RENFORCE Working Paper[1]

Alternative enforcement of competition law - Balancing legal requirements in practice

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1. INTRODUCTION

The term 'alternative' as used as an adjective to 'enforcement of competition law' brings all sorts of associations to mind. The most common misunderstanding is that it would entail an alternative to administrative enforcement, such as private or criminal enforcement. This is not the case; alternative enforcement is to be understood as the collective noun for various instruments of *administrative* enforcement, different from the enforcement instruments usually applied by administrative authorities. From this limitation it follows that the focus of this paper is on alternative instruments used by competition authorities when enforcing competition law. However, this raises the question what the 'standard' instruments of administrative enforcement are, and to what extent 'alternatives' are used. To answer this question, a definition is necessary.

1.1 Definition

The main hypothesis underlying this paper is that competition law is generally enforced by the imposition of sanctions in case of infringements, involving a vertical relationship between competition authority and undertaking.[2] This method is known as the command-and-control approach to enforcement. Command-and-control has certain advantages, because it establishes a clear relationship between the two parties, it puts the enforcer at a distance from its subject and it formalizes mutual rights and obligations. On the other hand, there are also a number of disadvantages: the method takes no account of the fact that it might not always be appropriate to impose a sanction, it offers little flexibility to enforcers and it is based on punishment rather than rewards, lacking positive incentive to behave better.[3] It is not surprising that enforcers have developed tactics and instruments that better meet these needs.

Different from the vertical relationship between competition authority and undertaking underlying the command-and-control approach to enforcement, alternative enforcement presumes another, more horizontal kind of relationship. Within this relationship, undertakings play a more proactive role, by providing the competition authority with information, offering remedies for their illicit behavior, helping the authority to resolve competition cases more

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[1] This Working Paper is an adaptation of a paper presented at the Ius Commune Workshop for Ph.D. Candidates in Leuven.

[2] This is corroborated by the fining policies of the national competition authorities. According to these policy documents, the most common way to sanction infringements of competition law, for instance cartels or abuse of dominance, is by imposing fines on undertakings. Apart from that, the number of fining decisions has increased over the years, and so has the aggregate amount of the fines imposed. In the Netherlands: Boetecode van de Nederlandse Mededingingsautoriteit 2007, specifically §§9 and 10. In the United Kingdom: OFT's Guidance as to the Appropriate Amount of a Penalty, OFT423, September 2012, specifically §1.3. In France: Autorité de la Concurrence, Notice of 16 May 2011 on the Method Relating to the Setting of Financial Penalties, specifically §2. Additionally, see on a European level: Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, recital 29.

[3] See for more alternatives and a short description of the shortcomings of command-and-control: R. Baldwin, *'Regulation, After Command and Control'*, in K. Hawkins (ed.), The Human Face of Law, Oxford University Press, Oxford: 1997.

quickly or even promote compliance with competition rules voluntarily.[4] In return, undertakings can gain the trust of an authority, and it may count on a more lenient treatment in case of infringement.

A more horizontal approach to competition infringements might help the competition authorities to facilitate a speedier resolution of cases or to be able to take a more appropriate approach to different kinds of cases. This is called 'added instrumentality' of enforcement instruments. Instruments with an added sense of instrumentality are either more effective or more efficient in a given situation, for instance by enabling competition authorities to reach their enforcement goals, or to resolve cases more quickly.

Alternative enforcement can therefore be defined as a collection of enforcement instruments presuming a more horizontal relationship between competition authorities and undertakings, which have an added instrumental value in terms of effectiveness or efficiency.'[5]

1.2 Research question

The development of alternative enforcement practice could be described as a bottom-up movement. Even though there are some examples of alternative enforcement instruments used on Commission-level, it is national practice that shows most variety in types of enforcement instruments.[6] Because national competition authorities are, to a certain extent, free to design their own procedures when enforcing competition law, [7] interesting differences may arise between the different Member States. In that light, it is most interesting to limit the research to Member State practice (currently the Netherlands, France and the United Kingdom),[8] using the Commission only as a common comparator.

