



ECN WORKING GROUP COOPERATION ISSUES AND DUE PROCESS

DECISION-MAKING POWERS REPORT

31 October 2012

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References to jurisdictions

| | |
|-----|---|
| AT: | Austria |
| BE: | Belgium |
| BG: | Bulgaria |
| CY: | Cyprus |
| CZ: | Czech Republic |
| DE: | Germany |
| DK: | Denmark |
| EE: | Estonia |
| EL: | Greece |
| ES: | Spain |
| EU: | European Union; 'EU' is used here in reference to enforcement action by the European Commission (COM) under Articles 101/102 TFEU and its review by the EU Courts |
| FI: | Finland |
| FR: | France |
| HU: | Hungary |
| IE: | Ireland |
| IT: | Italy |
| LV: | Latvia |
| LT: | Lithuania |
| LU: | Luxembourg |
| MT: | Malta |
| NL: | The Netherlands |
| PL: | Poland |
| PT: | Portugal |
| RO: | Romania |
| SI: | Slovenia |
| SK: | Slovakia |
| SV: | Sweden |
| UK: | United Kingdom (all references to the UK competition authority should be understood as referring to the Office of Fair Trading (OFT)) |

GENERAL REFERENCES

| | |
|--------------------------|---|
| NCA: | National Competition Authority |
| ECN: | European Competition Network, which is composed of the NCAs and COM |
| MS: | Member State |
| SO: | Statement of Objections |
| Competition authorities: | the members of the ECN, namely NCAs and COM |

1. INTRODUCTION

Competition law and enforcement in the EU is characterised by the co-existence of EU law and national laws for substantive rules and procedures. Convergence in substantive analysis in antitrust is achieved through the obligation for NCAs and national courts to apply Articles 101 and 102 TFEU pursuant to Article 3 of Regulation 1/2003 and the mechanisms contained in this instrument to ensure co-operation and coherency (Articles 11 to 16 and 22).

However, the situation is more complex in relation to procedures and sanctions for the implementation of the EU competition rules in the Member States, as this is not generally regulated or harmonised by EU law. They are largely governed by national laws, subject to general principles of EU law, in particular, the principles of effectiveness and equivalence.

The Report on the functioning of Regulation 1/2003¹ found that divergences of Member States' enforcement systems remain on important aspects. It concluded that this aspect may merit further examination and reflection.

In line with this orientation, the ECN Working Group on Cooperation Issues and Due Process has prepared this Report based on information provided by its members. The purpose of the Report is to provide an overview of the different systems and procedures for competition enforcement within the ECN. The Report addresses the different models for competition enforcement within the ECN, the types of decision taken to enforce Articles 101 and 102 TFEU, as well as the procedural steps followed in this respect.

The Report is based on information from 28 jurisdictions (**AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, EU, FI, FR, HU, IE, IT, LT, LV, LU, MT, NL, PL, PT, RO, SK, SI, SV, UK**). Input and comments were taken into account up to 31 October 2012.

This Report reflects the state of convergence within the ECN and can serve as a basis for well-informed discussions on the need for further convergence and how this can be achieved, whether through soft law or legislative harmonisation.

2. INSTITUTIONAL SETTING

There are three basic institutional models of competition enforcement systems within the EU²:

1. The monist administrative model, where a single administrative authority investigates cases and takes enforcement decisions. In some jurisdictions, the authority may not have the power to impose fining decisions.

¹ Communication from the Commission to the European Parliament and the Council, COM (2009)206 final.

² See also paragraph 2 of the Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.04.2004, p. 43-53.

2. The dualist administrative model, where investigation and decision-making are divided between two bodies. One body is in charge of the investigation into cases, which are later referred to the other body which is responsible for deciding the case.
3. The judicial model, where two possibilities exist:
 - (i) The pure judicial model, where the competition authority investigates the case. It then brings the case before a court, or refers it to a prosecutor who brings it to court, which takes the decision both on substance and on fines. This model may also be used only in cases where the imposition of fines is sought.
 - (ii) The competition authority adopts enforcement decisions on substance and only brings the case before the courts, or refers it to a prosecutor who brings it to court, to seek the imposition of fines.

2.1. Monist Administrative Model

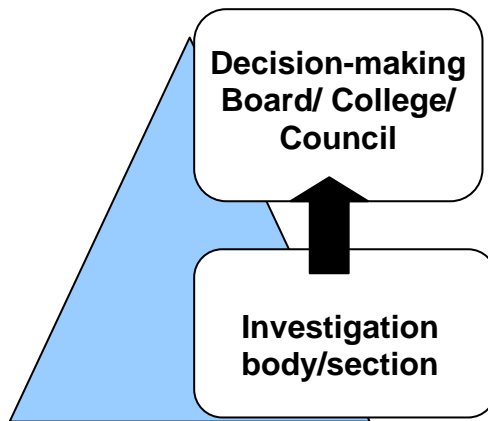
The most common institutional model within the European Competition Network is the “**Monist Administrative Model**” (a single administrative authority investigates cases and takes the enforcement decision). It is found in: **BG, CY, CZ, DE, DK**: non-fining cases, with the exception of administrative fines (**DK(1)**), **EE**: administrative and misdemeanour procedure (**EE(1)**), **EL, ES, EU, FI**: non-fining cases (**FI(1)**), **FR, HU, IT, LT, LU, LV, MT, NL, PL, PT, RO, SI, SK, SV**: cease and desist orders, commitment decisions and fine orders (**SV(1)**)³, and the **UK**.

Within this model, two different patterns⁴ can be distinguished:

1. Authorities that follow a “**non-unitary**” structure, i.e. the investigative and decision-making activities are separated functionally although they are handled by one single administrative institution. The investigation is normally carried out by investigation services and the final decision is adopted by a board/college/council of this administrative institution. Within this structure, there are potentially significant differences in terms of internal organisation and **relationship** between the different bodies. In some NCAs such as **ES** and **FR** a full functional separation between investigative and decision-making bodies has been set up, where their respective competences are carried out independently from one another.

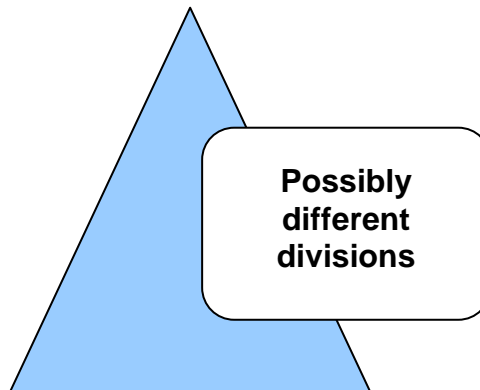
³ Where the Swedish competition authority considers that the material circumstances regarding an infringement are clear, it may issue a fine order in cases that are not contested by the undertakings subject to the fine order.

⁴ There are many particularities in all the enforcement systems reviewed and thus the purpose of this exercise is only to familiarize the reader with the general background of the systems.



BG, CY, DK(1), EL, ES, EU, FR, IT, LT, LU, LV, HU, PT, RO

2. Authorities that follow a “**unitary**” structure and have integrated administrative hierarchies, i.e. they do not have different bodies carrying out different steps in the procedure although there may be different divisions (e.g. a Competition department and Legal department) inside these authorities that deal with separate aspects of a case:



CZ, DE, EE(1), FI(1), MT, NL, PL, SK, SI, SV(1), UK

The following specificities exist⁵:

- In **CZ** and **SK**, a two-instance procedure is foreseen: in **CZ** a first-instance decision is taken by the Vice-Chairman and an appeal is possible to the Chairman who adopts the final decision. In **SK**, a first-instance decision is taken by the director of the executive division and an appeal is possible to the Council, which consists of 2 internal members (Chair and Vice-Chair) and 5 external members.

⁵ In **EL**, **IE** and the **UK**, certain sectoral regulators have concurrent powers to enforce Articles 101 and 102 TFEU.

- In **DE**, the competition authority is divided into 12 decision divisions, each of which undertakes investigations and engages in decision-making. In fines proceedings (hard-core cartel cases), the final decision of the competition authority becomes the indictment when the decision is appealed. Full review is then carried out by the court.
- In the **NL**, procedural steps are divided between the competition department and legal department. Chinese walls exist between both departments.⁶
- In the **UK**, once a Statement of Objections has been issued, a three-person Case Decision Group, separate from the investigation team, is appointed to act as decision-makers on the case, hence it is responsible for the final decision on infringement and penalty.
- In **MT**, a monist administrative model has been adopted with effect from the 23 May 2011. The previous dualist model will still be used with respect to investigations involving serious breaches of national law and Articles 101 and 102 TFEU which were opened prior to 23 May 2011 and were not yet concluded by this date⁷.

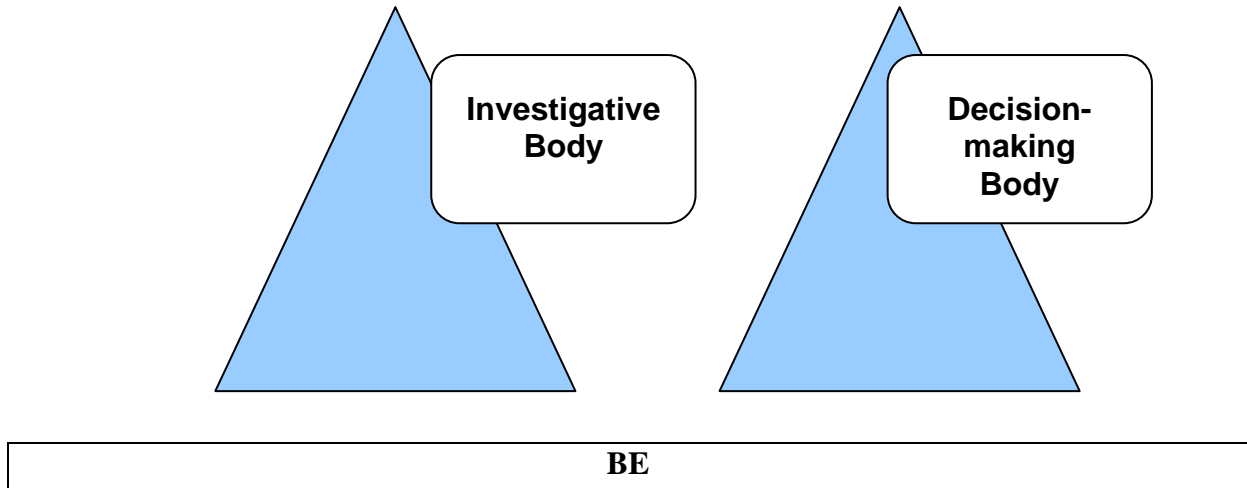
2.2. Dualist Administrative Model

Currently, one jurisdiction opts for the dual administrative system where the investigation and decision-making are separated into different institutions.

In **BE**, the Competition Council “sensu latu” is an administrative court which has a non-unitary structure, in the sense that it “sensu latu” is composed of the College of Competition Prosecutors and of the Competition Council “sensu stricto”. The College of Competition Prosecutors (CCP) is the “investigative body” and is responsible for issuing instructions to the officials of the Directorate General for Competition designated by the head of the Directorate-General to form the team with responsibility for the investigation. The Competition Council (BE-CC) “sensu stricto” is the General Assembly which is the “decision making body”. The use of this model in Belgium is currently under review and there is a proposal to change the enforcement system to a single administrative model.

⁶ The Competition Department is responsible for investigating and issuing the Statement of Objections (SO), which is signed by the director of the Competition Department. Neither the case team handling the investigative phase, nor the (director of the) Competition Department is involved in the decision-making process. The involvement of the Board in the investigative phase is limited to taking an initial authorisation to open an investigation and a go/no go decision to draft a SO. The Legal Department is responsible for drafting the sanction decision that is taken by the Board of Directors. The file is transferred to the Legal Department and a new case team hears the parties and prepares the draft decision. The Competition Department is not involved in the decision-making process at the level of Board or otherwise.

⁷ For the purposes of this report, reference is made to the Competition Act as amended by Act VI of 2011, which came into force on 23 May 2011 and provides for a monist model.

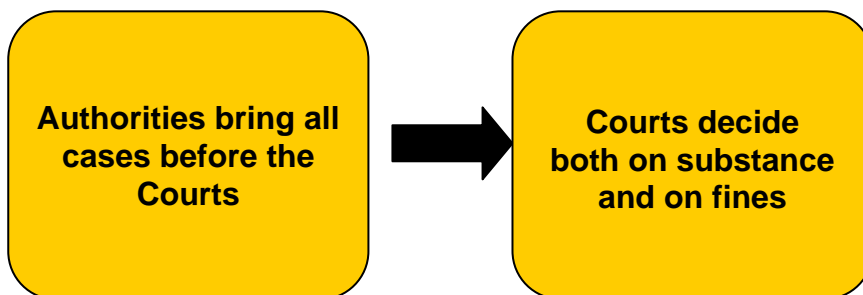


2.3. Judicial Model

In certain jurisdictions the investigations are carried out by the respective competition authorities, which then act as prosecutor or refer the case to a prosecutor, bringing the cases before a court which has the decision making and/or fining powers. The jurisdictions concerned are **AT**, **DK**: fining cases, with the exception of administrative fines (**DK(2)**), **EE**: criminal procedure (**EE(2)**), **FI**: fining cases (**FI(2)**), **IE**⁸, **SV**: fining cases (**SV(2)**).

Within this model, two different patterns can be distinguished:

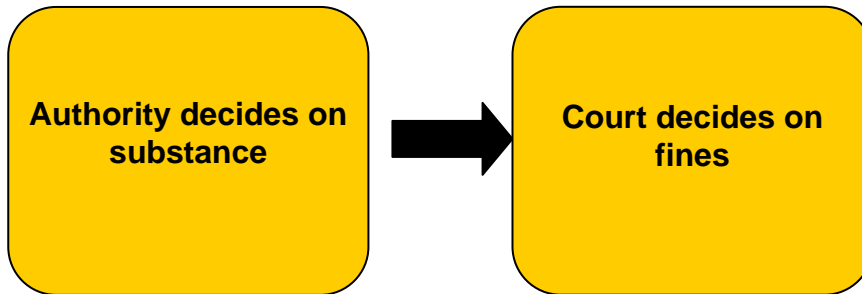
1. Firstly, the pure judicial model where the competition authority investigates the case. It brings then the case before a court which takes the decision both on substance and on fines. In **SV**, this model is applied only in cases in which the imposition of fines is sought by the Swedish NCA.



