (1991), n. 137 above, 1361.

> (i)n public law litigation the judge typically endeavors to develop affirmative requirements to govern the defendant's efforts to eliminate the illegal conditions and practices. Because the judge is seeking to implement generally articulated, aspirational norms in highly differentiated contexts, liability norms do not dictate the content of the remedy. Liability norms only provide the goals and boundaries for the remedial decision.[141]

Certainly, liability delimits the 'problems that the remedy must address' but 'does not, however, dictate how those problems should be solved'.[142] Hence, Susan Sturm notes that '(t)he choice of remedy is likely to be driven by goals that do not directly relate to the liability norm, such as conceptions of good management or the proper goals of punishment'.[143] It follows that the court or the authority 'cannot simply rely upon the processes used to generate a liability decision' to formulate a remedy, as the liability stage of the adjudication does not provide a sufficient amount of factual information (on the different interests involved in these polycentric disputes) to help the court or the authority to craft the process and substance of the remedy. The prospective nature of remedial fact-finding in a polycentric context is also source of additional complications.

The methods of remedial formulation in public law litigation reflect the complexity of the process and the multiple interests involved. As mentioned earlier, the traditional adversarial private law process is perceived as inadequate for an appropriate remedial formulation, in view of its formal and, more importantly, correlative character. The public remedial process is also more informal (as it may involve some bargaining and negotiation between the parties and in some cases some initial proposals from the infringer), it aims more at 'problem-solving rather than at determining truth and responsibility'[144] and it involves a more pro-active role for the judge or public authority in conducting the investigation, as it often involves the participation of interested actors beyond those of the parties to the liability determination, such as competitors and customers of the competition law infringer other than the claimant. The competition authority may consult with experts and other outside sources, as well as appoint third parties (monitoring trustees) to implement the devised remedial plan. It follows that the remedial discretion from which decision-makers benefit in designing appropriate remedies is broader than in a private law adjudicatory context. Yet, in the absence of a proper

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141 Ibid., 1363.
142 Ibid.
143 Ibid., 1364.
144 Ibid., 1377.

overarching theory of public remedial process, it is difficult to determine substantive standards, as opposed to process-centred ones, that would reduce the risk of discretionary remedialism in this case.[145]

The linkage between the rights/wrong and remedies presents particular challenges for decision-makers in a public law setting. In the traditional private law adjudication process, rights (or wrongs) are 'linked definitionally and logically' to remedies, as one of the principal functions of remedies is to replicate the content of the pre-existing right.[146] Transformative remedies also require some form of functional linkage between remedies and rights, the latter one being an implication of the principles of corrective justice and correlativity in private law adjudication. Public law process-based approaches, such as structural reform theories, challenge even further the fit between right (or wrong) and remedy. Sturm explains that 'the characteristics of public remedial decision-making preclude the possibility of deducing the remedy solely from the violation',[147] although they do not go as far as to question the existence, at least, of a 'loose fit' between the rights protected and the remedies. In this context, the linkage between remedies and rights (or wrongs) is instrumental,[148] as the liability stage indirectly constraints the targets of the remedial process, whose aim is to provide a solution to a specifically determined (at the liability stage) *problem*. The normative parameters that have been set at the liability stage in the form of problems that the remedy must address operate at the same time as a guide and as a constraint to the exercise of remedial discretion in a public law context.

As EU competition law is increasingly marked by the emergence of the economic approach, the problem to be solved at the remedial stage is not always set in clear and familiar to lawyers legal terms. Certainly, the use of legal terminology is still present but the core of the reasoning defining

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[145] Indeed, both the structural reform process advocated by Fiss, O. (1979), 'Foreword: The Forms of Justice', *Harvard Law Review*, **93**, 1 (as an alternative to the traditional adversarial dispute resolution model of Fuller; see Fiss, p. 2, 'Structural reform [. . .] is one type of adjudication, distinguished by the constitutional character of the public values, and even more importantly, by the fact that it involves an encounter between the judiciary and the state bureaucracies') and Sturm's project to establish process norms, such as interest participation, independence and impartiality and reasoned decision-making. Sturm (1991), n. 137 above, 1390–1403 does not address directly the question of discretionary remedialism, which is left at the background as a separate issue relating to the principles of the separation of powers and other normative theories on the role of the judiciary

[146] Sturm (1991), n. 137 above 1388.

[147] Ibid., 1389.

[148] Fiss (1979), n. 145 above, 50.

the problem is performed in economic *sprache*, at least for the decisions of the European Commission and NCAs, which increasingly include dense economic material. As the liability problem is set in economic terms, inevitably the remedial process is tempted to respond likewise, with the risk that the principle of corrective justice may be perceived as too much of a straitjacket to provide an appropriate remedial response, the principle of economic efficiency offering a better guide. The remedial discretion of the decision-maker would in this case recognize as its only limits the boundaries of the economic efficiency concept, thus introducing a conceptual dichotomy in the degree of remedial discretion in the context of a private law dispute as opposed to a public law one. Yet, even if one accepts that efficiency will guide the process, it is clear that efficiency involves some trade-offs that will inevitably be made between different interests affected, so as to define the most efficient remedial outcome. There is a variety of interests involved: those of the public for competitive markets, those of the companies on which remedies are imposed for business freedom and property rights, those of the consumers for lower prices and higher innovation, those of shareholders for higher pay offs, those of competitors for increased chances to access the market, those of customers and clients for lower prices, security of supply and quality inputs, among others. Some of these interests may be crystallized to legally sanctioned rights, protected by specific texts of constitutional nature, such as the European Convention on Human Rights or the EU Charter[149] that might be affected by the remedial action of competition authorities. It is important, however, to note that the EU courts adopt a functional definition of rights and subject them to limitations for reasons of 'public interest', thus showing that rights operate more as 'trumps' for certain entitlements or actions rather than as absolute protection devices that cannot be put aside in presence of powerful or weighty reasons. The development of trade-off devices of these various interests inevitably emerges from the need to provide directions to the decision-maker on the appropriate remedial action.

Decision-makers dispose of various trade-off devices in order to perform this search for appropriate – to the specific circumstances – remedies.

One may adopt a simple means-end rationality test, which will consider if the remedial means chosen would indeed be a rational means to a purported remedial end. This may amount to a simple suitability test, which would provide the decision-maker with a lot of discretion in adopting a remedial package, but with the limitation that the remedies should be linked rationally with some limited remedial ends. Hence, the test involves

[149] See, for instance, the right to property or the right to business freedom.

a list of limited remedial ends, as it would make no sense to proceed to an analysis of means without having in mind the ends to which these means aim.

Another possibility would be to assess the proportionality of the remedial action. This trade-off device would inquire whether the means are proportionate to the remedial ends. This exercise will involve in addition to considering if the means chosen are indeed a rational means to a purported end (step 1 of the test), some assessment of the possible excessive costs of the remedial action in relation to its benefits (step 2) and whether the means chosen are the least restrictive to the affected interests' alternative (step 3). The last operation inquires whether there is a less restrictive (to the affected interests) reasonably available alternative to accomplish the same remedial end. This test will not amount to a cost-benefit analysis, as it does not necessarily require that the benefits be more important than the costs: the costs may be more than the benefits but the decision-maker maintains some margin of appreciation to accept non disproportional differences between costs and benefits in this case.

Finally, we can regroup under the broad category of cost-benefit analysis a balancing test that attempts to measure the costs and benefits of a remedial option or of alternative remedial options, before choosing the most appropriate one. This trade-off device requires of course a more intensive fact and evidence-gathering exercise by the decision-maker and the consideration of the values of the costs and benefits examined.

The type of trade-off device required depends on the capacity of the institutions in each jurisdiction to carry the necessary analysis. One would expect a different capacity in a competition authority than in a court. Yet EU public law adopts the default trade-off device of proportionality, which as such imposes constraints on the remedial action and discretion of competition authorities and courts (through the proportionality test).

2. The principle of proportionality as a constraint to remedial discretion

(a) The substance of the proportionality test The principle of proportionality constitutes an important limit to the European Commission's discretion in imposing remedies[150] and demonstrates the necessary logical

[150] See also, Wils (2006), n. 122 above, at 183–208 (noting that 'the principle of proportionality of penalties reflects the retributive view of punishment. Indeed, the utilitarian conception of punishment, which justifies fines being set at the level required for optimal deterrence at the lowest cost, competes for the allegiance of the legal system with the retributive view of punishment. Under the latter view, punishment is not justified by its future consequence of deterring harmful conduct,

connection between the remedy and the liability stages. The principle is included in Article 49(3) of the Charter of Fundamental Rights of the EU providing that 'the severity of penalties must not be disproportionate to the criminal offence'. Proportionality is also a general principle of EU law, applying as such to all measures adopted by Community institutions. According to settled case law:

> by virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.[151]

This three-part test has, of course, to take into account the margin of discretion of the European Commission in adopting appropriate remedies. In that sense, proportionality differs from a cost-benefit analysis which would focus only on the gravity of harm and the alternative remedies that might have been imposed. The remedy will be disproportional when its costs and burdens outweigh its likely benefit of restoring competition or when its costs would be more important than an alternative remedy which would have also been equally effective. Proportionality may take into account other issues, such as the degree of judicial deference to the Commission's decision, as 'the appropriateness of and the need for the contested decision must be assessed in relation to the aim pursued by the institution'.[152] Although the principle of remedial proportionality does not exist as such in US antitrust law, a constitutional proportionality requirement applies to most punitive damages cases as well as to other types of remedies.[153]

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but rather on the ground that it is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing').

[151] Case C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa and others* [1990] ECR I-4023, para. 13.

[152] Case T-170/06, *Alrosa Co. Ltd v Commission* [2007] ECR II-2601, para. 99.

[153] Thomas, T.A. (2007), 'Proportionality and the Supreme Court's Jurisprudence of Remedies', *Hastings Law Journal*, **59**, 73; Sullivan, T.E. and R.S. Frase (2008), *Proportionality Principles in American Law: Controlling Excessive Government Actions*, Oxford: Oxford University Press. See also *State Farm Mut. Auto. Ins. Co. v Campbell et al.*, 538 U.S. 408 (2003) where the US Supreme Court has declined to adopt a strict ratio test for punitive damages, but has suggested that the punitive to actual ratio should rarely be in double digits (that is, exceed a 9–1 ratio).

(b) The remedial proportionality test in the context of Articles 101 and 102 TFEU It is explicitly provided in Article 7 of Regulation 1/2003 that the Commission may impose on undertakings any behavioral or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. This provision mainly codifies previous case law of the CJEU relying on Article 3(1) of Regulation 17/62 that the remedies imposed should 'not exceed what is appropriate' and should be 'necessary to attain the objective sought, namely [to restore] compliance with the rules infringed'.[154] There is a preference for structural remedies, only if there is no equally effective behavioral remedy or where any equally effective behavioral remedy would be more burdensome for the undertaking concerned, as otherwise the remedy might be disproportionate.

The principle of proportionality is given a specific content in Article 7 of Regulation 1/2003 and in the competition law case law of the European courts.[155] It requires that:

> measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.[156]

The first step of the proportionality principle is of particular interest for our purposes. It may indeed be advanced that the appropriate and necessary character of the remedies to be imposed would require a precise remedial measurement, not only with regard to the magnitude and scope (amount) of the harm to consumers/competition or the nature of the infringement, but also in relation to the type of violation that was identified. This might cover a specific competition law category (that is, a refusal to deal, a tying case, an exclusive dealing case),[157] but

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[154] See Case T-170/06, *Alrosa Co. Ltd v Commission* [2007] ECR II-2601, para. 102; Case T-338/94, *Finnboard* [1998] ECR II-1617, para. 242; Case T-76/89, *RTE and ITP v Commission* [1991] ECR II-757, para. 93; Case T-7/93, *Langnese-Iglo v Commission* [1995] ECR II-1533, para. 209; Case T-9/93, *Schöller v Commission* [1995] ECR II-1611, para. 163.

[155] Case T-260/94, *Air Inter v Commission* [1997] ECR II-997; Case T-65/98, *Van den Bergh Foods v Commission* [2003] ECR II-4653, para. 201; Case T-170/06, *Alrosa v Commission*, para. 98.

[156] Opinion of AG Kokkott in Case C-441/07 P, para. 46 (appeal from Case T-170/06).

[157] On the importance of categorization in the context of Article 82 EC, see Lianos, I. (2009), 'Categorical Thinking in Competition Law and the

a simple descriptive statistical analysis of the remedies imposed by the European Commission in abuse of dominant cases from the beginning of EU competition law to 2010, shows that remedies are not always confined to the type of abuse that has been previously identified (see Table 7.2).

More important in an economically-oriented competition law is the fit between the remedy and the theory of harm advanced in the specific case (that is, maintenance of monopoly, leveraging, essential facilities).

The importance of remedial fit is often stressed by antitrust law literature.[158] It is also indirectly linked with the existence of a causal relation between the undertaking's conduct and the theory of harm advanced, which has, as the DC Circuit held in the US *Microsoft* case 'more purchase in connection with the appropriate remedy issue'.[159] Remedies should of course be effective. They aim 'to re-establish the competitive situation, i.e., the competitive process that would have prevailed but for the infringement'.[160] However, if the principle of proportionality requires a close fit between the harm and the remedy, determining the nature of that fit (functional, instrumental) is crucial as to the possibility of adopting prophylactic remedies.

(i) The linkage between the remedy and the competition law violation The case law of the EU courts is clear as to the necessary linkage between the remedies and the competition law infringement.

First, the scope of the obligations imposed on the undertakings concerned in order to bring the infringements to an end identified should be implemented according to the nature of the infringement declared and the obligations imposed 'must not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of

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"Effects-based" Approach in Article 82 EC', in Ezrachi, A. (ed.) *Article 82 EC: Reflections on Its Recent Evolution*, Oxford: Hart Publishing.

158 See Barnett, T.O. (2009), 'Section 2 Remedies: What to do after Catching the Tiger by the Tail', *Antitrust Law Journal*, **76**, 31, 36 ('the remedy needs to be tied closely to the anticompetitive conduct occasioning it. That means that remedies need to be sufficient, but not overbroad, and proportional to the offense'); Werden, G.J. (2009), 'Remedies for Exclusionary Conduct Should Protect and Preserve the Competitive Process', *Antitrust Law Journal*, **76**, 65: '[r]emedies for exclusionary conduct should arise "organically out of the theory of the case"' (citing Sullivan, L.A. (1977), *Handbook of the Law of Antitrust*, St. Paul, Minn.: West Publishing Co., p. 146).

159 *Microsoft*, 253 F.3d, at 80.