Even though national competition authorities enjoy procedural autonomy, their discretion in enforcing competition law is not unlimited. National procedural autonomy has its limits, not just flowing from the principles of effectiveness and equivalence of European law that typically limit Member State action when applying European law, but also from general principles of law and fundamental rights (so-called safeguard requirements).[9] Within this framework, national competition authorities will try to create an enforcement policy that is as effective and efficient as possible (instrumental requirements). Based on these requirements, the research question is the following:

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[4] See for a more detailed description of this trend A.T. Ottow, De markt meester? – *De zoektocht naar nieuwe vormen van toezicht* (Inauguration Utrecht University), Den Haag: Boom Juridische Uitgevers 2009.

[5] However, this definition still needs to be tested, because it is not yet proven that alternative enforcement instruments indeed have added effectiveness or efficiency.

[6] This assertion is made based on preliminary research. As an example that fits within this paper, I would refer to the Commission's settlement procedure, which, in form and content is based on the fast-track procedure as used by the Dutch competition authority. See, in that respect, P. Kalbfleisch, 'Van the Paradise Lost naar Met Recht Markt, contribution to *Trust en Antitrust, Beschouwingen over 10 jaar NMa en 10 jaar Mededingingswet,* edited by P. Kalbfleisch, J. van Sinderen, A. van den Ende, M. van Oers en P.A.G. van Bergeijk, 2008, p. 28.

[7] This is called procedural autonomy, which is based on the European principles of conferral and subsidiarity, enshrined in Article 5 TEU. It means that even though European substantive law may be uniform, procedural law governing the application of these rules in the national legal order is often not prescribed on a European level.

[8] The choice for these Member States is based on earlier research. In short, it is based on the overall characteristics of the enforcement culture in the Member States, especially concerning their position in the balance between instrumentality and safeguard requirements, and the availability of alternative enforcement instruments.

[9] See for effectiveness and equivalence the judgments in Case 33/76, *Rewe v. Landwirtschaftskammer für das SaarLand*, § 5; Case 45/76, *Comet v. Produktschap voor Siergewassen*, §§ 12 to 16; Case 68/79, *Hans Just v. Danish Ministry for Fiscal Affairs*, § 25 and Case 199/82, *Amministrazione delle Finanze dello Stato v. San Giorgio*, § 14. For fundamental rights and general principles as limits to procedural autonomy, see Case C-260/89, *ERT*, § 41 and Case C-94/00, *Roquette Frères*, § 25 and Case C-112/00, *Eugen Schmidberger v. Republik Österreich*, § 73-74.

How can the application of alternative enforcement instruments, as done in the Netherlands, France and the United Kingdom, be seen in the light of the balance that needs to be struck between safeguard and instrumental requirements that national and European law have placed upon enforcement?

1.3 Relevance

During the development of alternative enforcement practice, academics have raised concerns regarding the question whether the safeguard requirements would be respected while using these instruments.[10] However, there has never been research on how alternative enforcement instruments are actually used in practice, and neither have they been viewed in a framework that distinguishes between safeguard- and instrumental requirements. Moreover, it is unclear what these requirements even entail, and whether the use of alternative enforcement instruments meets these requirements.

The academic relevance of this research is therefore twofold. First of all, it provides an overview of the use of alternative enforcement instruments in three Member States, and secondly, it provides a framework against which enforcement practice could be tested.

1.4 Set-up and goal of this paper

This introduction has provided a definition of alternative enforcement and has introduced the main research question and the relevance of this question. After that, the balance between the safeguard and instrumental requirements is explained and defined more precisely (§2). However, the focus of this paper is a brief description of a case study performed in the three Member States, concerning the settlement of competition cases (§3). Even though not all results and particularities are discussed, the case study illustrates what the research is actually about, without getting lost in the normative framework surrounding it. The case study on settlements eventually leads in some concluding remarks (§4).

2. FRAMEWORK: INSTRUMENTALITY AND SAFEGUARD ISSUES

In the previous sections some references have already been made to the framework against which alternative enforcement is tested, for instance when referring to the 'added instrumentality' of enforcement instruments. The framework distinguishes between the safeguard functions and the instrumental functions of law.