AT, IE, EE(2), SV(2)

⁸ In merger control cases, the Irish competition authority is both the investigation and decision making body.

2. In a variation of this model, authorities may decide upon the substance and later bring the case before the courts, or refer it to a prosecutor who brings it to court, to seek the imposition of fines, or authorities decide in cases other than fining cases.



DK(2), F1(2)

3. TYPES OF DECISION FOR ENFORCEMENT OF ARTICLES 101 AND 102 TFEU

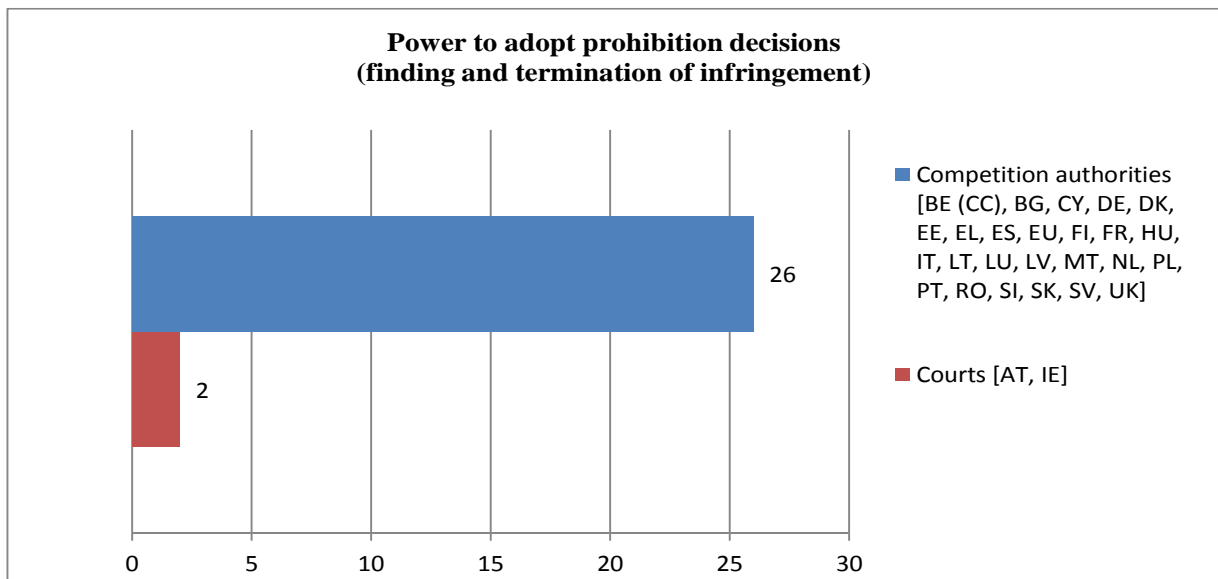
3.1. Prohibition decisions

Articles 101 and 102 TFEU are enforced across the EU by means of prohibition decisions⁹, among other types of decisions¹⁰. In the large majority of jurisdictions, the competition authorities have the power to adopt a prohibition decision for enforcement of Articles 101 and/or 102 TFEU (**BE – CC, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IT, LT, LU, LV, MT, NL, PL, PT, RO, SI, SK, SV, UK**). In some jurisdictions, the courts issue prohibition decisions (**AT** – the Cartel Court, **IE** – national courts).

⁹ For the purpose of the present report, 'prohibition decision' refers to a formal decision ordering to bring to an end an agreement or conduct that is found to infringe the competition rules. The decision may contain further elements such as an additional order not to repeat the infringement and/or the imposition of remedies.

¹⁰ For example, in many (but not all) jurisdictions, prohibition decisions can be combined with the imposition of sanctions. This question is further analysed in *section 3.1.4* below.

Graph 1



3.1.1. Differences between national legislation and Article 7 of Regulation 1/2003

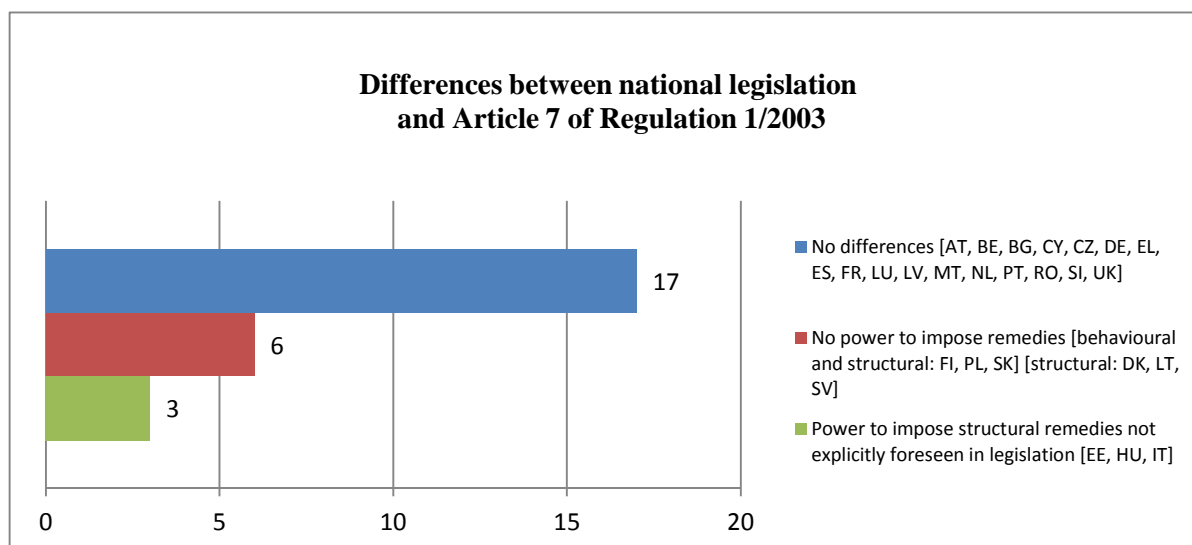
Article 7 of Regulation 1/2003 provides that where the Commission finds that there is an infringement of Articles 101 and 102 TFEU, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. When comparing the powers of national competition authorities that may adopt prohibition decisions with those established in Article 7 of Regulation 1/2003, it may be concluded that all jurisdictions provide for the power to find an infringement and issue a cease and desist order¹¹.

The main differences between national legislation and Article 7 lie in the power to impose remedies. Some competition authorities may not impose remedies, either behavioural or structural (e.g. **FI**¹², **PL**, **SK**). In some Member States, the competition agency may not impose structural remedies (e.g. **DK**, **LT**, **SV**), whereas in other jurisdictions the power to impose structural remedies is not explicitly foreseen in national legislation, or the legal provision covers all types of remedies without being specific (e.g. **EE**, **HU**, **IT**). Further details regarding the power to impose remedies are described in *section 3.1.5* below.

¹¹ In **AT**, prohibition decisions are adopted by the Kartellgericht upon application by the Bundeswettbewerbsbehörde, Bundeskartellanwalt ("Amtsparteien – Official Parties") and certain institutions and undertakings bearing a legitimate or legal interest in a decision (although the latter do not have right to apply for a decision imposing fines or periodic penalty payments). In **BE**, prohibition decisions are adopted by the Competition Council and in **IE**, they are adopted by national courts upon application by the Irish competition authority.

¹² In **FI**, the NCA may, when issuing a prohibition decision, oblige the business undertaking to deliver a product to another undertaking on similar conditions as offered by the same business undertaking to other undertakings in a similar position.

Graph 2



3.1.2. Parallel application of national legislation and Articles 101/102 TFEU

Either following a legal obligation or an established practice, the large majority of competition authorities apply national competition rules in parallel with Article 101 and/or 102 TFEU (**AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, LT, LU, LV, MT, NL, PL, PT, RO, SI, SK, SV, UK**). There is, however, one exception. In **IT**, in cases where a breach of Articles 101 and/or 102 TFEU is established, the authority does not apply national law, according to Article 1 of the Italian Competition Act the (so-called “single legal barrier” principle).

When national competition authorities apply EU competition law, in all jurisdictions there are no differences in the procedures they follow, when compared with the application of national law, except for the cooperation duties established in Regulation 1/2003.

3.1.3. Finding of past infringements

Article 7 of Regulation 1/2003 stipulates that if the Commission has a legitimate interest in doing so, it may find that an infringement has been committed in the past. A similar power to ascertain past infringements also exists in a large number of Member States. The most frequent reaction to past infringements by ECN competition authorities is the imposition of sanctions (see *section 3.1.4* below), although, similar to Regulation 1/2003, it is also usually possible to make a simple finding of an infringement in the past.¹³

Regarding past infringements a large majority of national jurisdictions have the power to make a finding of such infringements, usually within the legal limitation period, including **AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HU, IE, IT, LT, LU, LV, MT, NL, PL,**

¹³ In **SV**, the Swedish competition authority has the power to make a finding of a past infringement as part of fine orders.

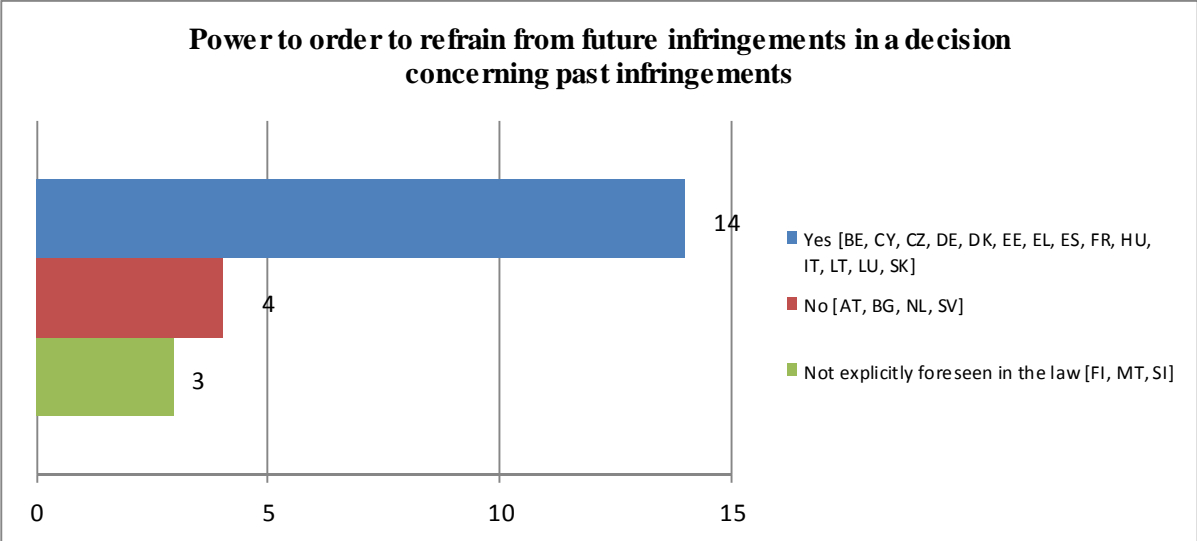
PT, RO, SK, SI, UK. Moreover, in **DK**, the competition authority can ascertain past infringements with the purpose of regulating future conduct of the companies involved. The enforcement of criminal liability for past infringements is under the jurisdiction of the courts.

In some jurisdictions, a legal requirement of legitimate interest (i.e. the existence of a risk of a repeated infringement) in ascertaining a past infringement is established in the law (e.g. **AT, DE**). In **SV**, only courts, at the request of the Swedish competition authority, may impose fines for past infringements, with the exception of cases where the Swedish competition authority may issue a fine order (see *section 3.5* below).

So far, in **PL**, the competition authority has only found past infringements of national law, and not also of Articles 101/102 TFEU in which case it discontinued the proceedings.

Many competition authorities have made use of the power to find past infringements (e.g. **BE, BG, CY, DE, EE, EL, FI, FR, LT, LV, NL, PL, PT, SK**). In cases of past infringements, competition authorities in some jurisdictions may require the addressee of the prohibition decision to refrain from competition infringements in the future (e.g. **BE, CZ, CY, DE, DK, EE, EL, ES, FR, HU, IT, LT, LU, SK**). This injunction may be explicitly included in the decision (e.g. **BE, CY, IT**), but in some jurisdictions is not usually included in decisions (e.g. **LV**). In other jurisdictions, the competition authority may not make such requirement (e.g. **AT, BG, NL, SV**) or this power is not clearly foreseen in national legislation (e.g. **FI, MT, SI**).

Graph 3



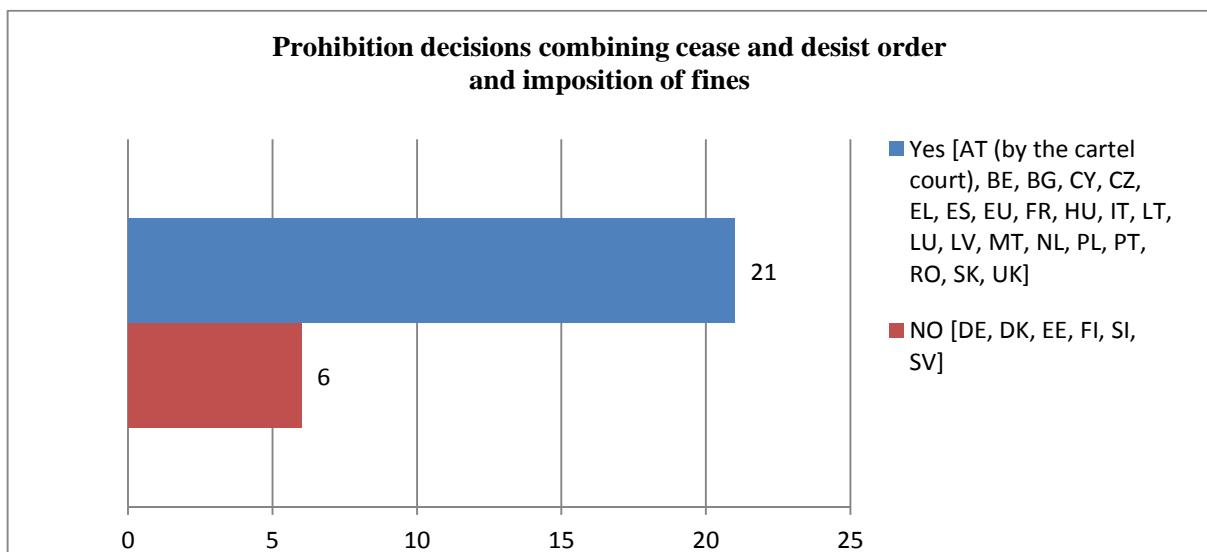
3.1.4. Prohibition decisions which combine cease and desist orders and the imposition of fines

Regarding the adoption of a prohibition decision which combines cease and desist orders and a fine, in most jurisdictions such combination in the same decision is possible, similar to the

EU system (e.g. **AT, BE, BG, CY, CZ, EL, ES, FR, HU, IT, LT, LU, LV, MT, NL, PL, PT, RO, SK, UK**).