160 Hellström, Maier-Rigaud and Bulst (2009), n. 3 above, 58.

Table 7.2 Type of infringement and remedies

Infringement	Excessive pricing	Exclusive dealing	discrimi-nation	Refusal to supply/ deal	tying	Conditional rebate	Abuse of procedures and standards	Alteration of market structure	Predatory behaviour	Abusive contractual clause	Margin Squeeze
Remedy											
fine (1=yes)	2	13	7	9	6	12	1	1	4	0	2
divestment	1	0	0	1	0	0	0	1	0	0	0
obligation to reorganise	0	2	0	2	1	0	0	0	0	0	1
obligation to deal/ supply	0	1	1	5	3	0	0	0	1	0	1
non discrimination	0	1	3	2	3	1	0	0	2	0	0
quantity/pricing obligation	0	2	1	3	2	1	0	0	0	0	1
obligation to inform customers	0	1	2	4	2	0	0	0	2	0	0
obligation to inform EC	0	1	3	2	2	1	0	0	3	0	0
obligation compliance programme	0	0	0	1	1	0	0	0	0	0	0
IP/licensing/royalties obligation	0	1	0	2	1	0	1	0	0	1	0
contractual obligation	0	2	1	0	1	0	0	0	1	0	0
Unbundling	0	0	0	2	3	0	0	0	0	0	0
Observations	3	18	13	18	7	12	2	2	5	1	4

compliance with the rules infringed'.[161] This relates to the obligation of the Commission to give the undertakings concerned the opportunity of being heard on the matters to which it has taken objection. For example, the Commission is not entitled to impose a fine on an undertaking without having previously informed it in the statement of objections that it intended to do so, a requirement which applies by analogy also to remedies.[162] The existence of a competition law violation (even if there is no explicit finding of an infringement) 'constitutes the basis of the obligation of the parties to terminate the infringement', hence the reason for imposing remedies.[163]

In *Atlantic Container* the CJEU annulled part of the Commission's decision for having imposed on the parties to the infringement an obligation to renegotiate or terminate the service contracts concluded between the shippers and the maritime conference, which were not found to be illegal under Article 101 TFEU (as only the provisions of the TAA relating to price-fixing and capacity were found by the Commission to infringe this provision).[164] The Commission had adopted this requirement of re-negotiation or termination as a prophylactic remedy in order to prevent the members of a cartel to continue to apply unlawfully fixed prices simply because these prices were incorporated in long-term contracts with the idea to ensure compliance with the Commission's decision, in other words, the requirement to renegotiate or terminate the service contracts was justified by the fact that the effects of the infringements identified in the decision would have continued to exist if the addressees of that decision were able to continue to enjoy the economic advantages secured by ongoing contracts entered into on the basis of the

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[161] Case T-76/89, *Independent Television Publications Ltd v Commission* [1991] ECR II-575, para. 93; Case C-279/95P, *Langnese-Iglo v Commission* [1998] ECR I-5609, para. 74.

[162] Case T-395/94, *Atlantic Container Line AB* [2002] ECR II-875, para. 417; Case 322/81 *Michelin v Commission* [1983] ECR 3461, para. 20.

[163] Joined Cases 56 & 58/64, *Consten & Grundig* [1966] ECR 299, at 338; Joined Cases T-125 and 127/97, *Coca Cola* [2000] ECR II-1733, para. 80 (observing that 'where an undertaking is in a dominant position it is obliged, where appropriate, to modify its conduct accordingly so as not to impair effective competition on the market regardless of whether the Commission has adopted a decision to that effect').

[164] Case T-395/94, *Atlantic Container Line AB* [2002] ECR II-875, para. 398 *et seq*. Service contracts are agreements under which the shipper undertakes to ship a minimum volume or value of cargo during the period of the contract and in return, the carrier undertakes to provide to the shipper specific service guarantees, such as a capacity guarantee, and negotiates a price lower than that which is normally applicable.

horizontal agreement to fix prices and limit supply found illegal by the Commission.[165]

As this part of the decision formed part of the order bringing the infringement to an end, there was no need to give specific reasons or to draw it to the attention of the parties concerned in the statement of objections.[166] The Court did not agree with this view, noting that most horizontal agreements to fix prices or divide up a market have such effects, more or less long-term, on third parties, but the Commission does not usually include comparable broader obligations in its decisions declaring an infringement.[167] Furthermore, the Court noted that the likelihood of private actions for damages should be a sufficient disincentive for the defendants to continue behaviour that would have maintained or facilitated the effects of the core infringement to Article 101 TFEU, and in any case, the Commission had the obligation to 'explain its reasoning' as to how the prophylactic measures suggested were 'obviously necessary' to put the main infringement to an end, something that the Commission's decision had not done.[168] Finally, the Court observed that 'the statement of objections should in any event have set out, even briefly, but in sufficiently clear terms, the measures which the Commission intended to take in order to bring an end to the infringements and should have given the applicants all the information necessary in order to enable them properly to defend themselves before the Commission adopted a final decision on that point', in view of the rights of defence of the defendants and the requirement that they should be offered a proper opportunity to make known their view.[169]

In a number of cases, the Commission required the undertakings concerned under its infringement decision to refrain in the future from any conduct which may have a same or similar effect to those covered by the infringement decision, with the aim of preventing the undertakings from repeating the behaviour found to be unlawful.[170] In *Cartonboard*, the Commission prohibited any future exchange of commercial information by which the participants directly or indirectly obtained commercial information on competitors, even if this was not by its nature unlawful

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165 Ibid., para. 406.
166 Ibid., para. 407.
167 Ibid., para. 413.
168 Ibid., paras 414–415.
169 Ibid., paras 418–419.
170 Case T-310/94, *Gruber & Weber GmbH & Co KG* [1998] ECR II-1043, para. 167; Case T83/91, *Tetra Pak* [1994] ECR II-755, para. 220 ('its aim is to put an end to all the practices found unlawful in the Decision and to preclude any similar practice').

under Article 101 TFEU as the information related also to certain aggregated statistical data.[171] The General Court found that such prohibition exceeded what was necessary in order to bring the conduct in question into line with what was lawful because it was seeking to prevent the exchange of purely statistical information which was not in, or capable of being put into, the form of individual information and thus used for anti-competitive purposes. Indeed, the Commission had not considered the exchange of statistical data to be in itself an infringement of Article 101(1) TFEU. According to the Court, 'the mere fact that a system for the exchange of statistical information might be used for anti-competitive purposes does not make it contrary to Article [101(1) TFEU], since in such circumstances it is necessary to establish its actual anti-competitive effect'.[172]

In *Langnese-Iglo*, the General Court observed that Article 101 TFEU confers on the Commission 'only the power to prohibit existing exclusive agreements which are incompatible with the competition rules',[173] thus rejecting the attempt by the Commission to impose a prophylactic prohibition of concluding future exclusive purchasing agreements. The Court justified its position by noting that:

> it would be contrary to the principle of equal treatment, one of the fundamental principles of Community law, to exclude for certain undertakings the benefit of a block exemption regulation as regards the future whilst other undertakings, such as the intervener in this case, could continue to conclude exclusive purchasing agreements such as those prohibited by the decision. Such a prohibition would therefore be liable to undermine the economic freedom of certain undertakings and create distortions of competition on the market, contrary to the objectives of the Treaty.[174]

The Court of Justice held on appeal that the General Court's position was consistent with its case law requiring that the obligation to terminate the infringement applied according to the nature of the infringement found, noting also that 'the principle of legal certainty requires that every act of the administration which produces legal effects should be clear and precise so that the person concerned may know without ambiguity what are his rights and obligations and may take steps accordingly'.[175]

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171 Case T-310/94, n. 170 above, para. 177.

172 Ibid., para. 178.

173 Case T-7/93, *Langnese-Iglo GmbH v Commission* [1995] ECR II-1533, para. 205.

174 Ibid., para. 209.

175 Case C-279/95 P, *Langnese-Iglo GmbH v Commission* [1998] ECR I-5609, para. 78.

Interim measures are also subject to similar constraints with regard to the linkage of the remedy with the competition law wrong identified. In *Ford Werke* the Commission had imposed interim measures requiring Ford AG to deliver to its German distributors right-hand drive cars, following the finding that Ford AG had infringed Article 101 TFEU by adopting a circular to its selective distribution network dealers that it would no longer accept their orders for right-hand drive cars. The CJEU was seized as to the legality of these interim measures, in view of the fact that the refusal by Ford to satisfy the demand of its German dealers for right-hand drive cars was a unilateral practice, which was included in the scope of Article 101 only as long as it related to the application of an existing dealer agreement between Ford AG and its distributors. The applicants argued that by reversing this unilateral practice, the interim measures of the Commission went beyond the powers granted to it to bring the infringement (here the agreement between Ford AG and its dealers) to an end.

The Court held that the Commission may adopt as interim measures those which appear indispensable in order to prevent the Commission's decision 'to become ineffectual or even illusory' because of the action of the undertakings.[176] However, this power includes the possibility to adopt prophylactic remedies as long as this is 'solely' in relation to the competition law infringement.[177] Yet, the contested interim measure did not relate to the agreement between Ford and the dealers but 'solely' to Ford's refusal to supply right hand-drive cars to German dealers. The refusal did not infringe either Article 101 or 102 TFEU, hence it did not come 'within the framework' of the final Commission's decision.[178] The Court further noted that even if the requirement imposed by the Commission to supply right-hand drive cars was considered in the context of Article 101(3) TFEU, as conditioning an exemption to the prohibition of Article 101(1) TFEU, the Commission 'would still have no authority to convert that requirement, by means of a decision ordering interim measures, into a separate enforceable order which leaves no choice to the undertaking concerned'.[179] It is only in case the discontinuation of supplies formed part of a principal infringement that the Commission may impose a remedy requiring the undertakings concerned to continue to supply.[180]

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[176] Joined Cases 228 & 229/82, *Ford of Europe Incorporated and Ford-Werke Aktiengesellschaft v Commission* [1984] ECR 1129, para. 19.

[177] Ibid., para. 20.

[178] Ibid., para. 21.

[179] Ibid., para. 22.

[180] See, for instance, the position of the General Court in Case T-23/90, *Peugeot* [1991] ECR II-653, paras 55–56. For an interesting analysis see Sofianatos,

(ii) Freedom of contract as a limit to remedial discretion The boundaries set to the Commission's remedial discretion may also be limited by the freedom of contract, should the remedy impose a duty to conclude contractual relations with a party.

In *Automec*, the General Court held that 'since freedom of contract must remain the rule', the Commission 'cannot in principle be considered to have among the powers to issue orders which it has for the purpose of bringing to an end infringements to article [101(1) TFEU] the power to order an undertaking to enter into contractual relations, since in general it has appropriate means at its disposal for requiring an undertaking to terminate an infringement'.[181] It should be remembered here that although the remedy of nullity is provided for by Article 101(2) TFEU, all other civil consequences of an infringement of this Article (and consequently also of Article 102 TFEU), such as damages or the possible obligation to enter into a contract, are to be determined by national law.[182] Yet, for the General Court, it cannot be held to be any justification for such a restriction on freedom of contract where there are several ways of bringing an infringement to an end. For example, infringements relating to vertical restraints in a distribution system can also be eliminated by the abandonment or the amendment of the specific rules of the distribution system. Hence, although the Commission undoubtedly has the power to find that an infringement exists and to order the undertakings concerned to bring it to an end, it cannot impose upon them its own choice from among all the various potential courses of action which are in conformity with the Treaty.[183] The submissions of the Commission in this case seem also to indicate that the remedy cannot go so far as to compel a supplier to accept a particular dealer within his distribution system, such remedy involving an *intuitu personae* relation between two parties.[184] Requiring admission to a selective distribution system does not, however, amount to imposing an *intuitu personae* relation, as the dealer should in any case fulfil the objective and qualitative requirements for the admission to the network, the same way other dealers do.[185]

In *Alrosa*, the General Court held that compliance with the principle of proportionality requires that, when there are less onerous measures than

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G.A. (2009), *Injonctions et Engagements en Droit de la Concurrence*, Paris: LGDJ, pp. 266–7.

181 Case T-24/90, *Automec Srl v Commission* [1992] ECR II-2223, para. 51.

182 Ibid., para. 50.

183 Ibid.

184 Ibid., para. 45.

185 See, Sofianatos (2009), n. 180 above, p. 268.

those the Commission suggests to make binding, and these are known, the Commission should examine whether those measures are capable of addressing the concerns which justify its action before it adopts, in the event of their proving unsuitable, the more onerous approach.[186] The Commission cannot prohibit 'absolutely any future trade relations between two undertakings unless such a decision is necessary to re-establish the situation which existed prior to the infringement'.[187] It is only in 'exceptional circumstances', such as 'where the undertakings concerned have a collective dominant position', that the Commission may prohibit undertakings completely and indefinitely from contracting amongst each other.[188] The Court found that, in the absence of these exceptional circumstances, the Commission's decision to require from undertakings to refrain for an indefinite period from all direct or indirect trading relations between them, infringes the principle of proportionality.

(c) The prospective nature of remedial assessment as a limit to the proportionality test Although in *Alrosa* the CJEU has struck down the judgment of the General Court[189] for having applied the same level of proportionality control to Article 9 and to Article 7 decisions,[190] the analysis by the General Court of the content of the proportionality test remains still relevant for Article 7 purposes (as far as it assumed that, for the General Court, the proportionality test was similar for both types of decisions). In this case, the General Court examined the proportionality of the commitments accepted by the Commission. Considering the possible evolution of this market in the future, the Commission was of the view that imposing a termination to the contractual relation between the two parties was clearly necessary in order to allow third parties to have access to Alrosa's output and to allow Alrosa to compete fully with De Beers.[191] The General Court was not convinced by the prospective analysis of the evolution of the market performed by the Commission for which it substituted its own.

The judgment of the General Court was set aside by the CJEU, mainly for applying the same standard of proportionality to Article 7 and 9

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[186] Case T-170/06, *Alrosa v Commission* [2007] ECR II-2601, para. 131.
[187] Ibid., at para. 103.
[188] Ibid., at para. 141.
[189] Ibid, paras 105–106; Appeal Case C-441/07 P.
[190] Case C-441/07, *European Commission v Alrosa Company Ltd.* [2010] ECR II-5949.
[191] Ibid. at para. 145 (referring to point 70 of the statement of objections sent by the Commission).

decisions.[192] Interpreted as such, the judgment of the CJEU may be limited to Article 9 decisions, thus not denying to the General Court the possibility of subjecting Article 7 decisions to a strict proportionality test. However, there is also some language in the CJEU's judgment that might constrain the ability of the General Court to perform a thorough analysis of the substantive proportionality of the remedy and its fit to the liability theory advanced: the General Court should in no case put forward its own assessment of complex economic circumstances and should not substitute its own assessment for that of the Commission.[193]

The Commission's analysis of the fit between the theory of anti-competitive effects, as it was determined in the stage of establishing the existence of a competition law wrong, and the remedy imposed in order to redress this problem, remains therefore outside the scope of judicial scrutiny (and the application of the proportionality principle) so long as the fit between the remedy and the problem is predominately analyzed from an economic perspective requiring a 'complex economic assessment'.