When applying the law, public bodies are bound by certain objectives, usually described in a mission statement. The most common objective in competition law enforcement is generating compliance,[11] to be achieved in the most effective and efficient way. However, national competition authorities do not have unlimited discretion to reach this goal. They are bound by general principles of law and by fundamental rights, which limit enforcement action. Therefore, there might be tension between the wish to reach enforcement goals, and the limitation on the methods to get there. Ideally, enforcement instruments should strike a balance

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[10] D. Waelbroeck, 'Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?, *The Global Competition Law Working Paper Series*, GCLC Working paper 01/08, <www.gclc.coleurop.be>, but also W.P.J. Wils, 'The use of settlements in public antitrust enforcement : objectives and principles', in C.D. Ehlerman and M. Marquis (eds.), *European Competition Law Annual 2008: settlements under EC competition law*, Hart Publishing, 2009.

[11] In order to make markets work well for consumers (OFT Mission Statement, http://www.oft.gov.uk), to improve chances and choices for businesses and consumers (ACM Mission Statement, https://www.acm.nl) or to safeguard the public economic order (Autorité de la Concurrence Mission Statement, http://www.autoritedelaconcurrence.fr).

between the two: the best possible way to reach enforcement goals, while keeping the violation of principles of law and fundamental rights at a minimum.[12]

2.1 Instrumental requirements

From an instrumental viewpoint, the law serves the goals set by the lawmaker.[13] Therefore, enforcement requirements based on the instrumental function of law pertain to having the law fulfill its goals. In other words, instrumentality requires enforcement to be *effective*, though it is unclear and much debated what effectiveness entails and how it can be measured.[14] Apart from that, practical issues such as budgetary restraints or limited staff might require a national competition authority to be as cost *efficient* as possible. Applying the principles of effectiveness and efficiency to competition law, it would seem that the notion of instrumentality requires enforcement to generate compliance in a way that brings the most results costing the least resources.[15] More concrete examples of instrumentality requirements in competition law are pursuing a deterrent enforcement policy, aiming for a speedy resolution of cases, restoring the competitive situation after an infringement or preventing infringements from occurring at the offset.

When enforcing 101 and 102 TFEU, European law also places instrumental requirements on national enforcement. National procedural rules applicable to European substantive law may not render virtually impossible or, at the very least, excessively difficult the exercise of rights conferred by European law, and the conditions governing European law may not be less favorable than those governing national law.[16]

2.2 Safeguard requirements

The instrumental side of law is counterbalanced by the safeguard function, which aims to protect the rights of citizens and legal persons. Safeguard requirements aim to limit governmental intervention, and prevent a purely instrumental approach to enforcement.[17] For that reason, safeguard requirements of enforcement flow from general principles of law (such as legality, legal certainty, equality or proportionality), and respect for fundamental rights (such as the right to a fair trial, including the protection against self-incrimination, access to documents, impartial decision-making and the right to legal review). These examples illustrate that safeguard requirements are lot less specific to competition law enforcement, because they are less linked to the specific objectives of the policies pursued by the enforcement authority.

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[12] The balance between the safeguard and instrumental functions of law has its foundations in public economic law. Ottow labels this way of thinking about the law 'de Utrechtse School', and quotes VerLoren van Themaat, Hellingman, Mortelmans and Geelhoed. See A.T. Ottow, De markt meester? – *De zoektocht naar nieuwe vormen van toezicht* (Inauguration Utrecht University), Den Haag: Boom Juridische Uitgevers 2009, pp. 6-7.

[13] L.A. Geelhoed, *De interveniërende staat: aanzet voor een instrumentenleer*, Den Haag: Staatsuitgeverij 1983.

[14] See for instance Ottow, who outlines a number of conditions under which market supervision can be deemed to be effective: A.T. Ottow, *Telecommunicatietoezicht. De invloed van het Europese en Nederlandse (bestuurs-)procesrecht*, dissertation University of Amsterdam, SDU Uitgevers, Den Haag: 2006. This topic has also been much debated in Law and Economics literature. See for instance B.E. Will et al., 'On the effectiveness of European cartel law enforcement (Council regulation 1/2003) – a Monte Carlo simulation', University of Saarland, 2012.