In some Member States, a separate procedure or decision for the cease and desist order and for the imposition of a fine has to be undertaken by the competition authority (**DE, EE, SI**). In other jurisdictions, the competition authority may issue cease and desist orders, but the power to impose fines is entrusted to a court (**DK, FI, SV**). If the Swedish NCA has issued a cease and desist order subject to a penalty payment, it may not request the court to impose an administrative fine regarding the same infringement for the time after the order was issued.

Graph 4



3.1.5. Prohibition decisions with remedies

Article 7 of Regulation 1/2003 provides that the Commission may impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.

Like the **EU system** of competition enforcement, most competition authorities may impose remedies when issuing a prohibition decision (**AT¹⁴, BE, BG, CY, CZ, DE, DK, EL, ES, FR, HU, IT, LT, LU, LV, MT, NL, PT, RO, SI, SV¹⁵**).

¹⁴ By the Cartel Court.

¹⁵ In **SV**, the legislation does not explicitly foresee the power to impose remedies. However, the NCA may formulate a cease and desist order in a way that in essence resembles a behavioural remedy.

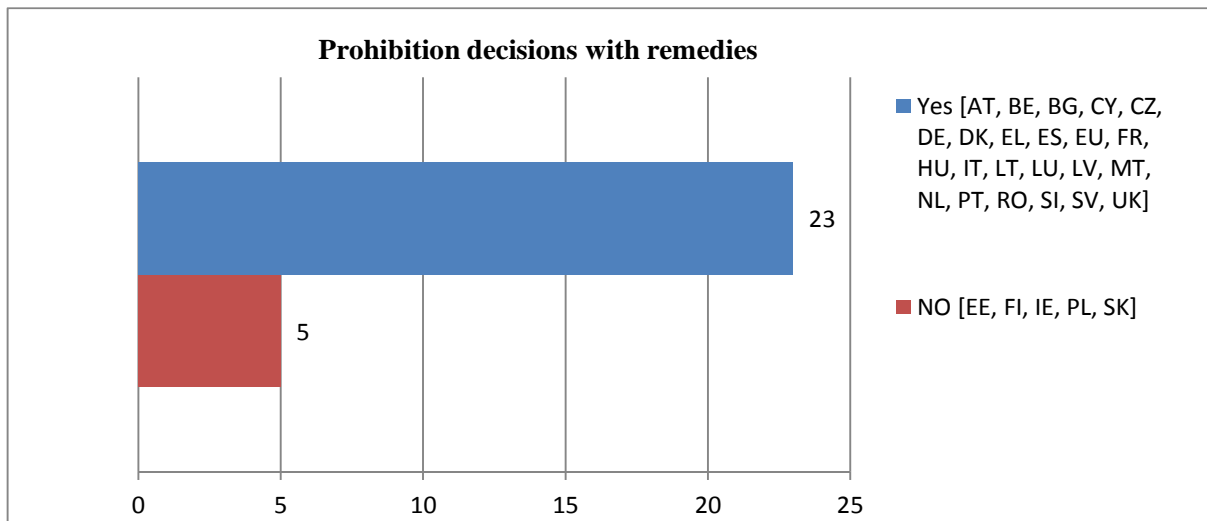
In the **UK**, the Competition Act 1998 provides that the competition authority may give such directions as it considers appropriate to bring an infringement to an end. The competition authority is not limited to giving directions to the infringing parties, e.g. directions may be addressed to the parent company of a subsidiary which is the immediate party to the infringement. Directions must be in writing and they are likely to form part of the infringement decision in cases where the decision and the directions are addressed to the same person.

In some Member States, the competition authority may not impose any kind of remedy, either of a behavioural or structural nature (**EE, FI, IE, PL, SK**). Specifically, in **IE**, national courts may apply structural and behavioural (injunction) remedies following a breach of national competition law.

In other jurisdictions only the imposition of structural remedies is not allowed (**LT**) or such imposition is not explicitly foreseen in national legislation (**DE, EE, HU, IT, LV**).

In some jurisdictions e.g. **BG, EL, ES, MT** and **RO**, structural remedies may only be imposed where there is no behavioural remedy which would have an equivalent effect/equally effective (also in **DE**, according to national case-law) or where such behavioural remedy would be more onerous for the undertaking. In **CY**, the choice between behavioural or structural remedies depends on the infringement and must be deemed necessary for the infringement to be brought to an end. In **FR**, such choice is not specifically framed in the national law, but general principles apply, such as the principle of proportionality.

Graph 5



3.1.6. Monitoring compliance

Monitoring mechanisms or procedures regarding prohibition decisions are often foreseen. Competition authorities monitor compliance with prohibition decisions on a case-by-case basis, according to the circumstances of the case (e.g. **BE, CY, DE, DK, FI, FR, LU, LV, PT, RO, NL**), or on a regular basis (e.g. **CZ, EE, EL, ES, IT, SK**), and in some jurisdictions with the possibility to be adapted according to the circumstances of each specific case (e.g. **EL**). In some jurisdictions, communication by the parties to the competition authority is mandatory when conditions or obligations are imposed in the decision (e.g. **BG, EL, SI**) or is stipulated in most cases (e.g. **EE, IT, LT**¹⁶). In **HU**, a monitoring procedure is mandatory, as the investigator shall hold a post-investigation in order to check compliance with the decision.

In some jurisdictions, no special provisions on monitoring mechanisms exist (e.g. **AT, MT, PL, SV**). In the **UK**, if a person fails, without reasonable excuse, to comply with a direction given by the competition authority to bring the infringement to an end, the authority may apply to the court for an order requiring compliance with a direction within a specified time. The court can require the person in default, or any officer of an undertaking who is responsible for the default, to pay the costs of obtaining the order.

In case of non-compliance with a prohibition decision, some jurisdictions have the power to impose periodic penalty payments as are provided for under Article 24(1) of Regulation 1/2003¹⁷, but different possibilities are available:

- a) Periodic penalty payments (**AT**¹⁸, **BE**, **BG**¹⁹, **CY, DK, EE**²⁰, **EL, ES, EU, FI, FR**²¹, **HU**²², **LU, MT, NL**²³, **PL, RO**²⁴, **SV**²⁵)

¹⁶ Only regarding the payment of the fine: the addressee of the decision must inform the competition authority that the fine has been paid within five days after payment.

¹⁷ The limit for periodic penalty payments is set at 5% of the annual daily turnover in the preceding business year per day and is calculated from that date appointed by the decision.

- b) Fine (**BE**, **BG**²⁶, **CZ**²⁷, **DE**, **EL**, **ES**, **FR**²⁸, **HU**²⁹, **IT**³⁰, **LT**³¹, **LU**, **MT**, **NL**³², **RO**³³, **SK**³⁴)
- c) Enforcement of execution of the decision (**AT**, **BE**³⁵, **EL**³⁶, **ES**, **HU**, **LU**)
- d) Criminal sanctions (**CY**³⁷)
- e) Increase the fine (**LV**³⁸)

¹⁸ Not exceeding 5% average daily turnover in the preceding business year per day and calculated from the date appointed by the decision to put an end to the infringement.

¹⁹ In **BG**, the Commission may impose a periodic pecuniary sanction up to 5% of the average daily turnover in the preceding financial year for each failure to comply with a decision of the Commission ordering the termination of an infringement.

²⁰ Up to €3 200 on natural persons and up to €6 400 on legal persons. The penalty payments may be imposed repeatedly.

²¹ Up to 5% of the average daily turnover, per day of delay, with effect from the date the competition authority determines.

²² Where the Competition Council, by its resolution, obliged the party to perform a specific act or conduct, the Competition Council shall impose an enforcement fine, concurrently with the ordering of the enforcement.

²³ Only when remedies are imposed as part of a cease and desist order.

²⁴ Up to 5% of the average daily turnover.

²⁵ The Swedish NCA may combine its cease and desist order with a penalty payment. However, the Swedish NCA needs to apply to the court in order for the penalty payment to be imposed in cases where an undertaking acts in breach of the cease and desist order.

²⁶ A pecuniary sanction not exceeding 10% of the total turnover in the preceding financial year.

²⁷ Fine up to CZK 10 000 000 or up to 10% of the net turnover of the undertaking in the last accounting period.

²⁸ Up to 10% of the worldwide turnover of the group.

²⁹ In case parties failed to comply with a commitment.

³⁰ Up to 10% of the turnover or, in cases where a pecuniary sanction has already been imposed, a fine of no less than double the penalty already imposed with a ceiling of 10% of the turnover. The Authority shall also set a time-limit for the payment of the fine and, in cases of repeated non-compliance, may decide to order the undertaking to suspend activities for up to 30 days.

³¹ Up to 1% of the average gross daily income in the preceding business year.

³² Only under exceptional circumstances; when the prohibition decision also contains a binding instruction, Art. 56(2) Dutch Competition Act.

³³ Up to 10% of the turnover of the offender.

³⁴ Up to 10% of the total turnover of the undertaking. This sanction may be applied repeatedly.

³⁵ By the Administration of the “Value Added Tax, Registration and Public Property”.

³⁶ In **EL**, regarding the imposition of the fine, execution of the decision is possible via the Tax Authorities. This relates to the implementation of the decision as such. According to L. 3919/2011, Art. 49, the fines imposed by the Greek competition authority are certified as public revenue and are collected by the competent Tax Office, which collects them according to the general provisions of the Code for Public Revenue Collection. The fines, therefore, are State (and not the competition authority's) revenue.

³⁷ Up to two years imprisonment and/or a fine not exceeding €340 000.

- f) Restrictions of economic activity by undertakings (**LT**)
- g) Demerger (**FR**³⁹)

3.1.7. *Judicial review*

In all jurisdictions, prohibition decisions may be appealed by the parties for judicial review.⁴⁰

3.1.7.1 Deadlines for submitting appeals

Regarding deadlines for the parties to submit an appeal before the courts (1st instance), counting from the notification of the prohibition decision, there is great diversity across jurisdictions, when compared with the 2 month time limit within the **EU system**, ranging from a 14 to 90 days deadline. The different deadlines for submitting an appeal against a prohibition decision are:

- a) 14 days (**BG, DE** for criminal proceedings)
- b) 2 weeks (**PL**)
- c) 20 days (**LT, MT**)
- d) 3 weeks (**SV**)
- e) 21 days (**IE**)
- f) 4 weeks (**AT, DK**)
- g) 30 days (**BE, EE, FI, HU, PT**⁴¹, **RO, SI**)
- h) 1 month (**DE** for administrative proceedings, **FR, LV**)
- i) 6 weeks (**NL**)

³⁸ Increase the fine up to the maximum allowed, i.e. up to 2.5 or 10% of the undertaking's turnover depending on the type of infringement.

³⁹ The law of the modernization of the economy of August 4, 2008 has empowered the Autorité de la concurrence to order the sales of stores in the retail trade sector (Article L. 752-26 of the Commercial Code). Its implementation is subject to two conditions: the Autorité must firstly find an abuse of dominant position on the part of a retailer through a prohibition decision and, secondly, the persistence of this abuse even after the prohibition decision. The powers under Article L.752-26 to impose structural remedies thus concern non-compliance with a prior prohibition decision.

⁴⁰ In some jurisdictions, parties may also first appeal to administrative bodies, within the competition authority (**EE, SK, NL**) or to a separate body (**DK, MT**). Appeals to administrative bodies are mandatory before an appeal is filed before the Courts (**DK, MT, NL, SK**) or optional (**EE**).

⁴¹ Working days.

- j) 60 days (**EL, IT**)
- k) 2 months (**CZ, ES, SK**⁴²)
- l) 2 months (**UK**)
- m) 75 days (**CY**)
- n) 90 days (**LU**)

In judicial appeals at second instance, deadlines may be different (e.g. **CZ**⁴³, **CY**⁴⁴, **DE**⁴⁵, **DK**⁴⁶, **LU**⁴⁷, **SK**⁴⁸) or the same as in first instance appeals (e.g. **EE, EL, FI, MT, NL, PL, SV**).

3.1.7.2 Duration of appeal procedures

The average duration of appeal procedures before the courts, from their start until the last instance court ruling also varies across jurisdictions, depending on the cases and type of procedure.⁴⁹

3.1.7.3 Nature and extent of judicial review

The nature and extent of judicial review also varies across jurisdictions. In most jurisdictions, the powers of the review court may change depending on the instance of appeal. In the **EU system** of competition enforcement, at first instance the General Court has the power to quash a prohibition decision on both facts and law, and at second instance the Court of Justice conducts its judicial review on points of law.

The powers of the court may also differ according to the type of decision (prohibition and/or fines) under review.

⁴² Deadline for the appeal to the Court.

⁴³ 2 weeks.

⁴⁴ 42 days.

⁴⁵ 1 week in criminal proceedings and additional one month for statement of grounds, 1 month in administrative proceedings.

⁴⁶ 8 weeks.

⁴⁷ 40 days.

⁴⁸ 15 days.

⁴⁹ In the **NL**, if a reasonable timeframe for the decision making process of the competition authority, including the administrative appeal, is exceeded, the fines imposed are progressively reduced: Reduction by 10% for exceeding a reasonable timeframe by 6-12 months, with a maximum of €10 000, and by 15% for an exceeding 12-18 months, with a maximum of €15 000.