The case law has consistently recognized the Commission's discretion as to 'complex economic and technical assessments', over which the courts only exercise a limited review for a 'manifest error' of appreciation.[194] In *Alrosa* AG Kokkott went as far as indicating that the 'crucial factor' limiting the General Court's scrutiny over the margin of assessment of the Commission in the context of Article 9 of Regulation 1/2003 was not due to the voluntary character of the commitments but to the fact that under Article 9 the Commission must carry out an assessment of the market situation in which the commitments offered are embedded. It must examine:

> what effects those commitments will have on future market activities and whether the alternatives known to it are equally appropriate for addressing the competition problem identified. This *alone* [emphasis added] requires an appraisal of complex economic matters [. . .] The fact therefore remains that in the present case the Commission enjoyed and also utilized a margin of assessment.[195]

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[192] See, our analysis below.

[193] Case C-441/07, *European Commission v Alrosa Company Ltd.* [2010] ECR II-5949, para. 67.

[194] Case 42/84, *Remia* [1985] ECR 2545, para. 34; Joined Cases 142/84 & 156/84, *BAT and Reynolds v Commission* [1987] ECR 4487, para. 62; Case C-7/95, *John Deere v Commission* [1998] ECR I-3111, para. 41, noting that '(d)etermination of the effects of an agreement on competition constitutes a complex economic appraisal'.

[195] Opinion of AG Kokott, Case C-441/07 P, *Commission v Alrosa Co. Ltd* [2010] ECR II-5949, para. 74.

It was the prospective nature of the analysis undertaken by the Commission under Article 9 of Regulation 1/2003, involving the assessment of the shape future market activities will take in the light of the commitments. That brings the commitment decisions of Regulation 1/2003 closer to commitment decisions in merger control, which, as we will explore in the next section, are subject to a lower degree of judicial scrutiny, hence a wider discretion is given to the Commission's remedial action. Commitment decisions under Article 9 and merger control share the need for a 'future-oriented prospective economic analysis' of the expected effects of the commitments offered by the parties, the fact that these emanate from existing practices or projected ones being irrelevant for this purpose.[196] In view of this wider discretionary space, the Commission is not required to identify alternative – less restrictive to the parties – solutions to the commitments offered to it.[197]. If the Commission was required to do so, such analysis would be deemed equivalent to performing a complex economic assessment (as 'the Commission is called to give a decision in the nature of a forecast'), and thus not subject, for the same reasons, to judicial scrutiny under the principle of proportionality. At the price of a tautological and formalistic argument, AG Kokott, followed by the Court, has excluded from judicial scrutiny under the principle of proportionality an important part of the remedial activity of the Commission.

The Commission may therefore enjoy a wide remedial discretion by being able to find cover behind the nebulous and still undetermined concept of complex economic assessment, and thus avoid a strict proportionality control of its remedial action, not only in the context of Article 9 but also for Article 7 decisions that impose prophylactic remedies following some prospective economic assessment of the effects of the infringement in the future. The recourse to more economic or effects-based analysis in the implementation of Articles 101 and 102 TFEU and the fact that EU competition law can apply even if the allegedly anti-competitive practice does not produce any actual anti-competitive effects, but may increase the likelihood of (potential) anti-competitive effects,[198] may produce the perverse effect of reducing the scope of the proportionality principle, limiting the extent of judicial scrutiny of the Commission's remedial action and thus increasing the likelihood of discretionary remedialism.

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[196] Ibid., para. 71.
[197] Ibid., para. 73.
[198] On the standard of proof for anti-competitive effects see, Lianos, I. and C. Genakos, Econometric Evidence in EU competition law: An Empirical and Theoretical Analysis, Chapter 1 in this volume.

(d) The remedial proportionality test in the context of EU merger control

(i) The principle of proportionality in merger control The principle of proportionality is explicitly mentioned in Regulation 139/2004 on EU merger control.[199] It should be remembered that in EU merger control, remedies are suggested by the parties and may be accepted by the Commission as a condition for a declaration of compatibility of the merger to Regulation 139/2004. In this area, the Commission has proceeded to a self-limitation of its margin of discretion (by effect of the principle of legitimate expectations) by adopting a detailed *Notice on merger remedies* where it provides guidance to the undertakings concerned on the appropriate modifications to concentrations suggested in their commitments proposed to the Commission. These modifications may be implemented in advance of a clearance decision or following a clearance decision. Implementing a well-established case law of the European courts,[200] the Commission notes in the Remedies Notice that it 'is not in a position to impose unilaterally any conditions to an authorisation decision, but only on the basis of the parties' commitments'.[201] However, if the parties do not validly suggest remedies adequate to address the competition concerns, the Commission has as its only option the adoption of a prohibition decision. It is further explained in the Notice that 'the commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view'.[202] The requirement that commitments should eliminate all the competition concerns derives from the case law of the General Court and may extend the ability of the Commission to accept remedies that may seem in some circumstances disproportionate to the identified competition concerns.

For example, in *Cementbouw* the Court noted that 'the parties' commitments must not only be proportionate to the competition problem identified by the Commission in its decision but must eliminate it entirely', concluding that 'the notifying parties are not required to confine

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[199] Regulation 139/2004, recital 30 ('commitments should be proportionate to the competition problem and entirely eliminate it'). Indeed, as it is stated in recital 6, 'this Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition'.

[200] Case T-210/01, *General Electric v Commission* [2005] ECR II-5575, para. 52; Case T-87/05, *EDP v Commission* [2005] ECR II-3745, para. 105.

[201] Commission Notice on remedies 2008, para. 2.

[202] Commission Notice on remedies 2008, para. 9. See also, Case T-210/01, *General Electric v Commission* [2005] ECR II-5575, para. 52; Case T-87/05, *EDP v Commission* [2005] ECR II-3745, para. 105.

themselves to proposing commitments aimed strictly at restoring the competition situation existing before the concentration'.[203]

The voluntary character of the commitments, and the fact that the Commission has no discretion in rejecting the commitments offered by the parties and in imposing unilaterally remedies aimed strictly at restoring the situation preceding the concentration may explain the weaker nexus required between the merger remedies to the competition concerns identified than in antitrust cases. Yet, the crucial factor is not the unilateral or voluntary character of the remedies but the different aim of merger control, in comparison to the aim of the *ex post* control of Articles 101 and 102 TFEU. In merger control, the aim is not just to restore the pre-existing competitive equilibrium but to 'ensure competitive market structures'.[204] Following the 2004 revision of the merger regulation and the new substantive test a 'competitive market structure' is not only defined in opposition to a dominant position, which should be eradicated, but to a structure that is not characterized by a significant impediment of effective competition, a category which is much broader in scope. It follows that the Commission may decide to accept commitments that go beyond the pre-merger market configuration, in other words, remedies that presumably establish a market equilibrium that is more competitive than the pre-merger one.

This is a distinct possibility in coordinated effects cases. Nicholas Petit distinguishes between three types of remedies approved in coordinated effects cases: 'type I' remedies, such as a divestiture, that create or restore 'competitive forces external to the oligopoly', which restore '– albeit in a different form – the pre-merger market structure', 'type II' remedies that seek to 'sever structural links within the oligopoly' and thus to 'eradicate collaborative opportunities between incumbent oligopolists', and finally, 'type III' remedies that aim at eliminating 'facilitating practices' that increase the likelihood of collusion.[205] Parties may be obliged to offer clear-cut type I remedies, when negotiating with the Commission, although less intrusive type II or type III remedies which could have achieved the same competitive outcomes are also available. For example, the parties may offer a remedy preventing the risks of tacit collusion post-merger by focusing only on one of the four conditions of the substantive standards devised by the EU Court in *Airtours plc v Commission*

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[203] Case T-282/02, *Cementbouw Handel & Industrie BV v Commission* [2006] ECR II-319, paras 307–308.

[204] Commission's Remedies Notice 2008, para. 15.

[205] Petit, N. (2010), 'Remedies for Coordinated Effects under the European Union Merger Regulation', *Competition Law International*, **6**, (2), 8–9.

for establishing coordinated effects,[206] and not be obliged to offer a wider panel of remedies that would have acted on all them.[207]

By subjecting the Commission to general principles, the Merger Notice limits its remedial discretion. According to the Notice, the Commission should review 'whether the commitments submitted by the parties are proportionate to the competition problem when assessing whether to attach them as conditions or obligations to its final decision'.[208] Yet, the language used in the *Notice* remains vague and the multi-factor approach employed in order to determine the appropriateness of different types of remedies leaves an important margin of discretion to the Commission. In assessing whether the proposed commitment will likely eliminate the competitive concerns identified, the Notice provides that the Commission will 'consider all relevant factors relating to the proposed remedy itself, including inter alia, the type and scope of the remedy proposed, judged by reference to the structure and particular characteristics of the market in which the competition concerns arise, including the position of the parties and other players on the market'.[209] Implementation concerns and the ability to monitor commitments should also influence the selection of appropriate commitments, thus introducing some additional factors to take into account in addition to the simple elimination of competition concerns.

(II) THE DISTINCTION BETWEEN STRUCTURAL/BEHAVIOURAL REMEDIES IN MERGER CONTROL The typology of remedies explored by the Commission, as it is also the case for any other competition authority in the world,[210] is directly inspired by the opposition between structural and behavioural remedies. Structural remedies, such as divestiture, aim to create or preserve legally and operationally independent firms so as to maintain competition in the affected market. Behavioural or conduct remedies subject firms to operating rules intended to prevent them from undermining competition.[211] The distinction is not clear-cut and some remedies may present characteristics of both categories: for example, a remedy of compulsory patent licensing may

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206 Case T-324/99, *Airtours plc v Commission* [2002] ECR II-2585.

207 Petit (2010), n. 205 above, 9.

208 Merger Notice 2008, para. 85.

209 Ibid., para. 12.

210 For instance see, UK Competition Commission, Merger Remedies: Competition Commission Guidelines (November 2008), p. 12.

211 Kwoka, J.E. and D.L. Moss (2011), 'Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement', (American Antitrust Institute, November 2011), available at http://www.antitrustinstitute.org/~antitrust/sites/default/files/AAI_wp_behavioral%20remedies_final.pdf, pp. 3–5 (last accessed 19 June 2013).

be considered as a form of divestiture of the firm's intangible property rights. The EU courts have been critical of a strict dichotomy in the past[212].

The simplicity of divestitures, as, once implemented, they do not require a specific monitoring mechanism, has been duly remarked.[213] An additional reason for the Commission to prefer structural commitments, as opposed to behavioural ones, is that structural commitments prevent, durably, the competition concerns raised by the merger.[214] In any case, the Commission acknowledges that 'the question of whether a remedy and, more specifically, which type of remedy is suitable to eliminate the competition concerns identified, has to be examined on a case-by-case basis'.[215] Case-by-case approach notwithstanding, the *Notice* expresses, however, a clear preference for divestiture-related remedies in general, noting that they 'are the benchmark for other remedies in terms of effectiveness and efficiency' and that the Commission may accept other types of commitments, 'but only in circumstances where the other remedy proposed is at least equivalent in its effects to a divestiture'.[216] There are cases where this would rarely be so: for example, the Commission considers that divestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps, problems resulting from vertical or conglomerate concerns,[217] or for removing links between the parties and competitors in cases where these links contribute to the competition concerns.[218] In contrast, the Commission appears more cautious with regard to other prophylactic remedies, such as commitments relating to the future behaviour of the merged entity, which can only be accepted in exceptional circumstances.

This preference for structural remedies in mergers may be contrasted to the generally more favourable position of Regulation 1/2003 on the *ex post* control of Articles 101 and 102 TFEU for behavioural remedies[219]

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[212] Case T-102/96, *Gencor v Commission* [1999] ECR II-753, para. 319 ('the categorisation of a proposed commitment as behavioural or structural is [. . .] immaterial', the Court preferring to examine on a case-by-case basis the commitments offered by the undertakings concerned).

[213] Merger Notice 2008, para. 13. For an interesting analysis of the alleged advantages of structural remedies see, Papandropoulos, P. and A. Tajana (2006), 'The Merger Remedies Study – In Divestiture We Trust?', *European Competition Law Review*, **8**, 443.

[214] Merger Notice 2008, para. 15.

[215] Ibid., para. 16.

[216] Ibid., para. 61.

[217] Ibid., para. 17.

[218] Ibid., para. 58.

[219] See Article 7(1) Regulation 1/2003 indicating that 'Structural remedies can only be imposed either where there is no equally effective behavioural remedy

and to the more positive approach towards behavioural remedies in the recent US DOJ 2011 Antitrust Division Policy Guide to Merger Remedies (hereinafter, 2011 US Remedies Guidance).[220] The approach of the DOJ to merger remedies seems to have shifted, with behavioural/conduct remedies being preferred for vertical cases while structural remedies for horizontal cases.[221] Furthermore, the new Guidance has added a number of behavioural remedies to the existing arsenal of the DOJ, such as firewalls, transparency or non-discrimination provisions, mandatory licensing, anti-retaliation and arbitration requirements. It is possible that conduct remedies may transform themselves to a form of economic regulation. In addition, they are generally subject to important implementation and monitoring costs.[222]

However, the effectiveness of structural remedies has been recently

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or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy'. See also, Hellström, Maier-Rigaud and Bulst (2009), n. 3 above.

[220] Department of Justice, Antitrust Division Policy Guide to Merger Remedies (June 2011). This text replaced a previous Guidance issued in 2004. In the United States, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission have different procedures for achieving final approval of a suggested merger remedy. The DOJ must file suit in a federal court to block or otherwise to challenge a merger. When the parties and the DOJ agree to a remedy, the Antitrust Division must file a proposed consent decree embodying the remedy to the relevant court. The court must determine if the proposed settlement is in the public interest based on the competitive impact assessment prepared by the Antitrust Division, a judicial scrutiny that is more intensive after the passage of the 2004 Tunney Act amendments. The Court must consider the relationship between the remedy and the specific competition harm alleged, whether the decree may cause harm to third parties, whether the relief is adequate, alternative remedies considered by the DOJ Antitrust Division, without, however, engaging in 'an unrestrained evaluation of what relief would best serve the public': OECD, Remedies in Merger Cases (Policy Roundtables, 2011), available at http://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf, p. 229. The Federal Trade Commission (FTC) can also ask a court to block the merger but may also use its proper administrative procedures to settle the case. After the parties reach agreement as to the settlement with the FTC's staff, the FTC votes to accept the agreement without this requiring any approval by the courts, the FTC being a quasi-judicial administrative agency. Parties may appeal any resulting order to final appellate review by the federal courts of appeal. Private actions against mergers are also possible. In theory all antitrust remedies (injunctions, divestiture, damages) are available (Section 4 Clayton Act), although damages awards are rare. See Hovenkamp, H. (1984), 'Merger Actions for Damages', *Hastings Law Journal*, **35**, 937.

[221] 2011 Merger Remedies, op. cit., p. 2.