[15] Note that effectiveness and efficiency are not the only principles that flow from the instrumental function of law. Some believe that the law incorporates a notion of corrective justice, which entails that enforcement should, also aim for compensation of victims. See for instance E.J. Weinrib, 'Corrective Justice', *Iowa Law Review,* Volume 77, 1990-1991, pp. 403-426.

[16] The European principles of effectiveness and equivalence, as derived from the duty of sincere cooperation (Article 4(3) TEU). See in particular the judgments in Case 33/76, *Rewe v. Landwirtschaftskammer für das SaarLand*, § 5; Case 45/76, *Comet v. Produktschap voor Siergewassen*, §§ 12 to 16; Case 68/79, *Hans Just v. Danish Ministry for Fiscal Affairs*, § 25 and Case 199/82, *Amministrazione delle Finanze dello Stato v. San Giorgio*, § 14.

[17] P. VerLoren van Themaat, *Het coördinatiebeginsel als coördinerend beginsel van sociaal economisch recht* (Inauguration Utrecht University), Deventer: Kluwer 1968.

Also European law recognizes that national enforcement is subject to various procedural safeguards.[18] Therefore, the Charter of Fundamental Rights and the European Convention on Human Rights are important sources of safeguard requirements.

3. EXAMPLE: SETTLEMENTS

A settlement is a type of negotiated procedure,[19] in which a competition authority disposes of a case through a specific procedure, or in application of a policy, under which some benefit is granted to the undertaking.[20] A more common type of negotiated procedure is the commitment decision. Settlements and commitment decisions can be distinguished procedurally by the fact that the first leads to a fully reasoned, final decision, whereas the latter leads to a specific commitment decision. Substantively, undertakings involved in a settlement would typically renounce some procedural rights and commit to not contesting the findings, whereas in a commitment procedure, undertakings are required to offer certain remedies.

This section explains why settlements are instruments of alternative enforcement, and it outlines settlement practice in the three Member States: France, the United Kingdom and the Netherlands. After that, some instrumentality and safeguard issues arising from this practice are identified. Because the purpose of this paper does not allow for a full discussion of all instrumentality and safeguard requirements, this section is limited to a number of common objections to the settlement procedures.

3.1 Settlements as alternative enforcement

A settlement is a procedure in which a competition authority and an undertaking negotiate the terms of a formal decision, after which a reduce fine is imposed. The fact that it is a negotiated procedure implies that the relationship between the parties is more horizontal compared to a regular (fully adversarial) procedure. The relationship is even more horizontal if undertakings voluntarily offer remedies, which, as is described below, often happens in practice.

Apart from the different relationship, settlements might have a sense of added instrumentality. First of all, by applying settlements, national competition authorities appear to aim for increased efficiency by means of a speedier resolution of cases.[21] Secondly, settlements including remedies could be an effective way of ensuring compliance, especially if these remedies take the shape of compliance programs.[22]

3.2 Settlement practice in the Member States

Currently, the development of settlement practice in the three Member States is in three different stages. In the Netherlands, there is no settlement procedure in competition law enforcement. Even though there are some cases in which the Dutch competition authority tried to negotiate a

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[18] Case C-112/00, *Schmidberger*, [2003] ECR-I-5659.

[19] The term 'negotiated procedure' is derived from the terminology of the Autorité de la Concurrence, *les procedures négociées*, which entails settlements, commitment decisions and compliance programs. In France, the latter are actually part of the settlements.

[20] Definition derived from W.P.J. Wils, 'The use of settlements in public antitrust enforcement : objectives and principles', in C.D. Ehlerman and M. Marquis (eds.), *European Competition Law Annual 2008: settlements under EC competition law*, Hart Publishing, 2009.

[21] Autorité de la Concurrence, 'Communiqué de procedure du 10 février 2012 relatif à la non-contestation des griefs', §5 and OECD, Plea Bargaining/Settlement of Cartel Cases, DAF/COMP(2007)38, 22 January 2008, p. 137.