Table 'Judicial review'

| Member State | Instance | Powers of the Court | | | | | |
|--------------|--|-------------------------------------|----------------------------------|--------------------------------|----------------------|---------------------|---------------------|
| | | Quash the decision on facts and law | Quash the decision only on facts | Quash the decision only on law | Hold a trial de novo | Take a new decision | Refer the case back |
| AT | 1st (Supreme Cartel Court) | | | X | | X | X |
| BE | 1st (Court of Appeal of Brussels) | X | | | X | X | X |
| | 2nd (Supreme Court of Belgium) | | | X | | | X |
| BG | 1 st (Supreme Administrative Court – three member Chamber) | X | | | | X | X |
| | 2nd (Supreme Administrative Court – five member Chamber) | | | X | | X | X |
| CY | 1 st (Supreme Court of Cyprus) | | | X | | | X |
| | 2nd (Plenary of the Supreme Court) | | | X | | | X |
| CZ | 1st (Regional Court Brno) | X | | | | | |
| | 2nd (Supreme Administrative Court) | | | X | | | X |
| DE | 1st (Higher Regional Court in Düsseldorf) | X ⁵⁰ | | X ⁵¹ | X ⁵² | X ⁵³ | X ⁵⁴ |
| | 2nd (Federal Court of Justice) | X ⁵⁵ | | X ⁵⁶ | | | X ⁵⁷ |
| DK | 1st (Competition Appeals) | X | | | | X | X |

⁵⁰ In administrative and fine proceedings.

⁵¹ In administrative proceedings.

⁵² In fine proceedings.

⁵³ In fine proceedings.

⁵⁴ In administrative proceedings.

⁵⁵ In fine proceedings.

⁵⁶ In administrative proceedings.

⁵⁷ In administrative and fine proceedings.

| Member State | Instance | Powers of the Court | | | | | | |
|--------------|--|---|----------------------------------|--------------------------------|----------------------|---------------------|---------------------|-----------------|
| | | Quash the decision on facts and law | Quash the decision only on facts | Quash the decision only on law | Hold a trial de novo | Take a new decision | Refer the case back | |
| | Tribunal) | | | | | | | |
| | 2nd (Civil Courts) | X | | | | X | X | |
| EE | Administrative acts (e.g. prohibition decisions) | 1st (Tallin Administrative Court) | X | | | | X | |
| | | 2nd (Tallin District Court) | X | | | X | X | |
| | | 3rd (Supreme Court of Estonia) | | | X | X | X | |
| | Fine decisions | 1st (Harju County Court, Viru County Court, Tartu County Court, Pärnu County Court) | X ⁵⁸ | | | X ⁵⁹ | | X ⁶⁰ |
| | | 2nd (Tallinn District Court, Tartu District Court) ⁶¹ | X ⁶² | | | | X ⁶³ | X ⁶⁴ |
| | | 3rd (Supreme Court of Estonia) | | | X ⁶⁵ | | X ⁶⁶ | X ⁶⁷ |
| EL | 1st (Athens Administrative Court of Appeal) | X | | | X | X | X | |
| | 2nd (Council of State) | | | X | | | | |
| ES | 1st (Audiencia Nacional) | X | | | | | | |
| | 2nd (Supreme Court) | X | | | | | | |
| EU | 1 st instance (General Court) | X | | | | | X | |
| | 2 nd instance | | | X | | | X | |

⁵⁸ For fine decisions imposed in misdemeanour procedures.

⁵⁹ For fine decisions imposed in misdemeanour or criminal procedures.

⁶⁰ For fine decisions imposed in misdemeanour procedures.

⁶¹ The Court does not intervene in the review of fine decisions imposed in misdemeanour procedures.

⁶² For fine decisions imposed in criminal procedures.

⁶³ For fine decisions imposed in criminal procedures.

⁶⁴ For fine decisions imposed in criminal procedures.

⁶⁵ For fine decisions imposed in misdemeanour or criminal procedures.

⁶⁶ For fine decisions imposed in misdemeanour or criminal procedures.

⁶⁷ For fine decisions imposed in misdemeanour or criminal procedures.

| Member State | Instance | Powers of the Court | | | | | |
|------------------|--|-------------------------------------|----------------------------------|--------------------------------|----------------------|---------------------|---------------------|
| | | Quash the decision on facts and law | Quash the decision only on facts | Quash the decision only on law | Hold a trial de novo | Take a new decision | Refer the case back |
| | (Court of Justice) | | | | | | |
| FI | 1st (Market Court) | X | | | | X | X |
| | 2nd (Supreme Administrative Court) | X | | | | X | X |
| FR | 1st (Paris Court of Appeal) | X | | | | X | X |
| | 2nd (French Supreme Court) | | | X | | | X |
| HU ⁶⁸ | 1st (Metropolitan Court of Budapest) | | | X | | X | X |
| | 2nd (Budapest Court of Appeal) ⁶⁹ | | | X | | X | X |
| IE | 1st (Appellate Court / National Courts of Ireland) | X | | | | X | |
| IT | 1st (Regional Administrative Court of Latium) | | | X | | X ⁷⁰ | X |
| | 2nd (Council of State) | | | X | | X ⁷¹ | X |
| LT | 1st (Vilnius Regional Administrative Court) | X | | | | X | X |
| | 2nd (Supreme Administrative Court of Lithuania) | X | | | | X | X |
| LU | 1 st (Administrative Tribunal) | X | | X | X | X | X |
| | 2 nd (Administrative Court of Appeal) | | | | | | |

⁶⁸ Neither court proves the facts ex officio. Instead of quashing the decision on facts, if necessary any of the two courts refers the case back (the first instance court to the Competition Authority, the second instance court to the first instance one).

⁶⁹ These powers concern the decision of the Metropolitan Court of Budapest (first instance), and not the decision of the Competition Council.

⁷⁰ Only regarding fines.

⁷¹ Only regarding fines.

| Member State | Instance | Powers of the Court | | | | | |
|--------------|--|-------------------------------------|----------------------------------|--------------------------------|----------------------|---------------------|---------------------|
| | | Quash the decision on facts and law | Quash the decision only on facts | Quash the decision only on law | Hold a trial de novo | Take a new decision | Refer the case back |
| LV | 1st (Administrative Regional Court) | X | | | | | |
| | 2 nd Supreme Court | | | X | | | X |
| MT | 1st (Competition and Consumer Appeals Tribunal) | X | | | | X | X ⁷² |
| | 2nd (Court of Appeal) | | | X | | X | X ⁷³ |
| NL | 1st (Rotterdam District Court) | X | | | | X | X |
| | 2nd (Court of Appeal for Trade and Industry) | X | | | | X | X |
| PL | 1st (Court of Competition and Consumer Protection) | X | | | | X | |
| | 2nd (Court of Appeals) | X | | | | X | X |
| | 3rd (Supreme Court) | | | X | | X ⁷⁴ | X |
| PT | 1st (Competition, Regulation and Supervision Court) | X | | | | X | X |
| | 2nd (Appeal Court) | | | X | | | X |
| RO | 1st (Bucharest Court of Appeal) | X | | | | | |
| | 2nd (High Court of Cassation and Justice) | X | | | | | |

⁷² Although the Competition Act does not specifically provide for referring the case back and there is no case law in this respect under the Competition Act, this may be possible in the light of jurisprudence in other areas of law.

⁷³ *Ibid.*

⁷⁴ The power to take a new decision will be used only in exceptional cases, since the Supreme Court may, upon the request of the appellant, quash the judgment under appeal and adjudicate on the merits of the case, only when the basis for the infringement of the substantive law is truly justified and the cassation complaint did not rely on the infringement of a procedural provision or if the argument of the infringement of a procedural provision was unjustified.

| Member State | | Instance | Powers of the Court | | | | | |
|--------------|--|--|-------------------------------------|----------------------------------|--------------------------------|----------------------|---------------------|---------------------|
| | | | Quash the decision on facts and law | Quash the decision only on facts | Quash the decision only on law | Hold a trial de novo | Take a new decision | Refer the case back |
| SI | Administrative procedure | 1 st (and last) Supreme Court | X | | | | | X |
| | Misdemeanour procedure | 1 st Local Court in Ljubljana | X | | | X ⁷⁵ | X | |
| | | 2 nd Higher Court | X | | | X ⁷⁶ | X | X |
| | | 3 rd Supreme Court | X | | | | X | |
| SK | 1st (Regional Court Bratislava) | X | | | | X ⁷⁷ | X | |
| | 2nd (Supreme Court of the Slovak Republic) | X | | | | X ⁷⁸ | X | |
| SV | 1st (Market Court) | X | | | | X | | |

In **CZ**, there is the possibility of appeal to the national Constitutional Court, in specific circumstances related to the breach of fundamental constitutional rights of the parties.

3.1.7.4 Review of level of fines

On the specific issue of the review of the level of fines, in the **EU system** the EU Court of Justice has unlimited jurisdiction and may cancel, reduce or increase the fine or periodic penalty payment. In the majority of national jurisdictions, the review courts may either increase or reduce the level of fines (e.g. **AT**⁷⁹, **BE**, **BG**, **DE**, **DK**, **EE**⁸⁰, **EL**, **FI**, **HU**, **IE**⁸¹, **IT**⁸², **LT**, **LU**, **MT**, **PL**, **PT**, **RO**, **SK**⁸³, **UK**).

⁷⁵ Only to revise the procedure for taking evidence (the Misdemeanours Act (ZP-1, Art. 163(6))

⁷⁶ Only to revise the procedure for taking evidence (the Misdemeanours Act (ZP-1, Art. 163(6))

⁷⁷ Regarding the level of fine that was imposed in administrative proceedings.

⁷⁸ Regarding the level of fine that was imposed in administrative proceedings.

⁷⁹ The Supreme Cartel Court ("SCC") is limited to what has been requested in the appeal(s). If only the undertaking(s) concerned appeal the level of fines imposed by the Cartel Court and request a reduction, the SCC may not increase the level of fines (*reformatio in peius* principle). If the Austrian competition authority appeals a decision of the Cartel Court because the Cartel Court has imposed lower fines than requested by the Austrian competition authority, the SCC may also increase the level of fines.

⁸⁰ In criminal proceedings.

⁸¹ In **IE**, the Court of Criminal Appeal can raise, lower or confirm the level of fines imposed by the Trial Court.

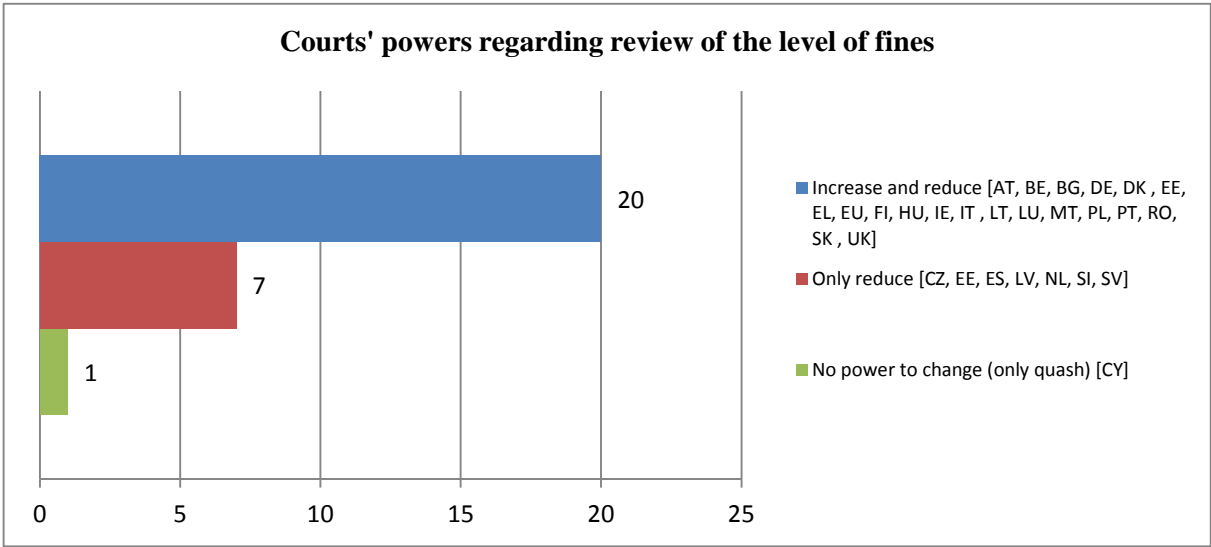
⁸² Although in theory they would be entitled to increase the fines, the administrative courts have in practice always confirmed or reduced the sanctions imposed by the Competition Authority.

⁸³ There is no case law on the increase of fines. The stipulation of the Civil Code of Procedure refers to "changing" the sanction.

However, in some jurisdictions the principle of prohibition of “*reformatio in peius*” applies, thus not allowing courts to impose more severe fines than those applied by competition authorities (e.g. CZ, EE⁸⁴, ES, LV, NL, SI). Moreover, in SV, the courts may not set fines at an amount higher than that requested by the NCA, but may only keep or reduce the amount of the fine as requested by the NCA.

In CY, the Supreme Court's sole option is to quash the decision on the fine, on the basis that it was not justified, reasonable, legitimate and/or proportionate.

Graph 6



3.1.7.5 Legal standing of complainants and third parties

As to the legal standing of complainants and third parties in appeals of prohibition decisions, the situation across jurisdictions is diverse.

In the EU system, a "... person establishing an interest in the result of a case" has the right to intervene".⁸⁵ The Court of Justice has accepted that complainants have the right to intervene in a case to uphold their complaint, in particular if it has participated in the procedure before the Commission.⁸⁶ In terms of third parties, the position is less clear, but the Court has held that undertakings which compete on the affected market with the company on which an Article 7 prohibition decision was imposed have a direct and existing right in appeal proceedings.⁸⁷

⁸⁴ In misdemeanour procedures.

⁸⁵ Article 40 of the Statute of the Court of Justice of the European Union, OJ C83/219, 30.3.2010.

⁸⁶ Case T-367/94 *British Coal v Commission* [1997] ECR II-469, para 13.

⁸⁷ Case T-201/04R *Microsoft Corp. v Commission* [2004] ECR II-2977.

In general, there are jurisdictions with explicit rules regarding appeals made by complainants (e.g. **BE, BG, CY, DE, EL, ES, HU**⁸⁸, **LT**⁸⁹, **NL**), for instance declaring the complainant a party of the proceeding (**ES, LT**). In **FR** and **LU**, the general provision allows “all parties” to appeal, which is interpreted as including the complainant.

In other jurisdictions the complainant is not considered to be a party to the proceedings and may not submit an appeal against a prohibition decision (e.g. **AT**⁹⁰, **CZ, IE**⁹¹, **PL, SK, SI**).

In **EE, HU** and **LV**, the complainant would only be recognised a right of appeal in case of rejection of their complaint/ non-opening of an investigation⁹².