[222] Kwoka, J.E. and D.L. Moss, (2011), n. 211 above.

challenged,[223] some authors suggesting that the economics of regulation may provide clear principles for the design of appropriate behavioural/conduct remedies, thus improving their effectiveness and lowering their costs.[224] The *ex ante* character and the prospective nature of merger control increase, nevertheless, the risk for both types of remedies to over-fix the competition problem identified,[225] which raises the issue of the proportionality of remedies. The 2004 US Remedies Guidance is clear as to the purpose of merger remedies, which is 'not to enhance pre-merger competition but to restore it' or to maintain it at the pre-merger levels.[226] Yet, the judicial scrutiny of the remedies included in the consent decrees of the DOJ and the FTC is in practice limited: first, the courts have refrained from assessing the merits of the government decision to settle the case, such decision being held outside the scope of judicial review, and have

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[223] See, for instance, European Commission, DG Competition, Merger Remedy Study (October 2005), available at http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf (last accessed 19 June 2013); US Federal Trade Commission, A Study of the Commission's Divestiture Process (1999), available at http://www.ftc.gov/os/1999/08/divestiture.pdf (last accessed 19 June 2013).

[224] Rey, P. (2003) 'Economic Analysis and the Choice of Remedies', in Lévêque F. and H. Shelanski (eds), *Merger Remedies in American and European Union Competition Law*. Cheltenham, UK and Northhampton, MA, US: Edward Elgar.

[225] On the risks of over-fixing and type I errors (pro-competitive mergers blocked or modified by the authority), see Duso, T, D. Neven and L.H. Röller (2003), 'The Political Economy of European Merger Control: Evidence Using Stock Market Data', CEPR Discussion Paper DP 3880, available at http://www.cepr.org/meets/wkcn/6/6607/papers/neven.pdf (last accessed 19 June 2013); Duso, T., K. Gugler and B. Yurtoglu (2007), 'EU Merger Remedies: A Preliminary Empirical Assessment', in Ghosal, V. and J..Stennek (eds), *The Political Economy of Antitrust (Contributions to Economic Analysis)* Amsterdam: Elsevier, pp. 302–48.

[226] 2004 US DOJ Merger Remedies, p. 2; *United States E.I. du Pont de Nemours & Co*., 366 U.S. 316, 326 (1961); see also, the US contribution to the OECD, Remedies in Merger Cases (Policy Roundtables, 2011), n. 220 above, (noting certain basic principles the US agencies apply to all their merger remedies. First, effectively preserving (or restoring) competition is the key to an appropriate merger remedy. [. . .] Second, the Agencies' central goal is preserving competition, not determining market outcomes. [. . .] Third, a remedy closely tailored to the theory of the violation in a particular case is the best way to ensure that the relief obtained cures the competitive harm. The Agencies will accept a proposed remedy only if they are satisfied that there is a close, logical nexus between the proposed remedy and the alleged violation – that the remedy fits the violation and flows from the theory of competitive harm'.); ICN Recommended Practices for Merger Analysis, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf (last accessed 19 June 2013), p. 2.

also exercised self-restraint of attempting to assess the competitive merits of one form of relief or another;[227] second, with regard to the content of the consent decree, the US courts do not examine if it is the best possible decree but only exercise some limited judicial scrutiny in order to guarantee that the consent decree meets the public interest test,[228] despite legislative efforts to deepen the degree of judicial involvement by defining more precisely the content of the 'competitive impact' of the remedy in the context of the 'public interest test'.[229]

(iii) A limited judicial scrutiny of remedial discretion in EU merger control The judicial review of remedial discretion in the context of EU merger control is also limited. First, the General Court has recognized that the Commission has a 'broad discretion in assessing the necessity of obtaining commitments in order to dispel the serious doubts raised by a notified concentration'.[230] The General Court cannot substitute its own assessment for that of the Commission, but its review must be limited to ascertaining that the Commission has not committed a manifest error of assessment. A failure to take into account commitments suggested by the parties or the fact that other commitments might have been accepted or even might have been more favourable to competition, 'does not by itself prove that the contested decision is vitiated by a manifest error of assessment'.[231] Second, although the Commission has no discretion as to the initiation of a phase II procedure, once 'serious doubts' with respect to the compatibility of the concentration with the common market are identified, Article 6(1)(c) employing the prescriptive 'shall', the Commission nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether the phase I com-

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[227] Areeda, P. and H. Hovenkamp (1978), *An Analysis of Antitrust Principles and their Application*, New York: Aspen Publishing., 3D, ¶ 327, pp. 25–37.

[228] See, for instance, *US v Microsoft*, 56 F.3d, at 1457–8 (D.C. Cir. 1995), the Court noting that 'Congress did not mean for a district judge to construct his own hypothetical case and then evaluate the decree against that case' (ibid., at 1461).

[229] See, for instance, the 1984 amendments to Section 5 of the Clayton Act and the subsequent 2004 amendments of the Tunney Act. See 15 U.S.C. § 16(e), observing that the competitive impact includes the termination of the alleged violations, provisions for enforcement and modification, the duration of the relief sought, anticipated effects of alternative remedies actually considered.

[230] Case T-158/00, *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland (ARD) v Commission* [2003] ECR II-3825, para. 328.

[231] Ibid, para. 329. See also Case T-177/04, *EasyJet Airline Co. Ltd v Commission* [2006] ECR II-1931, para. 128.

mitments are sufficient to dissipate these concerns. The Court explains: 'as the notion of 'serious doubts' is an objective one, the identification of such doubts necessarily requires the Commission to carry out complex economic assessments, in particular where it must assess whether the commitments proposed by the parties to the concentration are sufficient to dispel those serious doubts'.[232] The judicial scrutiny is that of a manifest error of assessment.[233] However, the Court takes into account the specific purpose of the commitments entered into during the Phase I procedure 'which, contrary to the commitments entered into during the Phase II procedure, are not intended to prevent the creation or strengthening of a dominant position but, rather, to dispel any serious doubts in that regard' and requires that 'the commitments entered into during the Phase I procedure must constitute a direct and sufficient response capable of clearly dispelling all serious doubts', thus reinforcing the degree of judicial scrutiny exercised.[234]

The extent of the judicial scrutiny of the General Court on the content of the merger remedy is further limited by the doctrine of 'complex economic assessments', which requires the Court to subject the Commission's appraisal to a limited legality control, the Commission maintaining a large margin of discretion. As the General Court explained in *EDP*, review by the EU courts must in this case be 'limited to ensuring compliance with the rules of procedure and the statement of reasons, as well as the substantive accuracy of the facts, the absence of manifest errors of assessment and any misuse of power'.[235] The extent of the judicial control of the proportionality of the remedy will by essence be limited, in view of the nature of the control of legality.[236]

The self-restraint that EU courts must exercise in the context of a

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[232] Case T-119/02, *Royal Philips Electronics NV v Commission* [2003] ECR I-1433, para. 77.

[233] Ibid., para. 78.

[234] Ibid., paras 79–80. See also, T-177/04, *EasyJet Airline Co. Ltd v Commission* [2006] ECR II-1931, para. 129.

[235] Case T-87/05, *EDP – Energias de Portugal, SA v Commission* [2005] ECR II-3745, paras 63 and 151.

[236] See, for instance, the Opinion of AG Kokott, in Case C-441/07 P, *Alrosa*, para. 88, noting that by examining if there was an alternative solution that would have reduced the risks of distortion of competition than the remedies suggested by the parties, the General Court left 'the *realms of a review of the lawfulness* of a Commission decision and in reality carrie[d] out its own appraisal of complex economic matters' (emphasis added). That would be contrary to the nature of the legality review (which is not a review over the comparative cost benefit analysis of the different remedies that can be imposed to restore competition), the latter involving a 'thorough analysis of market conditions, for which the [General Court] is not competent, however, but the Commission'.

limited control of legality may be opposed to the more aggressive judicial scrutiny of the proportionality of fines. There are two important differences with regard to the institutional context of other remedies in EU antitrust and merger law. First, the principle of proportionality takes an arithmetic form in Article 23(2) of the Regulation, which provides that the Commission can impose fines on undertakings that may not exceed 10 percent of its total turnover in the preceding business year. This somewhat arbitrary threshold constitutes an attempt by the legislator to draw a rough balance between the anti-competitive harm and the harm to the undertaking's financial position, according to the principle of proportionality and provide the courts with some rough measure of what is manifestly disproportionate. The Commission maintains, of course, its margin of discretion for imposing fines below this threshold. In addition, in fixing the amount of the fine, the EU courts require the Commission to pay due regard to both to the gravity and to the duration of the infringement as well as to the effect on the market of the competition law infringement.[237] These constraints to the Commission's discretion were included in its Guidelines on setting fines, along with other procedural requirements and may bind the Commission in view of the principle of legitimate expectations.[238] Second, the Commission's decisions on fines are not subject to the limited control of legality, as other remedies. Following the interplay of Article 261 TFEU and of Article 31 of Regulation 1/2003, the judicial control of the appropriateness of the amounts of fines is more intensive, the Commission's assessment being examined beyond the existence of a manifest error of assessment. Pursuant to these provisions, the General Court is endowed with unlimited jurisdiction to assess the appropriateness of fines, and if necessary, may vary, downward or upward, the amount of the fine imposed by the Commission. In its most recent case law, the Court of Justice prescribed rigorous standards for the judicial scrutiny of the Commission's decisions. In particular, the Court held that 'the Courts cannot use the Commission's margin of discretion – either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines (of the Commission) or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts'.[239] Despite this recent language for a

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[237] See Joined Cases C-189/02 P, C-202 P, C-205-208/02 P, C-213/02 P, *Dansk Rørindustry and others* [2005] ECR I-5425, para. 243.

[238] Commission's Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] OJ C 210/2.

[239] See, Case C-368/10 P, *Chalkor AE Epexergasias Metallon v European Commission*, 8 December 2011, not yet published, para. 62. See also, Case

more intensive judicial involvement in the consideration of the amount of fines, the judicial scrutiny exercised remains that of a control of legality, with all the inherent limitations this type of judicial scrutiny entails.[240]

But are the nature of the judicial control (control of legality as opposed to review on merits) and that of the proportionality principle the main sources of the relatively weak judicial control exercised over competition law remedies? Is the proportionality principle flexible enough to accommodate the need for a more intensive judicial control of competition law remedies? Is there any difference with regard to the degree of interference of the courts to the remedial action of competition authorities in the context of a merits review? In order to examine these questions, we will refer to the experience gained from the enforcement of competition law in the UK.

(e) Does a full merits review make a difference as to the margin of remedial discretion? The UK competition law system stipulates two forms of judicial control of the competition authorities' action. First, the remedies adopted by the Office of Fair Trading (OFT) with regard to the application of Articles 101, 102 and their national equivalents (Chapter I and II of the Competition Act 1998) are subject to a full merits (appellate) review in front of a specialised Tribunal, the Competition Appeal Tribunal (CAT).[241] The process is close to a quasi-adversarial model, where the

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C-389/10 P, *KME Germany AG, KME France SAS and KME Italy SpA v European Commission*, 8 December 2011, not yet officially published; Case C-272/09 P, *KME Germany AG, KME France SAS and KME Italy SpA v European Commission*, 8 December 2011, not yet published.

[240] It is interesting to note that in a recent judgment the EFTA Court held that 'when imposing fines for infringement of the competition rules, [the EFTA Surveillance Authority] cannot be regarded to have any margin of discretion in the assessment of complex economic matters which goes beyond the leeway that necessarily flows from the limitations inherent in the system of legality review': Case E-15/10, *Poste Norge AS v EFTA Surveillance Authority* (18 April 2012), not yet published, para. 100.

[241] The Tribunal was established by the Enterprise Act 2002 (s. 12 and Sch. 2). The CAT does not have inherent jurisdiction as the High Court (whose jurisdiction is established by precedent) but a statutory jurisdiction, its standards of review being based on statutory law. Section 46(1) and (2) of the Competition Act 1998 provide that any party to an agreement in respect of which the OFT has made a decision, or any person in respect of whose conduct the OFT has made a decision, may appeal to the CAT '*against, or with respect to, the decision*'. Such decisions may also be made by the various sector specific regulators pursuant to the competition jurisdictions they hold concurrently with the OFT. Schedule 8 provides for two different types of review depending on the type of decision under appeal.

decisions of the OFT are subject to strict and intensive scrutiny in law, facts and policy, the CAT having the authority to substitute its assessment to that of the authority. However, appeals against a decision by the OFT to release or not to release commitments given to it in the course of a competition investigation are not subject to appeal but to judicial review.[242]

Second, merger control remedies and remedies in the context of market investigation references, adopted by the UK Competition Commission (CoCo) (or the OFT during the first phase of the proceedings with regard to the decision to refer the merger to the Competition Commission or to clear the merger) are subject to the traditional control of legality (judicial review) of administrative action, in front of the specialised CAT as well as in front of the High Court. Yet, despite this important institutional dichotomy between competition law remedies in the *ex post* antitrust control (Chapter I, Chapter II, Articles 101 and 102 TFEU) and competition law remedies in the context of the *ex ante* competition law control (mergers, market investigation references), the intensity of judicial control exercised over remedies is particularly strong, in comparison to the situation in the EU. This may be explained by the fact that this is performed by the same judge (the CAT).

There are three grounds of review which are commonly used: illegality, procedural impropriety and irrationality. The threshold usually applied for irrationality is the unreasonableness *Wednesbury* standard according to which, 'if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere [. . .] but to prove a case of that kind would require something overwhelming', which sets a quite high standard of proof for the plaintiff'.[243] However, the threshold is a lower one, that of proportionality, when European Union law or Human Rights Act breaches are involved.[244] It is well established that the level of scrutiny to which the

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In most cases, according to para. 3(1) of the Schedule, the CAT '*must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal*'.

[242] Paragraph 3(1) does not apply to an appeal under s. 46 against, or with respect to, a decision of the kind specified in subsection (3)(g) or (h) of that section, or to an appeal under s. 47(1)(b) or (c). See also, Sch. 8, para. 3A.

[243] *Lord Greene Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, HL.

[244] There has been a lot of discussion on the relation between the rationality (reasonableness) standard and the proportionality standard, some authors suggesting that there is a clear opposition between the two, the rationality standard applying to public wrongs, while the proportionality standard in cases involving rights, while some others advanced a unitary framework based on the proportion-

Courts will subject an administrative decision depends 'upon the subject matter in hand',[245] the test being that of 'heightened scrutiny' for human rights cases.[246] The boundaries of the judicial review as opposed to a merits review are well set in the case law: according to the CAT, the exercise of judicial review should be contrasted with an appeal 'on the merits' [. . .] (as) judicial review proceedings are solely concerned with the lawfulness of a decision and not its correctness'.[247] The CAT has no jurisdiction to cure an error and the merits of the administrative action are only subject to political control. The nature of the judge, specialized or not, should not make any difference as to the intensity of review, as the scope of the judicial review is defined in terms if the extent of power and the legality of its exercise, rather than in terms of the protection of individual or the public interest.[248] However, some commentators have rightly observed that 'it is inevitable that the CAT's approach to the application of judicial review principles will be to some extent informed by its expertise and its experience as an appellate tribunal conducting merits appeals', and inferred that 'the CAT is likely to delve deeper into a regulator's reasoning and to have a better appreciation of any defects in it than an Administrative Court judge to whom merits are anathema and who may have little or no experience of complex regulatory disputes'.[249] The CAT is also more inclined to use cross-examination than traditional Administrative Courts.[250]

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ality standard. In practice, the difference of opinion represents merely an issue of branding of the type of control exercised as both sides seem to agree on the fact that there is a sliding scale in the intensity of judicial review exercised by the Courts (the 'rainbow of review').