[22] As is the case in France. Not everyone is convinced of the effectiveness of compliance programs though. See W.P.J. Wils, 'Antitrust compliance programs & optimal antitrust enforcement', *Journal of Antitrust Enforcement*, Vol. 1, No. 1, April 2013, but compare this to D. Gerardin, 'Antitrust compliance programs & optimal antitrust enforcement: a reply to Wouter Wils', *Journal of Antitrust Enforcement*, Vol. 1, No. 1, April 2013.

resolution with the undertakings, there is not a large enough body of cases to justify the conclusion that the Netherlands has a settlement practice. Conversely, the United Kingdom does have a settlement practice, even though there is no formal procedure for it either. Between 2006 and 2012, the settlement procedure has been applied six times. The most developed procedure is found in France, where the first settlement was concluded in 2003 and has been applied 29 times since. The French competition authority has a practice of combining settlements with the introduction of compliance programs. This causes undertakings to help and resolve the case more quickly by agreeing to settle, and forces them to actively contribute to a better competitive environment by introducing a compliance program.

Settlements in France

The French competition authority (Autorité de la Concurrence, or Autorité) applies the so-called non-contestation procedure, which has a legal basis in the French code of commerce and application guidelines published by the Autorité itself.[23] Unlike the Commission's settlement procedure, the non-contestation procedure was initially meant for non-cartel competition infringements. Over the years, the Autorité has applied the procedure to cartels nevertheless.[24]

Generally, a non-contestation procedure is requested by the undertaking, after it has received a statement of objections. The undertaking has to contact the head case-handler (rapporteur général), who mediates in the negotiations between the undertaking and the Autorité. The only non-negotiable element of the settlement is the waiver of the right to contest the legal analysis and the underlying facts of the case, and the right to appeal to these elements of the decision. Also, the rapporteur général does not negotiate on the amount of the fine, though he informs the undertaking of the reduction he is willing to propose to the Autorité.[25] In order to receive a higher fine discount, most undertakings offer additional commitments, usually taking the shape of compliance programs.[26] Typically, undertakings would receive a 10% discount for non-contestation and up to 20% extra for an extensive compliance program, though each discount is granted based on the specific circumstances of the case.[27]

Settlements in the United Kingdom

The settlement procedure as used by the British competition authority (Office of Fair Trading, OFT) is called the early resolution procedure. Unlike its French counterpart, this procedure does not have a legal basis and no guidelines on its application have been published.[28] The OFT does not limit the application of the early resolution procedure to cartels either, it has been used in an abuse case as well.[29]

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[23] *La procedure de non-contestation des griefs*, Article L.464-2 paragraph III of the Code de Commerce and 'Communiqué de procedure du 10 février 2012 relatif à la non-contestation des griefs'.

[24] For the first time in Decision 07-D-02 of 23 January 2007 (SITA/Veolia Waste Disposal I).

[25] However, the rapporteur is only bound by this number in exceptional circumstances, in which deviating from it would result in abuse of powers. Autorité de la Concurrence, Decision 09-D-05 of 02/02/2009 (*Temp agencies*).

[26] In fact, out of the 29 cases settled between 2003 and 2012, 24 cases contained a compliance program.

[27] Higher discounts have been granted in the past. For instance Autorité de la Concurrence, Decision 04-D-65 of 4 November 2004 (*La Poste*), in which a 90% discount was granted.

[28] The OFT has made this choice explicitly. The body of cases still is very limited, and the OFT wishes to develop this procedure in practice before publishing guidelines. See Office of Fair Trading, Competition investigation procedures guidance, March 2011, §§3.23 and 3.24. Still, the possibility of receiving a fine discount for early resolution is included in the OFT's fining guidelines, see Office of Fair Trading, OFT's guidance as to the appropriate amount of a penalty, OFT423, September 2012, §2.26.

[29] Office of Fair Trading, CE/8931-08 (*Reckitt Benckiser*), 12 April 2011.

The early resolution procedure typically starts after the statement of objections has been sent, though it has happened that a resolution was reached before that time.[30] The procedure can be requested by both the undertakings and the OFT, under the condition that negotiations commence quickly and take little time. If the parties come to an understanding, an early resolution agreement is signed, in which the duties of the undertakings and the OFT are outlined. Normally, undertakings would waive the right to contest the facts and the legal analysis of the case and, different from the French non-contestation procedure, they would have to admit liability for the infringement. Also, the undertakings must commit to assisting the OFT in a speedy resolution of the case. The OFT does not require a waiver of the right to appeal the final decision. Undertakings are free to offer additional commitments, but this does not happen very often.[31] On average, the OFT grants a 15% fine reduction for early resolution, provided that this discount does not exceed the discount for leniency.