General legal requirements regarding a specific interest in the appeal may also be applicable to complainants, in case their right of appeal is not explicitly established in competition law (**DK, MT**⁹³, **RO, SV**⁹⁴).

As to third parties, an appeal is admissible in general only if such third parties comply with certain requirements established in law, such as the demonstration of a valid interest (**BE, LU**), a sufficient interest (**UK**), a legal interest (**BG**), an individual and substantial interest in the case (**DK, IT**), a legitimate interest (**EE**⁹⁵, **EL**), infringement of his/her rights or legal interests (**DE, LV**⁹⁶), an interest in the outcome of the appeal (**RO**) or if their interests are directly or negatively affected by the decision (**NL, SI, SV**).

In **BE**⁹⁷, **ES, FR** and **LU**, only third parties that have been considered as a party in the proceedings before the competition authority may later appeal its decision. Regarding other third parties, they must demonstrate, in **FR**, an interest in the appeal (“*intérêt à agir*”). This is also the case in **ES** (*interés legítimo*).

In **FI**, the third party has to demonstrate that his/her rights, interest or obligations are directly affected by the matter and Courts tend to interpret this criterion in a strict manner.

⁸⁸ The complainant may seek legal remedy only against an order stating that the conditions for the opening of an investigation are not fulfilled.

⁸⁹ In **LT**, the complainant is a party to the proceedings.

⁹⁰ However, instead of filing a complaint to the Competition Authority, undertakings bearing a legitimate legal or economic interest may also file applications (except for the imposition of fines) to the Cartel Court, thereby acquiring full party status including the right to appeal decisions of the Cartel Court.

⁹¹ In **IE**, a prohibition decision is made by the court, in proceedings brought by the Competition Authority or the DPP (criminal cases) and the complainant is not a party to these proceedings.

⁹² In **EE, HU** and **LV**, the complainant may seek legal remedy only against an order stating that the conditions for the opening of an investigation are not fulfilled. This is not a prohibition decision.

⁹³ Although there is no case law on this point under the Competition Act.

⁹⁴ In **SV**, however, the complainant may appeal a prohibition decision as any other third party, if their interests are negatively affected by the decision.

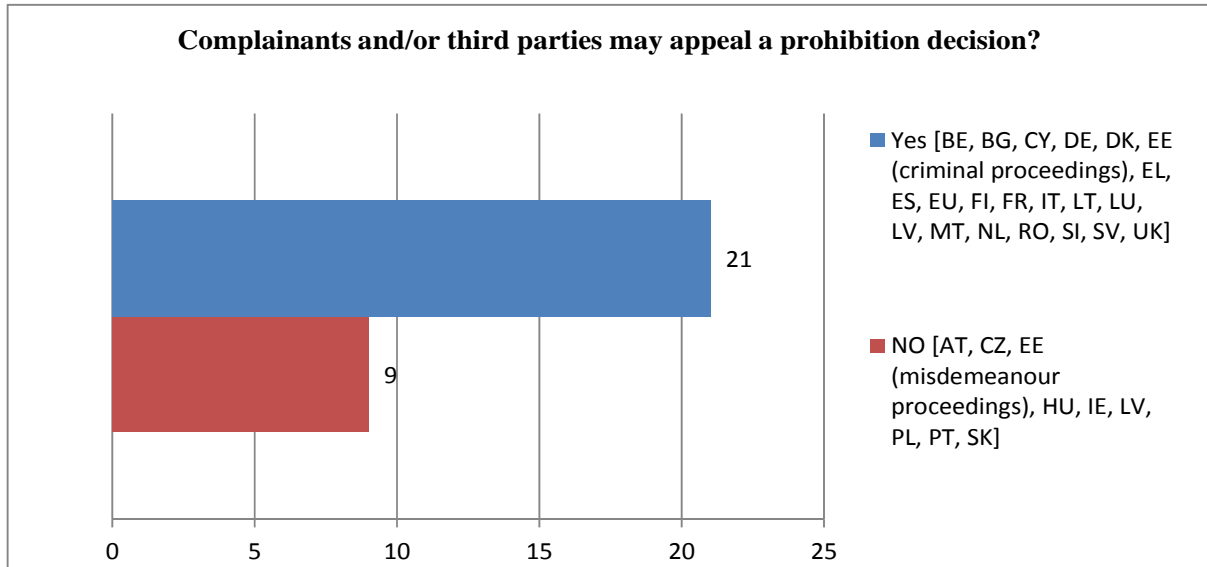
⁹⁵ With regard to third parties who can show a legitimate interest.

⁹⁶ With regard to third parties whose rights or legal interests are infringed.

⁹⁷ In **BE**, the Minister with responsibility for Economic Affairs has neither to justify an interest nor to have been represented before the Competition Authority to have legal standing.

Finally, in some jurisdictions, third parties may not appeal prohibition decisions (e.g. **LT, PL, PT**).

Graph 7



In the context of review of prohibition decisions, the courts have issued decisions covering substantive and procedural issues, regarding both the action of competition authorities and review courts.

The following are examples of principles developed by courts regarding prohibition decisions:

- In **BE** and **LU**, the courts choose between a more limited review and a full jurisdiction review⁹⁸ and can require the competition authority to conduct extensive *ex officio* investigations.

⁹⁸ The Court of Appeal can limit itself to the content of the appeals raised by the parties, but this is not binding on it since the Belgian Competition Law is a matter of public policy. In a case before the Court of Appeal (Brussels Court of Appeal, Case 2005/MR/3 and 2005/MR/4 Honda of 2 February 2009, §§41-45 (Dutch language) the Court itself considered the extent of the full jurisdiction granted by the Belgian competition law.

It considered that - in principle - the extent of the judicial review should be limited to a review of (1) the verification of compliance with the rules on legal procedure and motivation, (2) the proper assessment of the facts – their accuracy, reliability and coherence (3) the interpretation of the facts and the conclusions drawn from them by the Competition Council and (4) whether there was possible abuse of power by the Competition Authority. The Court of Appeal also stated that exceptionally it is possible for the Court to decide the case itself *de novo* if (1) the assessment of the grievances implicitly leads to the new decision, (2) if all relevant facts are available, and (3) the appreciation of the facts does not leave room for margin that falls within the competence of the Competition Council. It should be noted that the Court of Appeal did not limit its jurisdictional review regarding fines.

- In administrative proceedings in **EE** and **SI**, the courts do not interfere with the discretion of the competition authority in adopting its decision (as it cannot itself decide the content of an administrative act), focusing on procedural issues.
- In **DE**, courts have developed the understanding that future infringements may also be prohibited, granted that the principle of legal certainty is respected. Moreover, with regard to the supremacy of behavioural over structural remedies, the Federal Court of Justice in principle agreed with the competition authority that structural remedies may be imposed under the condition that behavioural remedies would not achieve the same results.
- In **FR**, courts examine the proportionality of injunctions imposed by the Competition Authority to the seriousness of the practices and require them to be set out clearly, precisely and unambiguously, with sufficient time for undertakings to comply with the injunctions.
- In the **NL**, on the basis of Article 6 ECHR, national courts have set reasonable time frames for the conclusion of proceedings and that the burden of proof of an infringement of competition rules (criminal charge) lies with the competition authority. Another national court decision stated that the Chinese wall within the competition authority must be strictly observed.

3.2. Commitment decisions

3.2.1. Legal and procedural framework

In terms of what is meant by a commitment decision in this context, a competition authority adopts a formal decision, by which it may make commitments offered by undertakings binding and enforceable on them. Commitment decisions are based on commitments voluntarily offered by the party or parties concerned. Commitment decisions do not make a finding of an infringement, nor do they conclude that an infringement would be terminated as a consequence of the commitments.

Commitment decisions are explicitly authorized by specific provisions in almost all jurisdictions (**AT, BE, BG, CY, CZ, DE, DK, EL, ES, EU, FI, FR, HU, IT, LT, LU, LV, MT, NL, PL, PT, RO, SI, SK, SV, UK**). Pursuant to Article 9 of Regulation 1/2003, if an undertaking offers commitments to meet the concerns expressed by the Commission in its preliminary assessment, the Commission may make these commitments binding on the undertaking. In **IE**, if the competition authority accepts commitments from an undertaking which has been under investigation for a breach of Article 101 or 102 TFEU, it can, with the consent of the undertaking concerned, apply to the High Court to have the commitments made a rule of court. This means that if the undertaking breaches those commitments, it is guilty of contempt of court.

The fundamental steps of the commitment proceeding are similar in all jurisdictions and usually comprise: (i) a proposal of the interested undertaking aimed at addressing the concerns⁹⁹ raised by the competition authority; (ii) a discussion of it between the undertaking and the competent authority (negotiation phase aimed at signalling to the undertaking involved potential weaknesses or inability of the proposed commitments to address the competition concerns); (iii) a possible involvement of third parties or complainants potentially interested by the proposal for commitments¹⁰⁰; and (iv) a definitive assessment of the proposal usually followed by a formal decision of the decision making body.

As a general rule, commitment decisions may be adopted under both national law and Articles 101 and 102 TFEU.

Specific provisions concerning commitments decisions are still absent in **EE**.

Several competition authorities (e.g. **BG, ES, COM**¹⁰¹, **FR, IT, NL, PL, RO, SK, UK**) have elaborated stated policies or guidelines concerning commitment proceedings and commitment decisions. In some cases such stated policies have been published in order to give companies guidance about the benefits they may gain from the procedure, the practical requirements for their applications, the different procedural steps and the possible outcomes, the cases when commitments are likely to be acceptable (e.g. **BG, ES, FR, IT, PL, UK** (the latter jurisdiction's notice is focused only on procedural aspects)).

The most serious infringements are a priori excluded from commitment decisions in several jurisdictions (e.g. **AT, BE, BG, CZ, DE, DK, EL, ES, EU, FI, FR, HU, IT, LT, LV, NL, PL**¹⁰², **RO**¹⁰³, **SV, UK**). In some of these jurisdictions, *explicit exclusions* are not foreseen, but the competition authorities in charge of commitment decisions infer such a conclusion in light of recital 13 of Regulation 1/2003 which provides that commitment decisions are not, in principle, appropriate in cases in which the Commission intends to impose a fine¹⁰⁴ (e.g. **AT, DK, HU, IT, MT, SI** where an obligation to follow European rules and case law is explicitly prescribed by the national competition law or by national case law (**BE**)).

The category of “serious infringements” excluded from commitment decisions at national level usually comprises cartels and, in some jurisdictions, other kinds of infringements such

⁹⁹ Such concerns can be illustrated in the context of a specific documents aimed at illustrating them. Such a document may be the “statement of objections” or a document setting out a summary of the authority's competition concerns and a summary of the main facts on which those concerns are based. See further *section 4.2.1* below.

¹⁰⁰ As is explained below, the involvement of third parties is not homogeneous in the different legal systems and may be only discretionary or mandatory.

¹⁰¹ See section 4 of the Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C308, 20.10.2011, p.6.

¹⁰² In **PL**, this exclusion is foreseen in the Guidelines on Commitments.

¹⁰³ In **RO**, such exclusion is foreseen in the draft of guidelines on commitments.

¹⁰⁴ **COM** does not apply the commitment procedure under Article 9 of Regulation 1/2003 to secret cartels that fall under the Notice on immunity from fines and reduction in fines in cartel cases (OJ C298, 8.12.2006, p.17), see further para 116 of the Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C308, 20.10.2011, p.6.

as, for example, the most serious abuses of dominant position (e.g. **BG, FR, UK**), infringements which have produced effects (e.g. **CZ, ES** if effects are irreversible) or significant damage to interests protected by the law (e.g. **LV**); infringements whose aim is to restrict competition (e.g. **NL**) or, in general, cases where a prohibition decision (e.g. **ES, SV**) or the imposition of fines is deemed appropriate (e.g. **DE, DK**).

All such criteria seem to give a large discretion to competition authorities in assessing a commitment proposal, opening a possibility for a rejection not only in case of inadequacy of the proposal but in all cases where the termination of the case with commitments would not be appropriate.

3.2.2. Negotiations and market test

3.2.2.1 Procedural limit for negotiations to take place

In most jurisdictions, similar to the **EU system**¹⁰⁵, there is not a set procedural limit for negotiations to take place (e.g. **AT, BE, BG, DE, DK, FI, HU, IE, LT, LU, LV, MT, NL, PL**¹⁰⁶, **PT, RO, SK, SV, UK**). In the **NL**, an application for a commitment decision can be filed until a sanctioning decision has been taken (Article 49a of the Dutch Competition Act), although the chance of a commitment being accepted is higher when it is filed during the course of an investigation by the Competition Department but before it issues an SO; a commitment decision will not be accepted where the competition authority has not yet started an investigation.

When a time limit is foreseen it varies significantly from one legal system to another. In **FR**, for example, the commitment proposal should be filed in a given time frame after the preliminary assessment¹⁰⁷; in **IT** the proposal should be filed within three months after the formal opening of the proceeding. In **SI**, the proposal may be filed until the expiry of the time-limit for comments on the SO (Article 39(1) of Slovenian Competition Act). More generally, in **EL** a proposal for commitments cannot be made “at a later stage of the procedure”. Moreover, the existence of a time limit, even if foreseen, is sometimes not mandatory, as the authority may accept a proposal also after it is already expired (e.g. **FR** and **IT**¹⁰⁸). Finally in **CZ** a commitment proposal may be presented only *after* the SO.

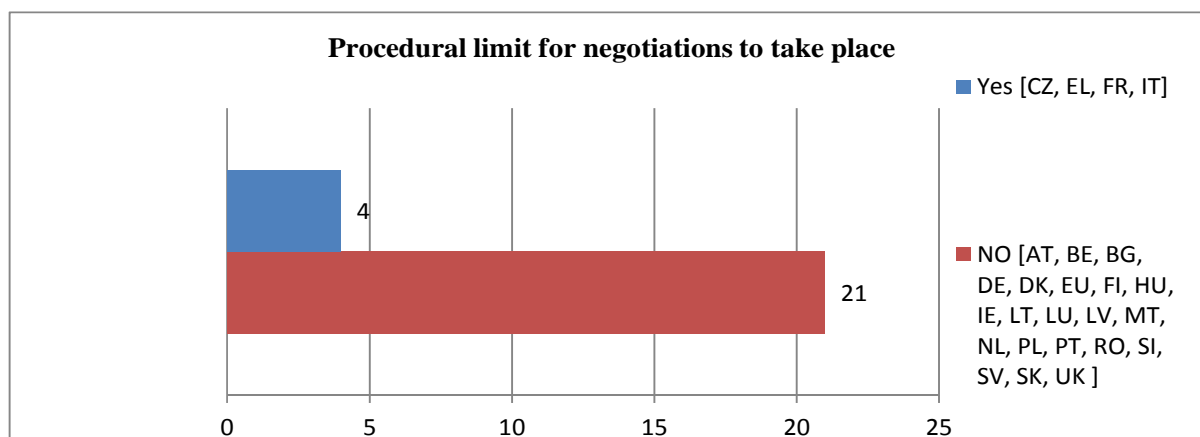
¹⁰⁵ Undertakings may contact the Directorate-General for Competition at any time to explore the Commission's readiness to pursue the case with the aim of reaching a commitment decision. The Commission encourages undertakings to signal at the earliest possible stage their interest in discussing commitments, see para 118 of the Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C308, 20.10.2011, p.6.