[245] *R (Mahmood) v Home Secretary* [2001] 1 WLR 840 at para. 18.

[246] See *R v Ministry of Defence, ex parte Smith* [1996] QB 517, 554.

[247] See *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 36, para. 60.

[248] For a clear statement see *Barclays Bank plc v Competition Commission* [2009] CAT 27, para. 27, 'In the *Tesco* case this Tribunal summarized its task as to ascertain whether the Commission had done what was necessary to put itself in a position properly to decide its statutory questions. In the BSkyB case, the tribunal emphasized [. . .] that the specialist composition of the Tribunal, with members well qualified to form their own views as to the correct methods of economic analysis, did not permit any departure from settled principles of judicial review, so as for example to permit it to substitute its own views as to the correct evaluation methodology, or as to the depth of analysis required, for those of the Commission'.

[249] See the excellent analysis by Dinah Rose QC and Tom Richards (2010), Appeal and Review in the Competition Appeal Tribunal and High Court, Blackstone Chambers, p. 12 available at http://www.blackstonechambers.com/news/publications/standards_of_appeal.html (last accessed 19 June 2013).

[250] Ibid.

The case law of the administrative courts generally shows deference to administrative action and accords important weight to the decision-makers when they have discretion. The court examines the rationality of the regulator's action, but it is not asked to form its own view on the part of the material available to the decision-maker.[251] When performing their task of judicial review, the courts are inspired by the EU theory on complex economic assessments, by taking a deferent approach to the economic appreciations of the competition authorities.[252] The weight (and thus the degree of deference) provided to the decision of the competition authority is commensurate with the prospective nature of economic analysis: 'because the likelihood of error is greater in a prospective analysis, the prospective analysis must be proportionately more rigorous to account for this possibility'.[253] Yet judicial review does not amount to rubber-stamping of decisions already made by the competition authorities, the CAT proceeding to a sort of cost-benefit analysis of the remedy.[254]

In *BAA Limited v Competition Commission*, although the CAT explained that the proportionality test does not require a precise quantitative analysis of the impact of the remedy, as the first step of a cost-benefit analysis

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[251] *R (Fraser) v National Institute for Health and Clinical Excellence* [2009] EWHC 452 (Admin) at para. 47 per Simon J.

[252] See *R v Director General of Telecommunications, ex parte Cellcom* [1999] ECC 314, '(w)here the Act has conferred the decision-making function on the Director, it is for him, and him alone, to consider the economic arguments, weigh the compelling considerations and arrive at a judgment [. . .] If (as I have stated) the court should be very slow to impugn decisions of fact made by an expert and experienced decision-maker, it must surely be even slower to impugn his educated prophesies and predictions for the future'.

[253] *Hutchison 3G (UK) Ltd v Office of Communications* [2005] CAT 39, para. 33.

[254] See *Tesco Plc v Competition Commission* [2009] CAT 6 (the CAT required the UK Competition Commission (CoCo) to perform a 'double proportionality' test, balancing the '(achievable) aims of the proposed measure on the one side, and any adverse effects it may produce on the other side', taking, however, into account 'the wide margin of appreciation' that the CoCo disposes on these matters and the need for a court to be cautious in interfering with these balancing exercises in an application for judicial review'); *Barclays Bank Plc v Competition Commission* [2009] CAT 27, paras 19 and 21 (the CAT noted that 'double proportionality' is not a new legal principle but simply a convenient label for the common sense proposition that, within a wide margin of appreciation, the depth and sophistication of analysis called for in relation to any particular relevant aspect of the inquiry needs to be tailored to the importance or gravity of the issue within the general context of the Commission's task. The proportionality test performed was defined as a 'balancing exercise required between effectiveness, reasonableness and practicability'.

that will compare the adverse effects on competition with the costs of implementing the remedy and its impact on the undertakings,[255] it held that some qualitative analysis of the costs of implementation and the impact of the remedy, in comparison to the AEC, should be performed in order to establish the link between the remedy and the wrong, thus limiting the remedial discretion of the CoCo.

In a full merits (appeal) review, the CAT proceeds to extensive findings of fact in cases where the evidence relied on by the OFT is challenged, very often on the basis of extensive new material introduced by the appellant and rebuttal evidence introduced by the OFT.[256] However, the Tribunal exercises an appellate function and cannot proceed to the same analysis of the factual record as a court (or a regulator) would do at first instance. The fact that it is an (appellate) review (and not a review *de novo*), limits the factual record that the Court disposes to that submitted by the parties and examined by the authority.[257] Hence, some weight will still be provided to the analysis performed by the relevant competition authority at first instance.[258] As some commentators have explained, 'when the decision under challenge is a multi-faceted policy decision, the CAT is more likely to allow the legitimate judgment of the regulator to stand, unless it can be shown that there is some error in the basis for that judgment'.[259]

In contrast to judicial review or the ordinary approach of an appeal court, the CAT is, however, willing in an appeal review to determine disputes of primary fact and proceeds more frequently than other appeal courts to cross-examinations of witnesses.[260] This might seem, at first

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[255] *BAA Limited v Competition Commission* [2009] CAT 35, para. 261.

[256] *M.E. Burgess, J.J. Burgess & S.J. Burgess v OFT* [2005] CAT 25, para. 130.

[257] See *Freeserve v Director General of Telecommunications* [2003] CAT 5, paras 110–111: '[. . .] in our view this Tribunal is essentially an appellate tribunal, not a tribunal of first instance. In complainants' appeals (as distinct, for example, from appeals against penalties) it seems to us that the primary task of the Tribunal will usually be to decide whether, on the material put before him by the complainant, the Director was correct in arriving at the conclusion that he did. If it turns out, in the course of the appeal, that the Director was insufficiently informed, in our view the appropriate course will usually be for the Tribunal to remit, rather than to attempt to investigate the merits for the first time'.

[258] *Albion Water Limited v Water Services Regulation Authority* [2008] CAT 31, paras 70 and 72: 'the Tribunal will, whilst still carrying out an assessment of the merits of the case, give due weight to a finding which is arrived at by an appropriate and reliable methodology, even if a dissatisfied party could suggest other ways of approaching the issue which would also have been reasonable and which might have resulted in a resolution more favourable to its case'.

[259] Rose and Richards (2010), n. 249 above, p. 19.

[260] Ibid.

sight, to blur the distinction between an appeal process and an examination of the facts of the case at first instance. The appeal process certainly involves the rehearing of a case but the content of such rehearing is something that depends on a variety of factors. Writing in the context of an appeal process to the decision of a court at first instance, May L.J. noted that:

> (t)he review will engage the merits of the appeal. It will accord appropriate respect to the decision of the lower court. Appropriate respect will be tempered by the nature of the lower court and its decision making process. There will also be a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged. At one end of the spectrum will be decisions of primary fact reached after an evaluation of oral evidence where credibility is in issue and purely discretionary decisions. Further along the spectrum will be multi-factorial decisions often dependent on inferences and an analysis of documentary material.[261]

Re-hearing in appeal does not amount to a rehearing 'in the fullest sense of the word', as the Court should 'not normally interfere with the exercise of a discretion unless the decision of the lower [authority] was reached on wrong principles or was otherwise plainly wrong'.[262] Hence, 'in so far as rehearing [. . .] may have something of a range of meaning at the lesser end of the range it merges with that of [judicial] "review"', as, 'at this margin, attributing one label or the other is a semantic exercise which does not answer such questions of substance as arise in any appeal'.[263] As the CAT has clearly explained in *M.E. Burgess*, '(i)n deciding whether to take its own decision, the Tribunal is mindful of the fact that it is an appellate tribunal from an administrative decision and should not therefore turn itself into the primary decision-maker without good reason'.[264] There is a perceptible tension between this and the fact that 'the Tribunal's jurisdiction is a merits jurisdiction, and thus wider than a judicial review jurisdiction'.[265]

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[261] *Dupont de Nemours v Dupont* [2003] EWCA Civ 1368, para. 94 cited by Rose and Richards (2010), n. 249 above, p. 20.

[262] *Dupont de Nemours v Dupont* [2003] EWCA Civ 1368, paras 96–97.

[263] Ibid., para. 98.

[264] *M.E. Burgess, J.J. Burgess & S.J. Burgess v OFT* [2005] CAT 25, para. 129.

[265] *Floe Telecomm v Office of Communications* [2005] CAT 14, para. 65, 'It is our intention that the tribunal should be primarily concerned with the correctness or otherwise of the conclusions contained in the appealed decision and not with how the decision was reached or the reasoning expressed in it. That will apply unless defects in how the decision was reached or the reasoning make it impracticable for the tribunal fairly to determine the correctness or otherwise of the

It follows that some margin of appreciation may also persist in the context of an appellate review process, depending on the exact position of the specific category of the decision in the 'spectrum of appropriate respect' from which the decision-maker benefits at first instance. 'Multi-factorial' decisions or decisions 'dependent on inferences and an analysis of documentary material' (thus involving a wide margin of interpretative choices and important sources of information or methodological and epistemic competence) require in general more respect for the choices made by the competition authority than its decisions over primary facts. Moreover, in the presence of a specialised tribunal, which has by essence the epistemic and methodological competence to assess the way these inferences were made, the margin of discretion recognized at the competition authority should be lower in comparison to where the rehearing is done by a generalist court without direct access to that epistemic and methodological competence.[266] It remains the case, however, that some sources of information which usually benefit a competition authority (for example, over the specific economic sector or other close sectors that might be affected) would be unavailable to the court, specialised or generalist, in view of the fact that even in an appellate review process the court can only evaluate the contending arguments submitted by the parties, in which case some residual degree of discretion would always be maintained by the competition authority.

Albion Water offers an excellent example of the degree of intrusion of the appellate judge to the remedial action of a competition authority. In *Albion*, the OFWAT (the sector specific regulator enforcing competition law under the concurrent jurisdiction powers) had not found an infringement of the EU and UK competition law provisions on the abuse of a dominant position.[267] The CAT reversed OFWAT's decision finding that Dŵr Cymru abused its dominant position by offering an access price for common carriage of non-potable water via its system (the 'First Access Price'), which imposed a margin squeeze and was excessive and unfair in itself.[268] It is interesting here to note that in its full review of OFWAT's decision on the merits, the CAT assessed the validity of the ECPR

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conclusions or of any directions contained in the decision. Wherever possible, we want the tribunal to decide a case on the facts before it, even where there has been a procedural error, and to avoid remitting the case to the [competition authority]'.

[266] In the context of the UK civil procedure, it is rare that generalist courts appoint assessors or for the parties to appoint single party experts.

[267] OFWAT, CA98/01/2004, 26 May 2004), *Albion Water Limited v Dŵr Cymru Cyfyngedig*.

[268] *Albion Water Limited v Water Services Regulation Authority* [2006] CAT 23; [2006] CAT 36; [2008] CAT 31 (on unfair pricing).

(Efficient Component Pricing Rule) methodology used by OFWAT, thus illustrating that methodology issues are not immune from strict scrutiny and do not form part of the margin of appreciation given to the competition authorities, as in judicial review proceedings. In the absence of a settlement between the parties on all outstanding matters, the CAT proceeded to a judgment on remedies, the UK legislation providing it, in the context of a full merits review, with the same powers as a competition authority to bring an infringement to an end. This power involved the possibility of the CAT ordering that the infringing undertaking refrains from measures 'having an equivalent effect' to those found to have been abusive, as long as these measures do not affect legal certainty, that is, they are sufficiently precise for their scope to be determinable.[269]

The broad powers recognized nevertheless raise questions as to the limits to which the remedial action of the CAT is subject in a full merits review. The CAT, as any court, should confine itself to deciding what is necessary for the adjudication of the actual dispute between the parties and may not decide more than is necessary.[270] It follows that, exercising an adjudicatory function in the context of a dispute, the CAT is inherently limited in its ability to impose complex and information demanding remedies. As it is noted by the CAT, 'there are considerable practical difficulties for courts (*or indeed competition authorities*) in crafting a remedy' that would involve, as was asked by Albion in this case, the setting of a minimum retail margin.[271] As it is noted by the CAT, the problem is faced also by competition authorities in their adjudicatory function. The following excerpts from the CAT judgment introduce an inherent boundary of competition law remedies: the fact that they are not and cannot be regulatory remedies.

> How can the Tribunal [or a competition authority] determine this margin without examining costs and demands, indeed without acting as a price-setting regulator, the determinations of which often last for several years (and are themselves subject to appeals)? [. . .] (H)ow the Tribunal, or the Authority, should respond when costs or demands change over time, as inevitably they will. The efficient margin fixed today may, through economic and business changes, become the inefficient margin of tomorrow. We do *not* say that these questions are unanswerable, but we have said enough to show why courts [or competition authorities] normally avoid direct price administration, relying on more appropriate methods.[272]

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269 Ibid., para. 39.
270 Ibid., para. 4.
271 Ibid., para. 55 (emphasis added).
272 Ibid.

(f) The limits of remedial discretion in the public law account of remedies In conclusion, the public law perspective on remedies does not give more ground to the doctrine of discretionary remedialism than the private law account. First, the proportionality principle will operate so as to limit the discretion of the competition authorities. The way proportionality is assessed may provide more or less leeway to the remedial action of the competition authority, but in general its margin of appreciation is subject to scrutiny. Second, as has been illustrated, despite the differences between the control of legality and the full merits review, the CAT proceeds to a strict scrutiny of the remedies imposed by the UK competition authorities, thus showing that the type of judicial control is not the most important variable in the possible limitations to the remedial discretion of competition authorities and that in rough edges the constraint exercised on their remedial powers may be functionally equivalent. Consequently, the fact that in the EU the control is limited to the legality of the remedy should not make a difference as to the existence of limits to the authorities' remedial powers. But does the fact that the CAT is a specialized court make any analogy with the EU courts ineffective? Would a specialized EU court acting in a full merits review have full remedial discretion? The answer to this question is also in the negative. Competition authorities and courts, even specialized ones, are limited by their adjudicatory function in the type of remedies they are able to craft: these cannot be regulatory in nature and lead a complex, from an economic perspective, information devouring and long-term assessment of the situation in hand. Having in mind these inherent limitations of the process of remedial action from a public law perspective, we summarize in the following section the factors limiting the risk of discretionary remedialism from both the private and the public law accounts of remedies.

C. The Degree of Remedial Discretion: A Mixed Public and Private Law Account

By providing analysis of the powers of remedial action from a public and a private law perspective, the two previous sections illustrated the normative impossibility of discretionary remedialism in competition law. Whichever theory one chooses to put forward, the remedial discretion of the competition authorities and courts hits a conceptual boundary, either set by the private or by the public law conception of 'remedies'.