Settlements in the Netherlands

As stated above, the Dutch competition authority (Autoriteit Consument en Markt, ACM) does not use a settlement procedure. In fact, the former president of the ACM explicitly rejected the possibility of adding this instrument to the Dutch enforcement toolkit.[32] According to him, the flexibility of the fining guidelines is enough to reward undertakings for their cooperation. This flexibility is found, for instance, in the possibility to consider cooperation with the ACM as a mitigating factor in determining the fine. Furthermore and more importantly, there are concerns about the negative effects that settlements may have on overall deterrence and on leniency policy, and the societal impact of settling instead of fining.

3.3 Settlement practice and instrumentality

The presumed negative effect on deterrence, on leniency and on societal impact are often-heard arguments against the application of a settlement procedure in competition law, all concerning the effectiveness of enforcement.

As for overall deterrence, some have argued that granting fine reductions weakens competition regimes, because the expected fine reduces.[33] Because of that, undertakings might be less deterred from infringing the law. In practice, such effect is difficult to perceive, because the Autorité and the OFT have stated that undertakings do not have an absolute right to settle, making it unrealistic for a future violator to take this discount into account when calculating the expected fine.[34] Additionally, deterrence can also be sought in the possibility of civil add-on procedures. Since a settlement ends in a formal decision, it is possible for injured parties to take

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[30] This happened in Office of Fair Trading, CE/8950-08 (*Royal Bank of Schotland & Barclays*), 20 January 2011 and Office of Fair Trading, [unpublished] (*British Airways & Virgin Atlantic*), 19 April 2012 (decision announced).

[31] It counts as a mitigating factor in the calculation of the fine. See Office of Fair Trading, OFT's guidance as to the appropriate amount of a penalty, OFT423, September 2012, paragraph 2.15. Additional commitments have been offered in Office of Fair Trading, CE/2890-03 (*Independent Fee Paying Schools*), 20 November 2006, Office of Fair Trading, CE/4327-04 (*Construction*), 21 September 2009 and Office of Fair Trading, CE/2596-03 (*Tobacco*), 15 April 2010.

[32] Peter Kalbfleisch, who was president of the ACM's predecessor: de Nederlandse Mededingingsautoriteit (NMa). See P. Kalbfleisch, speech 'Ontwikkelingen Mededingingsrecht 2009', 9 October 2008.

[33] This is based on economic theory, in which optimal enforcement is reached when the expected losses (the fine) exceed the expected gains from infringing competition law, see for instance W.P.J. Wils, *Optimal enforcement of EC antitrust law*, Kluwer Law International, 2002. See differently M.E. Stucke, 'The implications of behavioral antitrust', *Legal studies research paper series*, University of Tennessee, August 2012.

[34] Both authorities apply their settlement procedures on a case-by-case basis, giving no power of precedent to any of their previous cases. See OFT and Autorité documents. Also underlined by W.P.J. Wils, 'The use of settlements in public antitrust enforcement : objectives and principles', in C.D. Ehlerman and M. Marquis (eds.), European Competition Law Annual 2008: settlements under EC competition law, Hart Publishing, 2009.

the undertaking to court for tort action. Successful civil action is most likely in the United Kingdom, since undertakings are required to admit liability in a written document. In France, such an admission is explicitly not required.[35]

Because the leniency procedure is a successful detection mechanism, it is important that this remains an attractive option for undertakings. In that respect, a high discount for settlements could send a negative message, because it incites undertakings to sit-and-wait, instead of coming clean. In the United Kingdom, such an effect is avoided by making sure that the settlement discount does not exceed the discounts for leniency.[36] Conversely, in France, the Court has decided that fines must be set on an individual basis, and that the fine for a settlement cannot be dependent on the fine for leniency.[37] The incentive to apply for leniency might therefore be less protected in France as it is in the United Kingdom.