¹⁰⁶ However, in **PL**, if the practice has been proven and not only rendered plausible, a commitment proposal would normally not be accepted. According to the Guidelines on Commitments, the proposal should be filed at the very beginning stage of proceedings, as a rule in the first letter of the undertaking to the authority, after the initiation of antimonopoly proceedings.

¹⁰⁷ A case can only be dealt with through commitments before the SO is sent out.

¹⁰⁸ Only in exceptional circumstances, and on the basis of a justified and timely request of a party.

Graph 8



3.2.2.3 Third parties and complainants

In the context of the negotiation phase, third parties and complainants can usually play a role, especially sending their comments/objections with regard to the commitments proposed and whether they meet the competition concerns.

However, it is not possible to conclude that in all jurisdictions any person potentially affected by the commitments *has a right* to present his comments.

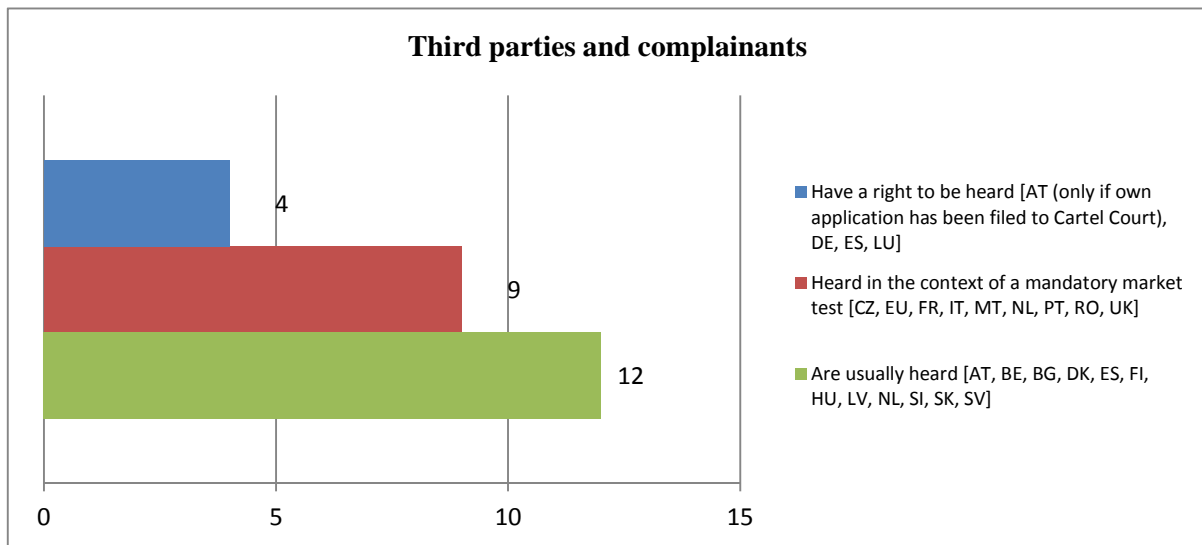
In some jurisdictions, complainants and third parties (or at least admitted third parties to the proceedings) do have a right to be heard, about a proposal of commitments or about the existence of it, and therefore in the commitment proceedings they must be put in a position to effectively present their objections before the competition authority (e.g. **AT, DE, ES**, and **LU** where, however, only complainants have a right to participate in the negotiation phase if they present an application to be admitted).

Furthermore, several jurisdictions have provisions establishing the market test as a mandatory step of the commitment proceeding in the context of which, interested third parties may present their point of view (**CZ, EU, FR, IT, MT, NL, PT, RO, UK**) (see further *section 3.2.2.4* below)

It is to be noted, however, that, in several jurisdictions where third parties or complainants do not have a “right” to play a role in the negotiation of commitments, the authorities in charge of the commitment proceeding usually have the power to consult such persons, if they deem it useful (e.g. **AT** (with reference to third parties), **BE, BG, DK, ES, FI, HU, LV, NL, SI, SK, SV**), directly or indirectly in the context of a (discretionary) market test. This power seems to be used quite frequently by most of these authorities¹⁰⁹.

¹⁰⁹ The involvement of third parties seems to be less frequent in **BE** and **PL**.

Graph 9



3.2.2.4 Market test

In those jurisdictions where, like the **EU system**, a mandatory market test is foreseen (e.g. **CZ, FR, IT, MT, NL, PT, RO, UK**¹¹⁰), the proceeding is quite similar. The competition authority usually publishes on its website¹¹¹ a summary of the case and the main content of the commitments proposed and grants a period for observations. In the **NL**, the authority publishes the draft commitment decision in the Official Journal. If some parties seem to be particularly affected by the case and/or the commitments, the authority may expressly request their opinion by sending request for information (e.g. **FR, IT, RO**). The authority takes in consideration the opinions expressed in the context of the market test in assessing if the commitments meet the competition concerns.

In those jurisdictions where a market test is not mandatory but discretionary the proceeding is decided case by case by the competition authority and may differ from the model described above (e.g. **AT, DE, ES, FI, HU, LV, SI, SK, SV**). Other documents relating thereto which are considered necessary by the authority, are deposited for inspection and are available upon request for a period of at least four weeks for interested parties who may state their views).

The use of market tests seems to be, in any case, quite frequent in practice and does not depend on the existence of a specific legal requirement to hold one.

¹¹⁰ Third parties which are likely to be affected by the proposed commitments are consulted.

¹¹¹ In **PT**, it is also published in two newspapers with large nationwide coverage, at the expense of the party concerned in the case.

3.2.3. *Adoption of commitment decisions*

A formal decision is always required so that the commitments become binding and the commitment proceeding may be closed.

In all jurisdictions, competition authorities are not obliged to accept proposed commitments.

3.2.4. *Assessment of commitment proposals*

In general, and notwithstanding the different wording of the relevant provisions, the commitments proposed should be accepted only if they meet the competition concerns raised by the competition authorities¹¹². Article 9 of Regulation 1/2003 specifies that the commitments must meet the concerns expressed in the preliminary assessment. The Commission can then conclude that there are no longer grounds for action.

In this regard, the ending of the behaviour which has given rise to competition concerns is usually not sufficient, since the commitments must guarantee that infringements will be avoided in the future (see, e.g. **BE, CZ, DE, DK, EL, EU, FR, HU, IT, LT, NL, PL, SI**). How to obtain such a result depends on the specific circumstances of the case. Experience has shown that specific actions, additional to the mere ending of the behaviour which has given rise to the competition concerns, may be needed to ensure that the competition concerns are met. It is not possible to outline which measures can be considered appropriate as it varies according to the specific case. In terms of commitment proceedings which have been concluded to date, examples include: energy release programmes (**DE**), amendments of existing behaviour like the duration of an exclusive purchase obligation or a rebate system (**DK, SI**), commitments to organise calls for tender or to change a logo and commercial name or to change substantially the undertaking's structure and governance (**FR**) and commitments to licence IPR (**IT, FR**).

In assessing commitment proposals, the competition authorities take into account not only their capacity to meet the competition concerns raised by the competition authority, as is explained in the preceding paragraphs, but also other criteria.

In the **EU system**, in light of the EU law principle of proportionality, the Commission must verify that the commitments address the identified competition concerns and that the commitments offered do not manifestly go beyond what is necessary to address these concerns. When carrying out that assessment, the Commission will take into consideration the interests of third parties.¹¹³ Similarly, at the national level, the EU principle of proportionality is a factor in the assessment of commitment proposals under EU law.

¹¹² Point underlined by all the competition authorities.

¹¹³ However, it is not obliged to compare such voluntary commitments with measures it could impose under Article 7 of Regulation 1.2003 and to regard as disproportionate any commitments which go beyond such measures, Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949.

Other examples of interesting criteria are the ease of execution of the commitments¹¹⁴, the possibility of effectively monitoring their implementation, and the existence of competition concerns which are easily/readily identifiable.

Up to now, behavioural rather than structural commitments have been more frequently accepted by several competition authorities (e.g. **BE, BG, DE, DK, ES, EU, FI, FR, HU, IE, IT, LT, LU, LV, NL, PL, PT, SI, SV, UK**). In **DE**, a particularly strict examination has been considered indispensable with reference to commitments which can interfere with the property rights independently of whether they are structural or behavioural in nature.

Finally, limits in the duration of the commitments can usually be set.

3.2.5. Monitoring and compliance with commitment decisions

As a general rule, the monitoring regime is determined on a case by case basis, though some authorities have a general mechanism (e.g. **BG, EL, HU, LT, RO**).

In most jurisdictions, trustee or independent directors are not frequently used.

In general, third parties and complainants can play a role in the monitoring phase, in particular by providing information about possible non-compliance with the commitments on their own initiative (e.g. **AT, BE, BG, CZ, DE, EL, ES, EU, FI, FR, IE, IT, LT, LU, LV, NL, PL, PT, SK, SV, UK**) or upon request of the competent authority (e.g. **DK, HU**).

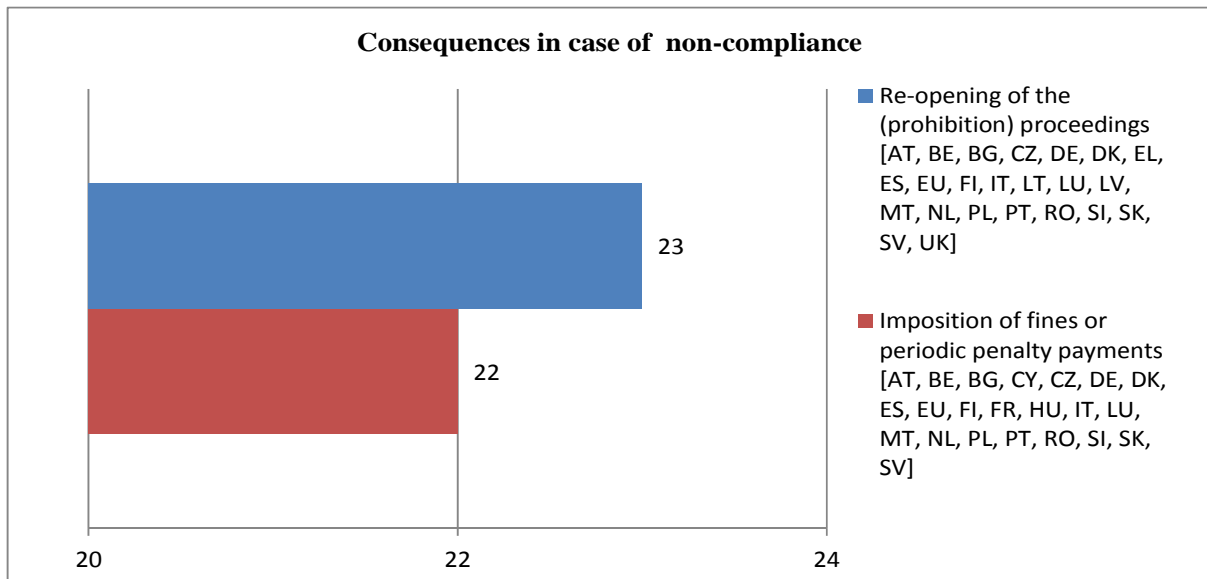
In case of non-compliance with the commitment decision, the re-opening of the (prohibition) proceeding is usually possible (e.g. **AT, BE, BG, CZ, DE, DK, EL, ES, EU, FI, IT, LT, LU, LV, MT, NL, PL, PT, RO, SI, SK, SV, UK**).

In line with Article 24(1) of Regulation 1/2003 (which provides for periodic penalty payments), fines or periodic penalty payments may be imposed in many jurisdictions (e.g. **AT, BE, BG, CY, CZ, DE, DK, ES, FI, FR, HU, IT, LU, MT, NL, PL, PT, RO, SI, SK, SV**¹¹⁵).

¹¹⁴ For example, the policy of **COM** is that commitments must in principle be unambiguous and self-executing, that is, their implementation must not be dependent on the will of a third party which is not bound by the commitments, see para 28 of the Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C308, 20.10.2011, p.6.

¹¹⁵ The Swedish NCA may combine a commitment decision with a penalty payment. However, the Swedish NCA needs to apply to the court in order for the penalty payment to be imposed in cases where an undertaking acts in breach of the commitment decision.

Graph 10



Once adopted, commitments may be changed usually in cases of specific circumstances which, in several legal systems are related to changes in relevant facts on which the decision was based, or the discovery that the acceptance of the commitments was based on misleading information¹¹⁶. In some legal systems there is a broader possibility of subsequent modification. For example in **FR**, the competition authority may re-open the proceeding in any case that it deems appropriate; in some jurisdictions, e.g. **LT** and **LV**, the parties have a right to apply for modifications of the commitments; and in the **UK**, commitments may be varied at any time to address the competition authority's "current concerns".

3.2.6. Judicial review

Like the **EU system**, the judicial review of commitment decisions is foreseen by almost all the competition authorities in the ECN, however, no appeal is foreseen in **SV** where however the parties can request the authority to re-examine its decision. Moreover, the possibility to appeal a commitment decision is not envisaged in **PT** (Article 84(2) of the Portuguese Competition Law).

In some jurisdictions, the possibility of appealing against commitment decisions is limited to: (i) the parties to the commitment proceeding (e.g. **AT, BG, PL, SK**); (ii) the parties to the proceeding and those persons in respect of which the decision contains provisions (e.g. **HU**); (iii) the third parties whose interests might be influenced by the commitment decision (e.g. **LV**).

¹¹⁶ In **PT**, in case of change of the relevant facts occurs, non-compliance with commitments or misleading, false or complete information, the Competition Authority may reopen the case.