There are strong objections to an approach of discretionary remedialism that would conceive the primary or secondary rights protected as being conceptually distinct from the remedies that would address the violation of that right, whichever remedial aim is finally chosen: restorative, punitive,

preventive. A remedy that would go beyond simply 'mirroring the abuse' in an abuse of dominant case and which would provide the infringer's competitors an advantage over the infringer in order to restore the competitive process may be justified only in very limited circumstances: those requiring the intervention of transformative or prophylactic remedies. However, even in these cases, the remedy should be connected logically with the wrong that it aims to address. This requirements stems from the principle of correlativity and corrective justice in the private law account of remedies, and that of proportionality in the public law account. Even if one takes a cost-benefit analysis approach, focusing on economic efficiency (for example, the remedy should improve the situation in comparison to that prevailing prior to theadoption of the remedies), the remedial discretion will be limited, first, by the operation of the cost-benefit analysis (as the costs of the remedy for the parties subject to it should not outweigh the benefits of the remedy), and second, by the nature of the adjudicative function, as courts and authorities are limited in their ability to address a number of issues and to craft complex and far reaching remedies. Their ability to delegate the enforcement task to third parties is also restricted in the antitrust context.

Courts and competition authorities are also subject to institutional constraints as to the remedies selected. Courts cannot impose fines, rarely use injunctions but they can generally award damages (although punitive damages are not practically available). Competition authorities in Europe can impose injunctions, fines but not damages or the disgorgement of illicitly gained profits. Some remedies are subject to a statutory limit (for example, fines that cannot be higher than 10 percent of the turnover of the undertaking concerned, injunctions in the *ex post* competition law enforcement cannot be disproportionate), while others are more intrinsically linked to the array of the competition law wrong (for example, damages).

The degree of judicial oversight also affects the remedial discretion of competition authorities and courts at first instance. The remedial action of the authorities may be subject to a limited control of legality (for injunctions involving complex economic appraisals), a more reinforced one (in the context of merger control), a full control of legality of facts and law (for example, for fines) or a full-merits review (appeal process in the UK in some instances). This oversight may set variable limits to the margin of discretion of the competition authority or the first instance judge, in particular as the reviewing court might take a different view over the need to defer to the judgment of the decision-maker at first instance and to her perception of what constitutes an appropriate or proportional remedy. The judicial oversight is even stronger in the presence of a specialised tribunal, as opposed to a non-specialized court, as it has been acknowledged by the Court of Appeal in the UK. An important relevant issue to

determine is whether there are differences in the wayspecialized and non-specialized courts assess remedial action s. The grounds of review may also affect the degree of remedial discretion. Remedial action which is subject to a simple rationality means-end test faces fewer constraints to the choice of appropriate remedies than one subject to a proportionality test, and even more, to a cost-benefit analysis test.

The remedial discretion of the decision-maker is of course stronger for prophylactic remedies than for other types of remedies. But even in this case, it remains limited. Competition law remedies cannot be transformed to regulatory remedies. The different institutional context is one side of the story. Competition authorities and courts are unable to administer far reaching prophylactic remedies that would require continuous monitoring and supervision of entire economic sectors. The information they can hear in litigation (evidence) is limited by the nature of the dispute and by the very specific scope of the competition law wrong they aim to address. This does not cover all types of market failure, but those emanating from a restriction of competition. However, as it has been rightly noted by Pablo Ibañez Colomo, there is a fine line between competition and regulation: First, competition may become regulatory in nature 'when its application on a proscriptive basis (rather than prescriptive basis) would not be possible given the features of the relevant market'.[273] Second, the '*expected standards of intervention* in a competition law case can be defined as the composite of (i) the gravity of the infringement identified and (ii) the remedies (if any) required to bring an end to it', the relationship between the two being presumed to be a 'linear one, that is, the intrusiveness of a given remedy increases in direct proportion with the gravity of the infringement'.[274] The author continues by explaining that '(w)here competition law is instrumentalised, the remedies imposed in a given case may exceed what would be necessary to bring an end to the infringement identified by the authority',[275] thus implicitly elevating the relation between remedies and rights/wrongs as the defining boundary between competition law remedies and regulatory remedies. The two 'do not follow the same logic', as the former are generally concerned 'with preserving the existing market structure from being further deteriorated, and not with sharing (or neutralising competitive advantages)'.[276]

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[273] Ibañez Colomo, P. (2010), 'On the Application of Competition Law as Regulation: Elements for a Theory', *Yearbook of European Law*, **29** (1), 261–306, p. 264.

[274] Ibid., p. 277.

[275] Ibid., p. 279.

[276] Ibid., p. 283.

The disproportional character of competition law remedies imposed by the Commission when they aim to challenge the prevailing market structure seems also to amount, according to the same author, to transforming them to regulatory remedies.[277] If we follow this approach, competition authorities should abstain from imposing remedies that look like regulatory remedies. Regulatory remedies, defined as remedies that have no direct relation or are disproportionate in relation to the wrong they aim to address, become the outer boundary of remedial discretion in competition law.

In an economically-oriented competition law, this boundary is more easily described than practised. Theories of consumer harm may not only relate to the structure of the supply side but may also be generated by the specific characteristics of the demand side. Behavioural economics may provide insights on how some behavioural biases of consumers may be exploited by incumbents in order to raise prices. If the practices of the incumbents are caught by competition law, the remedy will need to address these behavioural biases in order to be effective. Yet, providing for remedies dealing with existing behavioural biases will not just restore the competitive process, but will generate a very different one than the one prior to the identified 'competition law' infringement. Would that remedy be considered as having a regulatory nature and hence being outside the normal scope of competition law remedies as it aims to shape the conditions of competition in the market?

If one takes an efficiency-driven and deterrence-based approach, the 'regulatory' label of the remedy should not be a matter of concern. After all, the remedy is optimal as it improves the market equilibrium compared to that prior to the infringement. However, from a corrective justice/private law or a proportionality/public law perspective, such remedy would challenge the proper boundaries of remedial discretion. The tension of this type of remedy with the correlativity principle of the corrective justice/private law account of remedies is obvious, as the remedy will aim to more than just restoring the situation of the parties prior to the infringement. One could object that the polycentric dimension of the public law account of remedies might better accommodate 'regulatory remedies'. And this is certainly true in the context of a pure regulatory law dispute.

Yet, it is our contention that competition law disputes should be different and their polycentric character much more limited than pure regulatory law disputes. First, competition law remedies[278] relate to the

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[277] Ibid., pp. 290–2.

[278] With the notable exception of remedies imposed in the context of market investigation references in the UK, following Part 5 of the Enterprise Act 2002. In

exercise of an adjudicative function, either of a competition authority or of a court, and thus should be distinguished from remedies adopted in the context of a rule-making activity, as is often the case in regulation. Second, even when regulators exercise an adjudicative function in enforcing regulation, the polycentric nature of the regulatory dispute is more pronounced than in the context of competition law, the decision taking explicitly into account the economic conditions of an entire sector of activities, rather than the competitive conditions of a specific relevant market on which the parties to the dispute are active, by definition a narrower exercise. Third, the interests that are usually considered in a regulatory dispute are in principle more diverse than those taken into account in competition law disputes, the regulators assuming various responsibilities, such as the protection of the environment, universal service, security of supply, and so on, while competition authorities' role is primarily confined to the protection of the competitive process. As a result of the variety of regulatory goals, there is more extensive participation in the decision-making process of actors representing diverse interests, not directly related to the dispute.

Focusing, for illustration purposes, on merger control, which is the closest a competition law procedure can come to a regulatory law one, the Implementing Regulation provides for the participation in the process of 'third parties', a category which is narrowly defined as including those having a 'sufficient interest' in the Commission's procedure, such as customers, suppliers, competitors, members of the administration or management organs of the undertakings concerned or recognised workers' representatives of those undertakings.[279] Certainly, the Commission has appointed a Consumer Liaison officer and might also invite the views of other interested third parties including consumer organisations,[280] but these parties do not have a right to be heard in the absence of an explicit invitation by the Commission. In any case, the third parties are expected to comment only on the competition implications of the merger, rather than on broader issues, such as the protection of employment, environment, and so on.[281] This contrasts with

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the EU context, sector inquiries do not carry the possibility for the Commission to impose remedies, but may instead lead to the initiation of competition law proceedings under Articles 101 and 102 TFEU. Consequently, the mandate of the Commission in exercising its competition law competence is exclusively adjudicatory.

[279] On the role of third parties, see Article 18(4) of Merger Regulation 139/2004, and Articles 16(1) and (2) of the Implementing Regulation.

[280] Article 16(3) of the Implementing Regulation.

[281] See, DG Competition, Best Practices on the conduct of EC merger control proceedings, para. 37, referring only to 'competition concerns'.

the wide participation of various interests in the context of regulatory decision-making, often with the involvement of intermediary, although not elected, bodies representing a supposed public interest, and less frequently, by direct intervention from interested publics. Consequently, despite the polycentric dimension of most competition law decisions,[282] remedies are precisely confined to address the specific situation under adjudication. Indeed, the boundaries of remedial discretion are delimited by the interplay of the specific goals entrusted to competition authorities, the principle of remedial proportionality and the control of legality for misuse of powers.[283]

IV. VOLUNTARY VERSUS COERCIVE REMEDIES: A FALSE DICHOTOMY?

A. The Distinction between Voluntary and Coercive Remedies

As it was previously explained, in merger control, remedies take the form of commitments offered by the parties to the merger, either at Phase I or Phase II of the merger procedure, which are eventually accepted by the Commission if they address its 'serious doubts' over the legality of the merger or the 'competition concerns' identified. This leads to the publication of a decision under Article 6(2) or 8(2) of the EC Merger Control Regulation, which makes binding the commitments offered by the parties. In the context of the *ex post* competition law enforcement of Articles 101 and 102 TFEU, Article 9 of Regulation 1/2003 enables the Commission to make commitments offered by parties to its proceedings binding on them, instead of issuing a regular prohibition decision, when those commitments address the concerns expressed in the Commission's preliminary assessment. Such a decision may be adopted for a specified period and 'shall' conclude that there are no longer 'grounds for action' by the Commission. Technically, commitment decisions offered under Article 9 of Regulation 1/2003 are not remedies as they do not aim to put the infringement to an end, as it is the case for Article 7 of Regulation 1/2003 and phase II merger control decisions and do not make any finding as to whether there has been

[282] Which do not only affect the parties to the dispute but also other competitors, consumers, customers, shareholders, employees.

[283] This ground of judicial review refers to cases where an authority uses its powers to take a measure with a purpose other than that for which the powers in question were conferred to it.

an infringement.[284] Their only legal effect is to close the Commission's proceedings. Essentially, it is a measure of procedural economy.[285]

In addition, as it was noted by an AG of the CJEU, 'unlike Article 7, Article 9 of Regulation 1/2003 is not an instrument for establishing infringements of competition law, but merely gives the Commission the possibility of effectively addressing concerns over competition for the future'.[286] Contrary to Article 7 infringement decisions, they cannot be used as conclusive evidence of the existence of an infringement of EU competition rules in follow on private actions for damages.[287] Yet, from a functional perspective they can be qualified as 'remedies', as they aim to redress the situation of the victims of the competition law violation to that prior to the infringement.

As both Article 9 of Regulation 1/2003 commitment decisions and decisions adopted in the context of merger control are formally suggested by the parties to the transaction, they can be opposed to other competition law remedies and sanctions, which are imposed unilaterally by the Commission and are not the product of a 'voluntary' agreement between the Commission and the parties to the dispute (coercive remedies).[288] In a similar vein, commentators, and most recently the CJEU, consider that commitment decisions form part of what has been characterized as a 'consensual competition law enforcement' or a culture of 'settlement', thus accentuating the opposition between the voluntary nature of commitment decisions and the coercive nature of Article 7 of Regulation 1/2003 decisions imposing injunctions on the parties.[289]

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[284] Temple Lang, J. (2009), 'Commitment Decisions under Regulation 1/2003', in Gheur, C. and N. Petit (eds.), *Alternative Enforcement Techniques in EC Competition Law*, Brussels: Bruylant, pp. 121–144, p. 122.

[285] Case C-441/07, *Commission v Alrosa*, para. 35.

[286] Opinion of AG Kokott, Case C-441/07, *Commission v Alrosa*, para. 50.

[287] Cengiz, F. (2011), 'Judicial Review and the Rule of Law in the EU Competition law Regime after Alrosa', *European Competition Journal*, **7** (1), 127–153, p. 130.

[288] Opinion of AG Kokott, Case C-441/07, paras 51 and 55, noting the 'voluntary' character of the commitments; Wagner von Papp, F. (2012), 'Best and Even Better Practices in Commitment Procedures after Alrosa: The Dangers of Abandoning the 'Struggle for Competition Law', (hereinafter, 'Best and Even Better Practices'), *Common Market Law Review*, **49** (3), 929–70, 932–3. Noting the 'hybrid character of commitment decisions', opposing the 'public law paradigm' of 'an authoritative, unilateral top-down hierarchical command by the State' to the 'contract law paradigm' which relies on voluntary negotiations between the parties.

[289] See Case C-441/07, para. 48 (noting that undertakings 'consciously' accept concessions in the context of a commitment procedure under Article 9 of

1. The implications of the distinction on the remedial discretion of competition authorities

The EU courts have relied on the classification of remedies as voluntary or coercive, when dealing with the question of the degree of the remedial discretion competition authorities benefit from in EU antitrust and merger proceedings. Competition authorities are subject to restrictions in the use of voluntary remedies, at least in antitrust proceedings. Recital 13 of Regulation 1/2003 warns that commitment decisions under Article 9 may not be appropriate in cases where the Commission intends to impose a fine. Hardcore cartel cases, generally subject to fines, cannot be closed by a commitment decision.[290] The principle of proportionality may also limit the remedial discretion of competition authorities in both merger and antitrust proceedings.

We have already commented above on the application of the proportionality principle in merger decisions accepting commitments. Although Article 9, unlike Article 7 of Regulation 1/2003, does not explicitly refer to proportionality, as a general principle of EU law, proportionality is nonetheless a criterion for the lawfulness of any act of the institutions of the Union, including 'voluntary' remedies accepted by the Commission.[291] Yet, the precise extent and limits of the obligations which flow from the observance of that principle vary, according to the nature, voluntary or coercive, of the proceedings.

In *Alrosa*, the General Court applied the principle of proportionality to an Article 9 Regulation 1/2003 commitment decision. Alrosa and De Beers, respectively the first and second most important companies active in the production and supply of rough diamonds, with activities in vertically related markets, had entered into an agreement according to which Alrosa undertook to sell De Beers natural rough diamonds to the value of USD 800 million a year for a specific period of time, while De Beers undertook to buy those diamonds from Alrosa. The amount of rough diamonds concerned by the agreement represented around one-half

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Regulation 1/2003). For a discussion see, *inter alia*, Waelbroeck, D. (2009), 'The Development of a New "Settlement Culture" in Competition Cases', in Gheur, C. and N. Petit (eds), *Alternative Enforcement Techniques in EC Competition Law*, Brussels: Bruylant, pp. 221–60; Ehlermann, C.-D. and M. Marquis (eds) (2010), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law*, Oxford: Hart Publishing; Wagner von Papp (2012), 'Best and Even Better Practices', p. 929.