Lastly, some fear that a settlement with market parties might send a negative message to the community, for instance when competition authorities are accused of taking the easy way out, or of being captured by the market. As a result, the competition authority might be perceived as indecisive or as a weak enforcer of competition policy, taking away from its deterrent effect. To avoid this negative message, clear communication about settlement policy is necessary, so that there is no misunderstanding as to the reasons to apply settlements. France is quite ahead in this respect, having published non-contestation guidelines after an extensive consultation with market parties and other stakeholders.[38] Apart from that, it is important to pursue a strong fining policy next to a settlement policy. This might send the message that settling is only the exception to the rule. Even in France, where settling is most common, 4 out of 5 cases are still resolved following regular procedures.

3.4 Settlement practice and safeguard requirements

From a safeguard point of view, the most problematical aspects of settlements concern the waiver of procedural rights and the waiver of judicial review.[39]

Even though having undertakings waiving their procedural rights might seem questionable in the light of fair trial, the European Court of Human Rights has held that it is possible under certain circumstances.[40] Undertakings must do so out of free will, clearly stipulated and surrounded by minimum safeguards. First of all, this suggests that there may be no undue pressure. However, in a negotiation between a governmental body and an undertaking, the characteristics of the parties already suggest some form of pressure. In practice, the French and the British procedures are typically initiated by undertakings themselves and allow for withdrawal from the procedure up until the settlement agreement is signed.[41] Secondly, the

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[35] Cour d'Appèl de Paris, arrêt du 29 janvier 2008, 2006/07820, déférée à la Cour : 06-D-03 du 9 mars 2006 (*DIY Plumbing*), p. 14.

[36] To be precise, aggregate discount for a settlement and type C- leniency (the type in which undertakings come clean, but not as the first one, and not generating new information) cannot be higher than the discount for type A of B- leniency. See A. Nikpay and D. Walters, 'The Emerging Settlements Regime in the UK: The use of settlements in Competition Act cases', in C.D. Ehlerman and M. Marquis (eds.), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law*, Hart Publishing, Oxford and Portland, 2009.

[37] Cour d'Appèl de Paris, arrêt du 19 janvier 2010, 200/00334, déférée à la Cour : 08-D-32 du 16 decembre 2008 (*Steel Trading Super Cartel*).

[38] Autorité de la Concurrence, 'Communiqué de procedure du 10 février 2012 relatif à la non-contestation des griefs'.

[39] See in that respect D. Waelbroeck, 'Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?', *The Global Competition Law Working Paper Series*, GCLC Working paper 01/08, but there are many others, since this is a 'hot topic' in competition law enforcement.

[40] European Court of Human Rights, Case of *Hermi v. Italy*, 18 October 2006, Application No. 18114/02, paragraph 73.

[41] This does not mean that there is no undue pressure during the investigations, but the situation is different from the Commission's settlements, in which only the Commission has the power to start and end the procedure. Commission Notice on

requirement of clear stipulation might be safeguarded by the written documents: the minutes in France and the early resolution agreement in the United Kingdom. Whether this is sufficient remains to be seen. Lastly, the requirement of minimum safeguards implies that not all procedural rights can be renounced. This is not the case. Both in France and the United Kingdom the undertaking retains the right to contest other parts of decision, to access the documents underlying the decision and the right to appeal.

However, the fact that the right to appeal is limited in settlement procedures might be problematical from a safeguard point of view. Because competition fines are imposed by administrative authorities, case law requires review by a court with full jurisdiction. For a court to have full jurisdiction, its judicial review must go beyond mere legality control.[42] The question then, is whether the legal review in settlement cases goes beyond mere legality control. In the United Kingdom, this question can be answered in the positive: early resolution leaves the right to appeal all the elements of the decision intact, though the OFT might request the Court to increase the fine because of it. Conversely in France, judicial review is limited to the contestable elements of the decision, which means that at least the facts and the underlying legal analysis are excluded from legal review. Because of the settlement, the French Court considers these elements to fall within the margin of discretion of the Autorité, and usually rejects arguments raised against them. The only exception is when there has been a manifest error in judgment.[43] European case law might allow for this approach to judicial review. Even though the Court of Justice stresses the importance of a substantive analysis of the decisions made by the administrative authority, it also takes into account the margin of discretion the authority enjoyed at certain points.[44] Whether the French interpretation of this margin of discretion would be allowed remains to be seen.