In the **UK**, any sufficiently interested person may seek to have a commitment decision reviewed by the Competition Appeal Tribunal (CAT). On review, the CAT will apply the same principles as would be applied by a court on an application for judicial review. The CAT may (a) dismiss the application for review or quash the whole or part of the commitment decision to which it relates, and (b) where it quashes the whole or part of the decision, refer the matter back to the competition authority with a direction to reconsider and make a new decision taking into account the CAT's ruling.

In many jurisdictions, commitment decisions have never been appealed. Therefore, current experience of the judicial review of commitment decisions is generally still limited.

For example, in **DE**, only one decision has been appealed by a third party, but the appeal was abandoned.

In **FR**, judicial review has provided the court with an opportunity to clarify a number of aspects of commitment proceedings, the first of which is access to the file. The Court of Cassation ruled on 4 November 2008 that the Court of Appeal had, where the issue is raised, to assess whether documents that were not attached to the notification of competition concerns were necessary for the exercise of the rights of defence. In the case at hand, the Paris Court of Appeal ordered the competition authority on 6 October 2009 to notify two documents to the parties and subsequently upheld the authority's decision on 1 June 2010. The Court of Cassation reiterated on 10 February 2010 that, when the competition authority does not notify to the parties additional documents to the preliminary concerns, the Court of Appeal had to assess concretely the effects of such a situation on the rights of defence and had to annul the authority's decision only in case of an actual breach of those rights. The second issue is the legal nature of the preliminary concerns notified to undertakings. The Court of Cassation ruled on 4 November 2008 that such a document was not a "criminal charge" within the meaning of Article 6(1) ECHR.

In **LT**, an appeal was brought by a complainant claiming that the competition authority had not fully demonstrated the absence of significant damage and therefore the possibility of accepting the commitments proposal. The decision, annulled at first instance, was subsequently definitively upheld.

Finally, in **IT**, judicial review of commitment decisions has provided the court with an opportunity to clarify inter alia that: commitments decisions are meant to provide a swift restoration of competition in relatively novel or complex situations; they are not appropriate in the case of hard core cartels, since they would jeopardise the deterrent effect of pecuniary fines and the effectiveness of the leniency programme; the content of the binding commitments must relate to the subject matter of the investigation and be instrumental to addressing the relevant competition concerns; the competition authority must assess the proportionality of the proposed commitments, i.e. to verify whether the proposed commitments are necessary to meet the competition concerns in the case at stake, and that binding commitments should be capable of full, timely and easily-monitored implementation.

3.3. 'Positive' decisions

Under Article 5 of Regulation 1/2003, national competition authorities may decide that there are "no grounds for action on their part". Nearly all jurisdictions provide for such positive

decisions¹¹⁷ in cases concerning investigations related to Articles 101 and 102 TFEU.

The following specificities can be highlighted:

- Some authorities (e.g. **BE, CY, FI, FR**) explicitly mention that their positive decisions are reasoned.
- In **IT**, a positive decision is published only if it is adopted after a formal decision to open proceedings has been taken. Otherwise it is simply notified to the complainants.

3.3.1. Conditions for adopting a positive decision

In general there are not specific conditions for the adoption of a positive decision. Often authorities can simply conclude that no grounds for further action exist and hence a positive decision can be adopted, when there is insufficient evidence to prove an infringement and on the basis of the evidence gathered, the conditions for prohibition are not met. With regard to conditions to adopt a positive decision, **CZ** and **IT** specifically refer to the wording of Article 5 of Regulation 1/2003. In **DE**, a positive decision can only be adopted if a party has applied for it, even if the wording of the applicable provision does not explicitly state so.

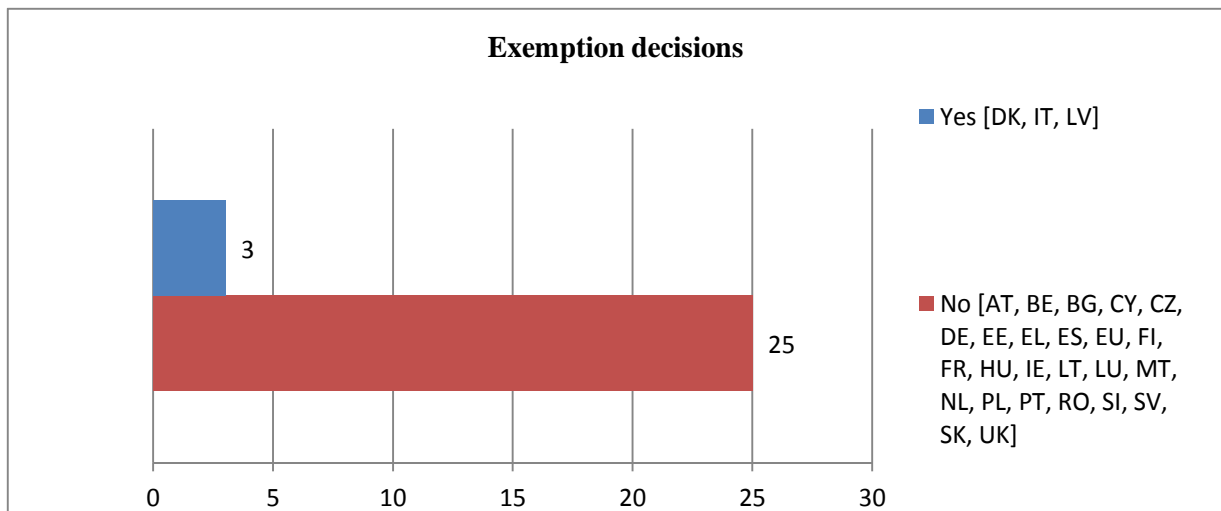
3.3.2. Exemption decisions

Nearly all jurisdictions have abolished exemption decisions following a submission of a notification under national law. In a few jurisdictions (**DK, IT, LV**) national law provides for a voluntary individual notification / exemption decisions, but it is not compulsory for businesses to apply for an exemption. Such exemption decisions are issued for a limited time period and they may be subject to conditions.

¹¹⁷ For the purpose of this Report, a "positive" decision is understood as a formal decision that an authority takes to reject a complaint or to close proceedings where it has come to the conclusion that on the basis of the information in its possession the conditions for prohibition are not met.

Under Article 5 of Regulation 1/2003, national competition authorities may decide that there are no grounds for action in these circumstances. These decisions are also known as "positive decisions", however, in legal literature the definition of a "positive decision" may also refer to decisions with constitutive exemption (finding of inapplicability), which NCAs are not empowered to adopt. See the preliminary ruling in Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., now Netia SA*, judgment of 3 May 2011, which concerned NCA's powers to adopt an inapplicability decision. The Court states that according to Article 5 of Regulation 1/2003 where the conditions for prohibition are not met, the power of the NCA is limited to the adoption of the decision that there are no grounds for action. Accordingly, only the European Commission has the power to make a finding of inapplicability of Articles 101 and 102 TFEU. In this case, the term negative decision is used by the Court as referring to a finding of inapplicability, and for the sake of consistency, in this Report positive decisions are understood as exclusively meaning decisions finding that there are no grounds for action.

Graph 11



3.3.3. Use of positive decisions

In practice, in some jurisdictions (for example **BE**, **DK**, **HU**) positive decisions are seldom adopted. Some authorities have adopted positive decisions mainly related to a certain type of suspected infringements (such as an abuse of dominant position), while others have used them for a variety of different types of alleged breaches of competition rules.

By way of example:

- In **BE**, one positive decision has been adopted since the entry into force of Regulation 1/2003. The case concerned bidding procedures for football broadcasting rights.
- In **CZ**, positive decisions have been adopted in investigations related to horizontal infringements and also abuse of dominant position.

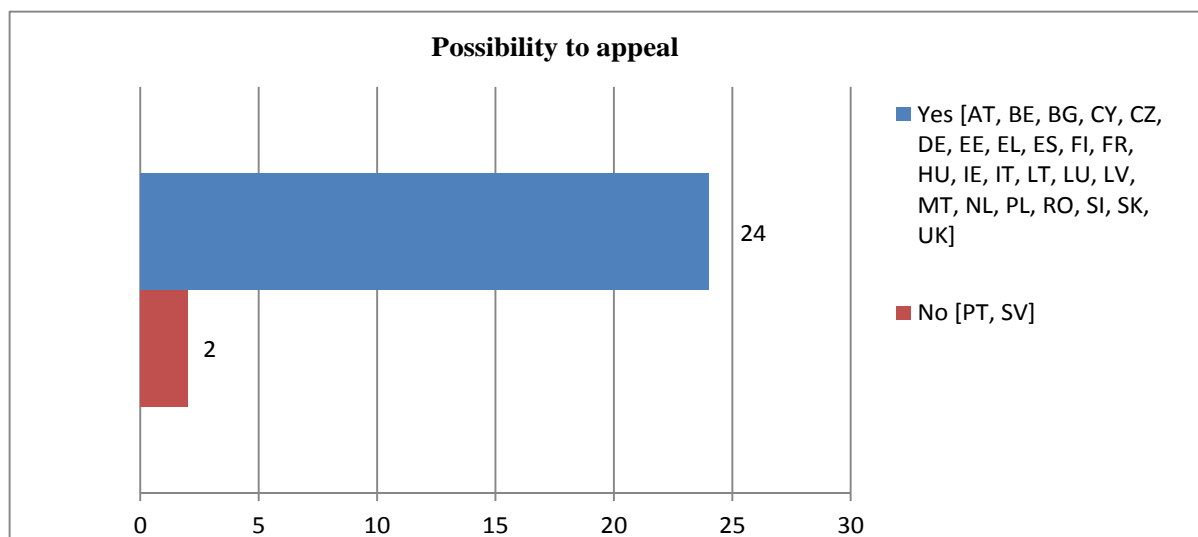
In some jurisdictions positive decisions may be of relevance in terms of building a body of case practice, as they are fully reasoned (e.g. **FR**). However, in some jurisdictions such decisions contain only a limited substantive assessment (e.g. **NL**).

In some cases, the positive decision was adopted at a late stage of investigations such as after issuing the SO. For example, in **DE** a case concerning barring-rights related to the mobile phone network was closed by a positive decision after the SO had been issued.

3.3.4. Possibility to appeal

In most jurisdictions, the positive decision can be appealed¹¹⁸. However, in a few jurisdictions (**PT, SV**) no appeal is possible. However, even if positive decisions cannot be appealed, there is a possibility of private action before the courts.

Graph 12



Several authorities (for example **BE, CY, EE, FI, FR, IT, LU, MT, NL, RO, SI, UK**) mention that a positive decision can be appealed by the complainant or third parties, who have a legitimate interest in the matter. In many jurisdictions (for example **BG, CY, EE, EL, HU, LT, LU, LV, NL, PL, RO**) a positive decision can be appealed in the same way as any other decision adopted by the authority. Additionally, the following specificities can be highlighted:

- In some jurisdictions (e.g. **AT, CZ, HU, SK**) an appeal can be lodged only by the parties to proceedings. In **CZ**, in practice the party to the proceeding is identical to the suspected infringer who typically has no interest in appealing a positive decision.
- In **DE**, in theory complainants or third parties can appeal a positive decision if they claim that the competition authority has misused its power of discretion. However, it is considered that most probably such appeals may fail, as the authority is granted a wide margin of discretion to adopt decisions.
- In **SV**, the positive decision triggers the right of third parties to bring a case before the Market Court, which decides the case on the merits.

¹¹⁸ In **DK**, an appeal of positive decisions is possible except in cases where the positive decision is taken due to lack of sufficient grounds to initiate an investigation or make a decision in the case. In **IE**, a positive decision is made by the courts.

3.4. Interim measures

3.4.1. Legal and procedural framework

Similar to Article 8 of Regulation 1/2003, all jurisdictions (**AT, BE, BG, CY, CZ, DE, EL, ES, EU, FI, FR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SI, SK, SV, UK**) with the exception of **DK**¹¹⁹ and **EE**, have the power to order interim measures. Such power is provided for by express legal provisions which usually identify the institution competent for ordering interim measures, the conditions under which this type of decision can be adopted, the types of measures to be adopted and the legal remedies available.

In **AT**, interim measures are issued by the Cartel Court as the designated competition authority for the purposes of Regulation 1/2003. Similarly, in **IE** national courts have the power to order interim measures.

LV may adopt interim measures decisions only in cases where the European competition rules are applied.

The substantive conditions for ordering interim measures are quite similar. Like in the **EU system**, the element of urgency is found in the majority of jurisdictions (e.g. **BE, BG, CY, DE, EL, ES, FI, FR, HU, IT, LT, LU, LV, MT, NL, PT, RO, SI, UK**). The two most common conditions under which interim measure decisions can be adopted are:

1st condition:

i) Urgency to act (e.g. **BE, BG, DE, CY, EL, EU, FR, IT, LT, LU, MT, PL, RO, SV, UK**) due to the risk of (e.g. **BG, DE, EU, IT, PT, RO**) and/or in order to avoid serious, irreparable or substantial damage (e.g. **CY, PL**¹²⁰, **SI**) to:

- competition (e.g. **BG, DE, EU, FR, HU**¹²¹, **IT, LV, MT, PL, PT**¹²², **RO, SI**);
- the interests of natural or legal persons such as undertakings in general (e.g. **BE, LT**), or even a particular person or category of persons (e.g. **UK**);

¹¹⁹ At the time of publication of this report, a bill to amend the Danish Competition Act has, however, been presented to obtain the power to order interim measures. According to the bill, interim measures decisions can be adopted in cases where an agreement or conduct, after a preliminary assessment, is deemed to constitute an infringement and the urgency to act is due to an estimated risk of serious damage to competition. The Danish Competition Council shall refer the interim measures decision to the Danish Competition Appeal Tribunal within 10 working days for confirmation of the decision. If the bill is passed by the Danish Parliament, the amendment to the Danish Competition Act will come into force on 1 March 2013.

¹²⁰ In **PL**, interim measures can be adopted if two conditions are fulfilled: (i) the existence of serious and hard to remove threats to competition and (ii) the practice liable to incur damage is the subject of investigation proceedings.

¹²¹ The law in **HU** refers to “threat to the formation, development or continuation of economic competition”.

¹²² The law in **PT** refers to not only irreparable damage but also that it is “difficult to repair”.