[290] See, however, the possibility for settlements in cartel cases: Commission Regulation (EC) No 622/2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, [2008] OJ L 171/3.

[291] Case C-441/07, para. 36.

of Alrosa's annual production and its entire production exported outside the Commonwealth of Independent States (CIS), where Alrosa was based. The Commission sent two statements of objection: one to both companies alleging an infringement of Article 101 TFEU, and another one to De Beers with regard to an infringement of Article 102 TFEU. In response to the Commission's concerns under Article 101 TFEU, the parties offered 'joint commitments' suggesting the significant reduction of the amount of diamonds delivered by Alrosa to De Beers by 2010, thus enabling competing firms to enter the market. Alrosa had previously offered commitments with an undertaking not to sell diamonds to De Beers with effect from 2013, but subsequently withdrew them. Following a market-test and the expression of concerns from third parties, the Commission invited both companies to suggest revised joint commitments that would phase out Alrosa's sales with the view to stop De Beers purchases by 2009. De Beers offered unilateral commitments designed to meet the concerns expressed and the Commission accepted the unilateral commitments and made them binding by issuing an Article 9 Regulation 1/2003 decision. The decision depriving Alrosa of its main customer, the company brought an action for annulment of the Commission's decision at the General Court on different grounds, including the violation of the principle of proportionality.

The General Court ignored the consensual character of the commitment decision explaining that 'the voluntary nature of the commitments [. . .] 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' and that 'giving that commitment, the undertakings concerned merely assented, for their own reasons, to a decision which the Commission was empowered to adopt unilaterally'.[292] The Court found that the nature and extent of the obligations generated by commitment decisions were equivalent to those emanating from an Article 7 remedy, thus accepting that the principle of proportionality applied in the same way to voluntary and coercive remedies. In order to fulfil its duty under the principle of proportionality in the context of Article 9, the Commission was invited to perform 'an appraisal *in concreto* of the viability of the intermediate solutions', suggested by the parties but not finally chosen, in order to identify the least restrictive (to the rights of the infringing undertaking) alternative.[293] The Court also held that:

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[292] Case T-170/06, *Alrosa v Commission* [2007] ECR II-2601, paras 105–106; Appeal Case C-441/07 P.

[293] Ibid. at para. 156. See, however, the contrary position of AG Kokkott in Case C-441/07 P, para. 62.

> compliance with the principle of proportionality requires that, when measures that are less onerous than those it proposes to make binding exist, and are known by it, the Commission should examine whether those measures are capable of addressing the concerns which justify its action before it adopts, in the event of their proving unsuitable, the more onerous approach.[294]

The Court noted that the Commission cannot prohibit 'absolutely any future trading relations between two undertakings unless such a decision is necessary to re-establish the situation which existed *prior to the infringement*'.[295] In this case the Commission had rejected the joint commitments offered by Alrosa and de Beers fearing that the exclusive supply commitment laid down in the agreement signed between Alrosa and De Beers would result in the strengthening of De Beers' market position. The Commission found that imposing this termination to the contractual relation between the two parties was clearly necessary in order to allow third parties to have access to Alrosa's output and to allow Alrosa to compete fully with De Beers. The main concern was that De Beers benefited from an advantage over its competitors, not only because of its size but also because it was able to guarantee the best consistency in the supply of rough diamonds to its customers.

It was not, however, clear how the remedy responded to the competition concern raised. First, the Commission had not explained how continuing supply to De Beers would affect Alrosa's ability to guarantee a regular supply of significant quantities of rough diamonds. Second, even if this had been the case, and the continuation of supply would have increased the competitive advantage of De Beers, thus contributing to maintain or reinforce its dominant position on the market, this does not constitute an abuse of a dominant position. As it was put clearly by the Court:

> [s]ince the object of Article [102 TFEU] is not to prohibit the holding of dominant positions but solely to put an end to their abuse, the Commission cannot require an undertaking in a dominant position to refrain from making purchases which allow it to maintain or to strengthen its position on the market, if that undertaking does not, in so doing, resort to methods which are incompatible with the competition rules. While special responsibilities are incumbent on an undertaking which occupies such a position, they cannot amount to a requirement that the very existence of the dominant position be called into question.[296]

The CJEU nevertheless struck down the judgment of the General Court for having applied to a similar extent the proportionality control in Article

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294 Case T-170/06, *Alrosa v Commission*, para. 131.
295 Ibid., at para. 103. Emphasis added.
296 Ibid., at para. 146.

9 and Article 7 decisions.[297] The CJEU noted 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'.[298] It further explained that:

> application of the principle of proportionality by the Commission in the context of Article 9 of Regulation No 1/2003 is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately.[299]

Although both Article 7 and 9 decisions are subject to the principle of proportionality, the application of that principle differs according to which of those provisions is concerned. Hence, according to the CJEU:

> (t)here 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 [. . .].
>
> Undertakings 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.[300]

2. The implications of Alrosa for the remedial discretion of the Commission

Following *Alrosa*, the distinction between voluntary and unilateral remedies leads to a different application of the proportionality principle, hence to a different interaction between the remedy step and that of establishing the existence of a competition law wrong, but also to a greater variation in the degree of judicial scrutiny of remedies and the remedial discretion of the Commission.

(a) A different application of the proportionality test Exploring subsequently the implications of the distinction, it should be noted, first, that for Article 9 Regulation 1/2003 commitment decisions, the proportionality

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297 Case C-441/07, *European Commission v Alrosa Co Ltd*. [2010] ECR I-5949.

298 Ibid., at paras 38, 48 (noting the specific characteristics of the mechanisms provided for in Articles 7 and 9 of Regulation 1/2003 and the voluntary character of the commitments under Article 9).

299 Ibid., para. 41.

300 Ibid., paras 48–49. Emphasis added.

ground of review is transformed to some reinforced control of the rationality (means-end test) of the remedy, even if the court still keeps the proportionality label. Yet, the third step of the proportionality test, the assessment of the existence of a least restrictive alternative, finds itself significantly emptied from its content. The Court refers vaguely to it, noting that in the context of Article 9 decisions, the Commission 'is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately'.[301] AG Kokott explains in her Opinion the operation of the proportionality control in this context:

> (t)he Commission is not required, in relation to decisions under Article 9 of Regulation No 1/2003, itself to seek less onerous alternatives to the commitments offered to it. Nevertheless, it must review all the alternatives to the commitments – in this case in particular the joint commitments by De Beers and Alrosa – *known to it* in order to ascertain whether they constitute less onerous means of resolving the competition problems identified, by which interests of third parties are not affected or are affected less severely.
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> However, in this connection the Commission is required to take into consideration only alternatives which are equally appropriate as the commitments offered to it with a view to resolving the competition problems identified. Both the commitments actually offered and any alternatives to those commitments must therefore be *manifestly appropriate* for resolving the competition problems. [. . .]
>
> In accordance with the spirit and purpose of Article 9 of Regulation No 1/2003, *the assessment of alternatives is not intended to require any extensive and lengthy investigations or evaluations*. In proceedings under Article 9 the Commission need not take into consideration alternatives whose appropriateness could not be established with sufficient certainty without such efforts.[302]

The implications of this transformation of the proportionality test on the tactics of the parties to the transaction have been explored elsewhere.[303] We will focus here on the type of analysis required by the Commission in the context of the third step of the proportionality test for Article 9 commitment decisions.

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[301] Case C-441/07 P, para. 41.

[302] Opinion of AG Kokott, Case C-441/07 P, paras 56–58 (emphasis added).

[303] For an excellent analysis see, Wagner von Papp (2012) 'Best and Even Better Practices', pp. 936–9, noting that the case law of the Court is an open invitation to the parties to engage in 'salami tactics', that is the presentation to the Commission of a selection of alternative incremental commitments, thus imposing to it the comparative proportionality analysis of all options that was demanded by the General Court in *Alrosa*.

First, the Commission can only explore the least restrictive character of the commitments in comparison to commitments already received and known to it, and not in comparison to alternative remedies that could have addressed, in the Commission's view, the competition law wrong identified. This limits considerably the scope of the third step of the proportionality analysis as commitments are only offered by the parties concerned, which are induced, as we will explore later, to offer commitments that go beyond the redress of the competition wrong identified. Of course the problem may be avoided if the parties decide to adopt the tactic of suggesting alternative incremental commitments, but should they decide to do so, they will incur the risk of 'increasing the Commission's decision space instead of restricting it'.[304] The views of parties concerned are not also represented in the choice of the appropriate remedy. The configuration of the *Alrosa* case was atypical, as Alrosa was not a third party, having also been targeted by the Commission in its investigation and been led to offer joint commitments to it.

Second, even if the parties propose alternative remedies, the Commission is not required to perform any extensive and lengthy investigations or evaluations of the different remedies suggested but to limit its analysis on the identification of a remedy that is 'manifestly appropriate' for resolving the competition problems. The terminology employed does not seem to describe an exacting and careful exercise of the comparative costs and benefits to the parties' rights of the alternative remedies suggested.

Finally, the 'proportionality' analysis is partly biased in favour of the option chosen by the Commission, because of the weight put on the procedural economy benefits offered by commitment decisions. It is explained that 'it is perfectly conceivable for the Commission to dismiss certain solutions in the context of Article 9 which it would have had to investigate in the context of Article 7 of Regulation No. 1/2003'[305] and that '(t)he general interest in finding an optimum solution from the point of view of speed and procedural economy justifies restricting the choice of possible measures in the context of Article 9 of Regulation 1/2003'.[306] The benefits of commitment decisions for the undertakings concerned are overstated,[307] and third parties are offered a more limited protection than in the context

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304 Ibid., pp. 937–8.

305 Opinion of AG Kokott, Case C-441/07 P, para. 59.

306 Ibid., para. 60.

307 Ibid., para. 60, noting that '(i)n return, with the termination of the antitrust proceedings initiated against them, they are quickly given legal certainty and can avoid the finding of an infringement of competition rules which would be detrimental to them and possibly an impending fine'.

of Article 7 infringement decisions.[308] As a result of this weighted 'proportionality' analysis, the mismatch between the remedy and the competition law wrong risks to be more pronounced in the context of Article 9 commitment decisions than in Article 7 Regulation 1/2003 decisions, or also merger decisions. As is noted by the Court:

> (t)here is [. . .] 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. Even though decisions adopted under each of those provisions are in either case subject to the principle of proportionality, the application of that principle none the less differs according to which of those provisions is concerned.
>
> Undertakings 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.[309]

The limited degree of judicial scrutiny the Court is inclined to perform on Article 9 commitment decisions exemplifies this problem.

(b) A limited degree of judicial scrutiny for commitment decisions In *Alrosa*, the Court held that judicial review for Article 9 decisions 'relates solely to whether the Commission's assessment is manifestly incorrect'.[310] The interplay of this weak form of judicial scrutiny with the specific interpretation of the proportionality principle in the context of Article 9 of Regulation 1/2003, which we explored above, offers a wide remedial discretion to the Commission. As it explained by the Court, '(t)he General Court could have held that the Commission had committed a manifest error of assessment only if it had found that the Commission's conclusion was *obviously unfounded*, having regard to the facts established by it'.[311]

The terminology employed by the Court, 'obviously unfounded', resembles the control of rationality in *Wednesbury* unreasonableness, in the context of UK public law for public wrongs, a lower standard of judicial scrutiny offering a wide margin of appreciation to the authority. A similar standard of review applies also to remedial decisions in the context of

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[308] Ibid., para. 61, noting that reliance by third parties on the existence of an allegedly anti-competitive practice deserves at most 'limited protection', having regard to the general interest in undistorted competition.

[309] Case C-441/07 P, paras 47–48.

[310] Ibid., para. 42.

[311] Ibid., para. 63. Emphasis added.

UK competition law, despite the more active intervention of the judiciary in an appeals process, which shows that there is a perception that the intensity of judicial review in this context should be relatively limited. This contrasts with the more intensive review of remedies in merger control, although the voluntary nature of the merger remedies leads to a similar understanding with Article 9 decisions with regard to the operation of the proportionality test.[312] There is wide agreement that the intensity of judicial review in EU merger control has increased considerably in recent times.[313] In *Tetra Laval BV*, Advocate General Tizzano noted that judicial review of the finding of facts 'is clearly more intense, in that the issue is to verify objectively and materially the accuracy of certain facts and the correctness of the conclusions drawn in order to establish whether certain known facts make it possible to prove the existence of other facts to be ascertained'.[314] This seems a higher intensity of review than the examination by the Court of the 'obviously unfounded' character of the conclusions of the Commission with regard to the factual basis of remedies in Article 9 commitment decisions.

This is also true with regard to the lower intensity of judicial scrutiny exercised on the Commission's complex economic appreciations in merger control, where the Court has to respect 'the broad discretion inherent in that kind of assessment'.[315] Yet, as it is also explained in the Opinion of Advocate General Tizzano:

> the fact that the Commission enjoys broad discretion in assessing whether or not a concentration is compatible with the common market does certainly not mean that it does not have in any case to base its conviction on solid elements gathered in the course of a *thorough* and *painstaking* investigation or that it is not required to give a *full statement of reasons* for its decision, disclosing the various passages of logical argument supporting the decision. The Commission [. . .] is bound to examine the relevant market *carefully*; to *base its assessment on elements which reflect the facts as they really are, which are not plainly*

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[312] See, Case T-282/02, *Cementbouw*, n. 203 above, paras 308, 314–319; Case C-202/06, *Cementbouw* and the opinion of AG Kokott in this case as well.

[313] See, for instance, Parr, N. (2008) 'Observations on burden and standard of proof and judicial review in EC and UK merger control', in *Annual Proceedings of the Fordham Corporate Law Institute*, New York: Fordham University Press, pp. 155–182; Fountoukakos, K. (2008), 'Judicial Review and EC Merger Control: Reflections on the Effectiveness of the System with Regard to the Standard of Review and Speed', in *Cambridge Yearbook of European Legal Studies*, Oxford: Hart Publishing, pp. 133–66. On the national context, see Harker, M., S. Peyer and K. Wright (2011), 'Judicial Scrutiny of Merger Decisions in the EU, UK and Germany', *International and Comaprative Law Quarterly*, **60** (1), 93–124.

[314] Opnion of AG Tizzano, Case C-12/03 P, para. 86.

[315] Ibid.