3.5 The balance in settlements

As explained above, the instrumentality and safeguard issues as discussed above reflect common objections against the application of a settlement procedure. Arguments derived from French and British practice have shown that these might not always hold true. Just one question remains unanswered: how is the balance struck between instrumentality and safeguard function in Member State settlement practice? Based on the brief, and rather topical discussion above, it is almost impossible to make coherent statements about the balance between these two functions. Leaving this for the thesis, this article is confined to some general observations on this point.

It seems that competition authorities seem to be well aware of the pitfalls of using settlements, especially concerning instrumentality. Common objections concerning deterrence, leniency and societal impact have been addressed, sometimes explicitly, sometimes by accident. Most importantly, it seems that the Autorité and the OFT pursue a strong fining policy next to the settlement procedure. This interaction between regular and alternative enforcement might lead to a more effective or efficient competition policy.

The instrumental advantages of settlements have to be weighed against disadvantages from a safeguard point of view, in particular the waiver of procedural rights, including the right

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the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, 2008/C 167/01, 2 July 2008.

[42] European Court of Human Rights, Case of *Menarini Diagnostics S.R.L. v. Italy*, Application no. 43509/08, 27 September 2011. A little while later, the ECJ was faced with the same questions in the cases of Chalkor and KME. Although not explicitly referring to the ECHR-case law, the Court of Justice adopted a similar approach.

[43] Cour d'Appèl de Paris, arrêt du 19 janvier 2010, 200/00334, déférée à la Cour : 08-D-32 du 16 decembre 2008 (Steel Trading Super Cartel).

[44] European Court of Justice, C-386/10 P, Chalkor and C-389/10 P, KME Germany.

to full judicial review. The fact that the waiver is done voluntarily and formally might satisfy these concerns, and so might the fact that the final decision is fully reasoned. The fact that judicial review is limited, at least in France, might be more of a concern.

To come to a conclusion: do the suspected advantages of effectiveness and efficiency outweigh the procedure's problems with judicial review? In other words: would it be appropriate for competition authorities to apply a settlement procedure? Even though the issues described here do not fully support this conclusion, one could say that these settlement procedures, being a more formal procedure of nature, strike a rather adequate balance between instrumentality and safeguards. This balance might be most optimal in the British early resolution procedure, since it pays more attention to the instrumentality requirements in terms of leniency, and to the safeguard requirements in terms of judicial review. In general, one could conclude that the settlement procedure is an appropriate instrument, as long as a strong competition policy (in terms of detection and fining) is pursued next to it, as long as undertakings are truly free to opt in or out, and as long as judicial review exceeds a mere legality control.

4. CONCLUSION

In this paper, the research on alternative enforcement of competition law has been illustrated. First, a preliminary definition was provided, formulated as the opposite of 'regular' competition law enforcement; command-and-control enforcement. This was followed by a brief description of the framework against which enforcement practice should be tested. Though the precise criteria were not explicated, a distinction was made between the instrumental- and safeguard function of law, because tension in application is suspected in this dichotomy. Finally, the method of the thesis was illustrated by looking at settlements in France and the United Kingdom. This gave rise to a discussion on a number of instrumentality and safeguard issues, illustrating what problems the application of alternative enforcement instruments might yield.

The thesis does not only concern settlements, but problem solving strategies, market studies and compliance programs as well. The two main features of alternative enforcement have inspired the choice for these instruments: the relationship between competition authorities and undertakings and the sense of added instrumentality. Putting these instruments against the line of instrumentality versus safeguard, some interesting issues may arise. Also, as is clear from the brief description of settlements, some interesting differences may exist between the various competition authorities, making the use of one instrument more appropriate in one Member State than in the other. Alternative enforcement of competition law is an interesting research topic, gaining attention in academic literature, but also in practice, almost as we speak. This research hopes to contribute to this debate and to put the practical use of these instruments in a broader academic perspective.