> *insignificant and which support the conclusions drawn from them, and on adequate reasoning; and to take into consideration all relevant factors*.[316]

The analysis goes far beyond looking to the 'obviously unfounded' character of the Commission's conclusions in Article 9 of Regulation 1/2003 cases and delves into its decision's 'logic, coherence and appropriateness'.[317]

In conclusion, EU competition law operates with varying intensities of review, thus embodying a sliding scale, which goes from a more intensive judicial scrutiny of Article 7 decisions, then an intermediary intensity of review for merger decisions and finally a lower intensity of review for Article 9 decisions. The voluntary character of commitment decisions does not explain this difference of degree in the intensity of judicial review, as otherwise the level of scrutiny would have been equivalent to that of merger control decisions. Yet, the judicial scrutiny for commitment decisions is of a lower degree than in merger control. The prospective nature of the prophylactic remedies adopted in the context of Article 9 may be considered as an additional factor of differentiation,[318] although the Commission performs complex economic assessments involving prospective analysis in the context of merger control but also for Article 7 decisions.[319] Hence, if there is any difference between antitrust commitments decisions, from one side, and merger phase II decisions and antitrust injunctions, from the other side, this should relate to the fact that these individual decisions pursue different objectives, the first aiming to address the Commission's concerns following a preliminary assessment, while the second aims to put an end to the infringement that has been found to exist.[320] However, an alternative approach to the variance of the intensity of judicial review would be to integrate the requirements of procedural economy in the proportionality test, the same way as requirements of effectiveness of the remedy have been added to the cost-benefit analysis of remedies in UK competition law. In any case, the sliding scale of judicial review shows that the remedial discretion of the Commission remains important in the area of commitment decisions and that there is a risk of misfit between the

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316 Ibid., para. 87 (emphasis added).

317 Ibid., para. 88.

318 As this is noted by AG Kokott in Case C-441/07, para 71.

319 See, for instance, the complex economic assessments involving prospective analysis completed for choosing an appropriate remedy in the *Microsoft* case.

320 Case C-441/07, para. 46. If this is, however, the distinguishing criterion, then remedies suggested in phase I (Article 6(2) should not be subject to the more demanding judicial scrutiny of merger control, as no finding of infringement has been made, only serious doubts about its existence, but subject to the less intensive judicial review of Article 9 Regulation 1/2003 commitment decisions).

remedies and the competition wrong they aim to address, possibly leading to broad prophylactic remedies of regulatory nature.[321]

B. Criticism of the Voluntary/Coercive Remedies Dichotomy

We have explained in the previous section how the opposition introduced by the case law of the Court between voluntary and coercive remedies does not justify the different implications following from the adoption of such remedies for the control of proportionality and the intensity of judicial review. In this section, we will argue that the distinction is also wrong and does not take sufficiently into account the important similarities between injunctions and commitments in EU competition law. The opposition often made between a 'contract law paradigm', and a 'public law' one, as the theoretical framework of the distinction, does not stand serious scrutiny. First, the reference to the 'public law paradigm' as a separate pole to the 'contract law' one, seems far-fetched in view of the importance of 'administrative contracts' in continental administrative law, but also of the distinction between *imperium merum* (the power to coerce) and *jurisdictio* (the power to make legal decisions).[322] Remedies do not form part of the *imperium* but of the *mixtum imperium*, the power which a magistrate has for the purposes of administering the civil (not criminal) part of the law, which is incident to *jurisdictio*. If remedies were classified within the *imperium* it would not have been possible, first, for arbitration clauses to be included in merger remedies, arbitration being in this case a forced 'contract', which is a distinct possibility in EU merger control,[323] and, second, for remedial injunctions to produce extraterritorial effects.[324]

More troubling is the opposition sometimes made between the passive role of the parties in Article 7 proceedings and their active role in commitment decisions, in merger control or in the context of Article 9

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[321] See, for instance, the commitment decisions adopted in Commission Decision Case COMP/C-3/39.530 – *Microsoft (tying)*, [2009], available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39530/39530_2671_3.pdf (last accessed 23 June 2013)

[322] Sofianatos (2009), n. 180 above, pp. 3–5.

[323] Liebscher, C. (2004), 'Drafting Arbitration Clauses for EC Merger Control', *Journal of International Arbitration*, **21** (1), 67; Blanke, G. (2006), 'International Abritration in EC Merger Control: A Supranational Lesson to be Learned', *European Competition Law Review*, **27** (6), 324; Idot, L. (2000), 'Une innovation surprenante: L'Introduction de l'arbitrage dans le contrôle communautaire des concentrations', *Revue d'arbitrage*, **4**, 591.

[324] Sofianatos (2009), n. 180 above, p. 486. However, that does not guarantee the execution of the remedial injunctions outside the EU.

of Regulation 1/2003. Despite the 'coercive' appearance of an injunction, often this is the result of a prior (failed) negotiation between the Commission and the parties concerned, the Commission attempting at least to achieve some form of adhesion from the parties that will guarantee the proper execution of the remedy.[325] The psychological pressure that an infringement decision might be adopted by the Commission, in the absence of commitments offered by the parties, largely denies the voluntary and consensual nature of the process and enables the Commission to extract disproportionate remedies.

Some commentators have criticized the conclusion that the Commission may extract disproportionate remedies, arguing that the 'extra price' paid by a risk averse party to avoid an infringement decision does not by itself make the commitments disproportionate. The assumption is that 'the commitments offered are presumably at most equal in value to (1) the expected value of the remedies imposed in an infringement decision – if necessary, discounted to net present value – plus (2) the avoided expected discounted costs associated with the further investigations (and possibly litigation), this sum being multiplied by (3) the risk aversion factor that reflects the actor's preference for the certain outcome in the commitment procedure as compared to the variance of sanctions possible in an infringement decision'.[326]

According to these authors, such an approach implicitly compares the infringement sanctions from one side with the commitments including the risk aversion factor and the added investigation/litigation costs, on the other side, a counterfactual which they criticize as being the 'wrong' one.[327] They argue that, assuming that the Commission imposes sanctions in the infringement procedure (and that they are proportional), the undertakings would still suffer the additional costs incurred by further investigations and probably judicial review as well as 'the costs reflected by the risk aversion factor because of the undertakings' continued uncertainty of the eventual outcome'.[328] Although these 'friction costs' are less visible in the infringement procedure where they are dissipated, they become a visible part of the commitments, without that however changing the overall burden on the undertakings. Hence, according to them:

> (there is) [. . .] no reason why a proportionality test should take into account the avoided costs of investigation/litigation and the concomitant uncertainty

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325 Ibid., pp. 188–191.
326 Wagner von Papp (2012) 'Best and Even Better Practices', p. 944.
327 See, for instance, ibid., p. 944.
328 Ibid., p. 945.

> to the extent they are transformed into commitments – and thus, hopefully, contribute some social value – but not to the extent they are dissipated as friction costs. In other words: if we worry about risk aversion and the costs of the investigation and litigation in the commitment procedure, then we would also have to take these factors into account when deciding on the proportionality of sanctions imposed in the infringement procedure. If we do not take them into account in the infringement procedure – and we do not – then there is no reason to raise concerns about them in the commitment procedure.[329]

This counterfactual compares the outcome in terms of the harshness or disproportionate (to the competition wrong) character of remedies if the parties offer commitments with that in case the Commission proceeds in adopting an infringement decision. However, the counterfactual offered by these authors does not take sufficiently into account the other options offered to the Commission and the strategic interplay between the Commission and the parties, in particular the possibility for the Commission to adopt a divide and conquer strategy. Hence their conclusions may be subject to criticism. It is possible that in the absence of a commitment from the parties, the Commission might decide not to bring an infringement action and to abandon the case altogether. From that perspective, there is always a risk that the commitments offered might be disproportionate, as in this case the parties do not incur any 'friction costs'. More specifically, they do not incur investigation/litigation costs. Because the option of an Article 7 infringement decision exists for only a small fraction of defendants, commitments merely replace a no-prosecution option.

This is a distinct possibility for the following reasons. First, the Commission will not accept a commitment decision for all cases, in particular hardcore restrictions, which are high on its priority list, and for which they would prefer to impose sanctions, mainly for deterrence reasons.[330] Hence, the cases leading to commitments are likely to be the ones for which the nature of the infringement is not that egregious for competition law, as is often the case with cartels. Second, the counterfactual opposing two options (commitments or infringement decision) assumes that the Commission has infinite resources to carry out the investigations and the analysis required for an infringement decision. It is additionally expected that the Commission will also have adequate motivation and time for these long procedures. However, in reality, the resources of the Commission are limited and DG Competition has to make difficult enforcement choices.

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[329] Ibid., p. 945.

[330] It should be remembered that according to Recital 13 of Regulation 1/2003, 'Commitment decisions are not appropriate in cases where the Commission intends to impose a fine'.

One could also add that the Commissioner for competition (and the high officials at DG Competition) act within a specific time-limited mandate. One of the main attractions of commitment decisions is that they bring results (in terms of remedies) quickly without any significant costs in terms of human resources and risks for the reputation of the Commission in case of a negative outcome at the judicial review stage. It follows that the Commission does not have the incentive to prosecute *all* anti-competitive practices that come to its knowledge. This prosecutorial resource constraint undermines the assumption of these authors that, in the absence of commitments, the defendants will face an Article 7 investigation and decision.

However, if the parties are aware that the Commission does not have the adequate resources to prosecute all cases, why would they then be inclined to offer commitments instead of taking the risk that the Commission abandons the case? In other words, the prosecutorial resource constraint of the Commission should be factored in their strategy. There are various reasons why knowledge of the Commission's scarce resources will not necessarily reduce the parties' incentive to offer disproportional commitments. In a recent paper on the 'prisoners' (plea bargain) dilemma', Oren Bar-Gill and Omri Ben-Shahar examine the sources of the 'credibility paradox' to which leads this resource constraint, asking:

> [. . .] if the prosecutor has enough resources to take only a few defendants to trial, how can her threats to take all defendants to trial induce them to plea? The resource constraint, in other words, can potentially undermine the credibility of the prosecutor's threat. [. . .] [W]hy do so many defendants accept harsh plea bargains if the alternative for most of them is the non-prosecution option?[331]

They argue that because each defendant bargains individually with the Commission, the defendants in general face a collective action problem, in the sense that if they refuse as a group to offer harsh commitments to the Commission, they would all as a group be better off. Assuming that each bargain struck with the Commission (a commitment decision) produces externalities, as the defendant who proceeds with a commitment decision frees prosecutorial resources to pursue other defendants, the Commission may use a divide and conquer strategy in order to extract better terms from the agents than in the absence of these externalities.[332] At the same time, the fact that, following the settlement, additional resources are available to

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[331] Bar-Gill, O. and O. Ben-Shahar (2009), 'The Prisoners' (Plea Bargain) Dilemma', *Journal of Legal Analysis*, **1** (2), 737–73, 739.

[332] Ibid., p. 743.

prosecute other cases increases the credibility of the Commission's threat to 'prosecute' and thus its bargaining power in the negotiation process with the parties offering commitments.

Hence, the collective action problem of the defendants enables the Commission or other competition authorities to leverage their minimal resources into substantial bargaining power, leading to commitments that generate one-sided outcomes rather than balanced settlements, as one would have expected if commitments were analysed under the 'contract law' paradigm.[333] The competition authorities may also enhance this bargaining power by making public their objective function and defining their priorities. According to Bar-Gill and Ben-Shahar, '(a)s long as prosecutors are able to identify sequencing strategies and other divide-and-conquer strategies and make it publicly known that they subscribe to these orderings (by publishing a priority list), they will be able to bargain with each defendant as if they have a credible threat to take this defendant to trial'.[334] They further note that 'the clarity of the priority list is a substitute for prosecutorial resources' and that 'for a severely resource-constrained prosecutor, the solution is to make his priorities crystal clear'.[335]The publication of guidance on the Commission's enforcement priorities for exclusionary abuses[336] might operate as a tool to reinforce its ability, first, to secure a much higher number of commitments than the number of Article 7 infringement investigations/decisions it could have afforded to bring forward, in view of its focus on cartel activity, and second, extract more burdensome (disproportional) remedies from the parties, than what would have been the case in an Article 7 infringement decision.[337]

There are some additional possibilities for the Commission to use the infringement decision as leverage in the commitment procedure: Undertakings may develop the belief that the Commission could 'vary sanctions outside the proceeding at hand', thus treating undertakings in separate proceedings less favourably. The Commission may also transform third parties' claims into additional concessions from the undertakings, by

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[333] Ibid., p. 741.
[334] Ibid., p. 754.
[335] Ibid., p. 756.
[336] Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ C 45/7.
[337] The authors note that the Commission should bring some infringement actions against unyielding defendants so as to keep the threat of the prosecution credible.

exploiting the incentive of the undertakings to offer commitments in order to avoid future follow-on damages litigation.[338]

In conclusion, the alleged 'voluntary' and consensual nature of commitment decisions represents more an effort of *ex post* rationalisation of the decision of the Court to limit judicial review and the operation of the proportionality principle in the context of Article 9 commitment decisions, than serve as a solid foundation for justifying the different degrees of discretionary remedialism in Article 7 and Article 9 of Regulation 1/2003 decisions as well as in merger control decisions.[339]

V. CONCLUSION

The topic of competition law remedies has been left largely unexplored by legal and economic literature. Although there is now substantial published work on antitrust sanctions and antitrust damages, few studies have proceeded to undertake a systematic overall analysis of all types of remedies, including conduct and structural remedies, in the areas of merger control and antitrust. Even fewer have attempted to develop a theory of remedial action that would explore the limits of remedial discretion in competition law. Many reasons may explain this reticence in academic and professional literature to engage with the topic. First, in the absence of a clear definition of the concept of remedy in EU competition law or, more generally, in the law of various Member States of the EU, and of a well-accepted taxonomy, the study of remedies presents important challenges, as the contours of the concept have to be determined before one proceeds to any empirical analysis. For this, it is important to unveil the limits of remedial discretion in the context of the public and the private law accounts of remedies, before applying them to competition law. Second, the optimal deterrence (enforcement) model, the economic approach in determining appropriate remedies, which has so far dominated competition law literature on remedies, does not accord well with the principles of corrective justice and proportionality that animate respectively the private and the

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[338] Wagner von Papp (2012), 'Best and Even Better Practices', p. 947.

[339] An indication of *ex post* rationalization is that the Court had arrived at a diametrically opposed conclusion as to the 'unilateral' character of undertakings to which the parties have committed themselves (a decision adopted under Article 3 of the old Regulation 17/62 and close to the commitment decisions under Article 9 of Regulation 1/2003), in Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *A. Ahlström Osakeyhtiö and others v Commission* [1993] ECR I-1307, paras 181–185.

public law accounts of remedies. To provide common ground, this study provides a novel analytical framework integrating both economic and legal principles, taking the view that although deterrence (and economic efficiency) constitutes an important objective of EU competition law, this should be achieved in the context of established legal understandings of the concept of remedy. The fact that the concept is not well defined in law may offer the opportunity needed for moving these understandings closer to an economic approach. More specifically, we examined the impact of the economic approach on the linkage between the competition law wrong and remedies as the foundations for an economically inspired, but still respectful to legal traditions, concept of remedial discretion.