- general economic interests (e.g. **BE, LU**);
- the public interest (e.g. **EL, LT, UK**);
- the economy generally (e.g. **FR**);
- the economy of the sector concerned (e.g. **FR**);
- the interests of consumers (e.g. **FR**);

or

ii) The need for immediate action (e.g. **HU, NL, UK**) in order to safeguard:

- the interests of the plaintiff/complainant (e.g. **LU**);
- the interests of actual competition (e.g. **NL**);
- the interests of damaged parties (e.g. **NL**);
- the legal or economic interests of interested persons (e.g. **HU**);
- the formation, development or continuation of economic competition (e.g. **HU**);
- the public interest (e.g. **UK**).

2nd condition:

The possibility (e.g. **FR, SI**) or presumption of an infringement (e.g. **AT**¹²³, **BE**¹²⁴, **CY, EL**¹²⁵, **EU, FI, FR, HU, IE, IT**¹²⁶, **LV**¹²⁷, **MT, NL, RO**¹²⁸, **SV, UK**¹²⁹). In some jurisdictions (e.g. **BG, LT**) the relevant legislation sets as condition the gathering of sufficient evidence substantiating an infringement. Even though in **LU** and **PL** the presumption of an infringement is not explicitly mentioned in the Competition Act, in practice it will be applied when the infringement has been rendered plausible.

¹²³ Preconditions for a cease and desist order must be credibly shown.

¹²⁴ According to the practice of the competition authority interim measures can be adopted on the basis of a prima facie finding of infringement.

¹²⁵ In **EL**, the law refers to presumption of alleged infringement.

¹²⁶ The law in **IT** refers to “cursory examination”. The reference to a “*cursory examination*”, in the context of the Italian competition law, means that the existence of an infringement should be not definitively assessed but very likely in the light of reasonable evidence. On this point of view, therefore, the Italian legal system does not differ from the case law of the European Court of Justice.

¹²⁷ The law in **LV** refers to “evidence that testifies to possible violation”.

¹²⁸ The law in **RO** states “following a first examination”. Moreover, it refers to infringements “expressly prohibited by the law”.

¹²⁹ The law in **UK** refers to “reasonable suspicion”.

It is not clear whether the standard of proof that has to be met is the same in all the above jurisdictions. In **FR**, in 2000 the Supreme Court opted for a lower standard of proof (possibility of infringement, rather than prima facie infringement). In the **NL**, interim measures can be ordered when, on basis of preliminary views, the infringement of the Competition Act is plausible.¹³⁰

The **third most common condition** is that the practice liable to incur damage as above is the subject of investigation proceedings (e.g. **BE**¹³¹, **BG, CY, DE, FR, LU, MT, PL, PT, RO**). The interim measures proceedings are of an ancillary nature in most jurisdictions since such measures may be adopted either following the initiation of proceedings on the merits of the case or within the framework of on-going investigation proceedings. In **DE**, interim measures orders may be adopted only in proceedings that may lead to a prohibition decision, including decisions on past infringements. In **BE** and **FR**, requests submitted by parties for the adoption of interim measures by the authority are admissible if a complaint on the merits of the case is filed. In **LU** and **RO**, interim measures may be adopted only within the framework of a formal investigation procedure. In **SK**, interim measures may be adopted only within the administrative proceedings, regarding the investigation of the case in question.

In terms of particular specificities:

- In **FI**, interim measures can be ordered where an infringement has been committed and there is a need to terminate the infringement immediately.
- In **SV**, such decisions are adopted in special circumstances, i.e. where there are serious breaches of competition law which may have significant negative consequences.
- In **AT**, according to case law, interim measures must not create an irreversible situation.

The main steps of the interim measures proceedings appear to be quite similar in all jurisdictions. As expressly stated in the respective provisions, interim measure proceedings may be initiated:

- Ex-officio, as is the case pursuant to Article 8 of Regulation 1/2003 (e.g. **BG, CZ, EL, ES, HU, IT, LV, MT, NL, PL, PT, SI, SV**). In **FR** the competition authority may not act on its own initiative but only upon a request.
- Following the request of a natural or legal person (e.g. **BE, BG, CZ, ES, HU, LU, NL, PT, SV**), which may be the complainant (e.g. **BE, FR**¹³²), any person whose interests are affected by the practice under investigation (e.g. **BG**), the parties to

¹³⁰ In practice the **NL** competition authority has used this instrument only in some exceptional circumstances, and not in complex cases, as within 6 months after the order for interim measures a decision has to be issued.

¹³¹ Condition of admissibility.

¹³² In **FR**, admissible complainants are listed in the law. They are any undertakings, the Minister for economic affairs, local administrations, professional organisations, trade unions, consumer organisations, chambers of commerce or of industry and some sectoral regulators.

the investigation proceedings or any interested/ concerned party (e.g. **CZ, ES, LU, PT**) or by a particular member of the Government in the jurisdiction concerned (e.g. **FR**- upon the request of a Minister (**BE, EL, FR**); in **BE**, it can be the Minister responsible for Economic Affairs or the Minister with responsibility for the concerned sector;

- Following the request of other bodies such as professional organisations, syndicates, consumer organisations, chambers of commerce or of industry (**FR**);
- Upon the request of consumers: **BE** (on the condition that they can prove to be harmed by the practice under investigation at a general level¹³³).

In some jurisdictions time-limits regarding the examination of the requests for interim measures filed are provided for. For example, in **CZ** the decision shall be taken within 10 days from the filing of the request while in **EL** the decision must be adopted within 15 days following the request of the Minister. In **HU**, the competition authority acts on the request immediately. In **ES**, the Directorate of Investigations must send a proposal regarding the request to the Council within 2 months after the request was filed or the proceedings initiated.

Interim measures proceedings may be initiated:

- at any moment during the investigation regarding the merits of the case (e.g. **BE, BG, ES**¹³⁴, **EU, FR**¹³⁵, **LU**¹³⁶, **LV, MT, PL, PT, RO, SI, SV**);
- after the notification of the SO (e.g. **HU**);
- at any time until the investigation is completed (e.g. **UK**).

In some jurisdictions, the relevant provisions expressly refer to the parties' right to be heard within the framework of interim measures proceedings (e.g. **EL, ES, EU, FI, FR, IT, LT, PT, UK**) or provide for the drafting of a proposal or report regarding the interim measures to be adopted (e.g. **BE**¹³⁷, **UK**¹³⁸). Exceptions to the right to be heard are also provided for in a few jurisdictions. In particular, in **IT** the competition authority may decide, in case of extreme urgency, to adopt a provisional interim measure before the parties have had the time to be heard and comment on the measures, although, in such circumstances, the decision is not definitive, and thus, the authority must hear the parties before validating its provisional decision. In **FI**, parties are to be heard unless the urgency of the matter or other specific reasons demands otherwise, while in **PT** the oral hearing is not held prior to a decision being

¹³³ The possibility that natural persons can ask for interim measures is based on an interpretation of the wording "general economic interest" which could include "consumer welfare", thus allowing natural persons (consumers) to ask for interim measures.

¹³⁴ During both the examination and the resolution phase of the proceedings.

¹³⁵ At the request of the complainant.

¹³⁶ Following the initiation of the case.

¹³⁷ Addressed to the Council by the College of Competition Prosecutors.

¹³⁸ The relevant provision in **UK** refers to "a written notice by the OFT".

taken if it may put the objective or effectiveness of the interim measures order at serious risk or in case of urgency. In these cases, the parties are heard after the adoption of the decision.

Only a few competition authorities have elaborated stated policies or have issued some kind of guidance concerning interim measures; for example, the **FR** competition authority in 2007 included in its Annual Report a comprehensive study of its practice, the **EL** competition authority, whose notice refers to the condition of irreparable damage to the public interest, and the **IT** competition authority, whose notice is focused on procedural aspects. The **UK** competition authority provided guidance concerning its interim measures procedures first in its Competition Act 1998 (CA98) Enforcement Guidelines (OFT407)¹³⁹; and more recently in its revised CA98 Procedures Guidance (OFT1263rev).¹⁴⁰

3.4.2. Interim measures orders

Interim measures decisions stay in force:

- until a decision is issued on the merits of the case (e.g. **BE, CZ, DE, ES, FR, LU, LV, NL**¹⁴¹, **PL, SI, SV**) or until the implementation of the sanctions imposed by the decision on the merits of the case (e.g. **LT**);
- until revoked (e.g. **BG**¹⁴², **ES, PT**¹⁴³);
- as long as the reason for which they were adopted lasts is valid (e.g. **SK**), or for as long as it is necessary under the specific circumstances of each case (e.g. **CY**);
- until the full hearing of the case by the national court (e.g. **IE**) or until the investigation is completed (e.g. **UK**);
- for up to a certain period of time (e.g. **BG** - 3 months, **DE** – up to 1 year, in exceptional cases even longer).

In e.g. **BE, FR, MT** and **PL**¹⁴⁴ the period for which the order is valid may be specified in the order itself. No time-limits are provided for in e.g. **AT** and **HU**.

¹³⁹ OFT Guidelines “Enforcement”, December 2004, chapter 3. Available on the OFT’s website: www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft407.pdf

¹⁴⁰ “A Guide to the OFT’s investigation procedures in competition cases” (OFT1263rev), 16 October 2012, chapter 8. Available on the OFT’s website: www.of.gov.uk/shared_of/policy/oft1263rev

¹⁴¹ Where the Report (SO) was drafted within 6 months following the adoption of the interim measures decision.

¹⁴² In **BG**, interim measures orders can be revoked within 3 months from their adoption if the illegitimate practice is terminated and the damage to competition is prevented the interim measure also before expiry of the term of its effect.

¹⁴³ For a period of 90 days, except if prolonged by a reasoned decision.

In **FI**, interim measures orders are no longer valid if, within 60 days from the adoption of such a decision, a decision on the merits of the case is not issued by the competition authority or a proposal to the Market Court is not filed. The above time-limit may be extended by the Court following an application by the competition authority. Similarly in the **NL**, interim measures orders become invalid if a **SO** is not filed within 6 months following the adoption of the order.

Some national laws provide for a maximum time limit in which an interim measures order remains in force:

- until a decision on the merits of the case is issued (e.g. **BG, PL, SI and SK**);
- for a period not exceeding 90 days (e.g. **PT**¹⁴⁵).

Like Article 8 of Regulation 1/2003, where an order of interim measures can be renewed insofar as this is necessary and appropriate, in some jurisdictions the validity of an interim measure order may be extended (e.g. **BG, MT, PL, PT**). In e.g. **ES**, interim measures orders may be modified.

In contrast, in **IT**, such decisions cannot be extended or renewed.

3.4.3. Content of interim measures

In most jurisdictions, there is an express reference in the relevant national provisions that interim measures imposed aim at the suspension or termination of the practice under investigation, thus, competition authorities may impose on the undertaking(s) concerned an obligation to terminate and refrain from the alleged infringement (e.g. **BE**¹⁴⁶, **BG, ES, FI, FR**¹⁴⁷, **HU**¹⁴⁸, **LT, LU, PL, PT, SI**). In some jurisdictions interim measures are ordered if necessary for the implementation (e.g. **LT**), the useful effect (e.g. **PT**¹⁴⁹) or the effectiveness (e.g. **ES**) of the decisions on the merits of the case or to avoid the potential negative effects which would occur if the behaviour is not immediately terminated (e.g. **SV**). For example, in

¹⁴⁴ Pursuant to Art. 89 Section 2 of the Act on Competition and Consumer Protection, in interim measures decisions, the President of the Office of Competition and Consumer Protection shall determine the period for which the decision is due to be binding. The decision shall be binding no longer until a decision concluding the proceedings regarding this case is issued.

¹⁴⁵ Unless if prolonged by a reasoned decision.

¹⁴⁶ In **BE**, interim measures shall be necessary to suspend anti-competitive practices under investigation.

¹⁴⁷ In **FR**, it is expressly provided for by the respective national provisions that an injunction may be imposed at the parties to “revenir à l'état antérieur”. Moreover it is provided that the measures ordered should be necessary to face the urgency.

¹⁴⁸ In **HU**, the competition authority may also oblige the undertaking(s) concerned to eliminate any unlawful situation.

¹⁴⁹ It is also provided for by national provisions that the measures adopted should be necessary to the immediate re-establishment of competition.

IT any measure which may be justified in order to avoid damage for competition may be imposed (although this does not imply the possibility to impose measures that go beyond the possible content of a prohibition decision). Several competition authorities may adopt any measure that they deem necessary (e.g. **CY, FR, RO**) or any other provisional measure (e.g. **BE**¹⁵⁰, **BG**¹⁵¹, **PT**), and not only or necessarily those requested by the applicant.

In some cases, the relevant provisions expressly provide that the competition authority may oblige the undertaking(s) to perform an act or to refrain from performing such an act (e.g. **CZ, FI, FR, LV, LT, NL**). In the case of **LT**, the competition authority may impose on the undertaking(s) concerned an obligation to perform certain acts following authorization by a national court.

In some jurisdictions, e.g. **FI** and **ES**, the national legislation enumerates specific interim measures to be adopted. In **FI**, the relevant national provision expressly provides that the competition authority may temporarily oblige an undertaking to end discriminatory terms and deliver products to another undertaking on similar conditions as offered by the same business undertaking to other undertakings. In **ES**, the competition authority may, according to relevant legislation, impose on the undertaking(s) an order to cease the practice under investigation or certain conditions aiming at preventing the damage caused by the said practice or demand a guarantee to cover the liability for such damage. Such guarantees may also be imposed by the **HU** competition authority.

Examples of interim measures which have been adopted in practice are as follows:

- Modifications of contractual terms or other general commercial terms and conditions;
- Termination of discriminatory or excessive tariffs;
- Obligation to provide services;
- Obligation to refrain from terminating contractual relations;
- Stop commercial cross-selling practices for commercial data obtained through a legal monopoly;
- Obligation to bid separately for a public tender;
- Grant access to an essential facility;
- Obligation not to apply predatory pricing.

¹⁵⁰ The power of the President of the Competition Council is discretionary. He or she is not bound by the proposals made by the parties and/or the Competition Prosecutor.

¹⁵¹ According to the law in **BG**, the authority may adopt “any other necessary measures, taking into account the objectives of this Law”.

3.4.4. Monitoring of interim measures

Most jurisdictions monitor the implementation of interim measures according to general provisions for monitoring decisions (e.g. **BE, BG, EL, ES, FR, IT, SK**) and/ or no specific monitoring mechanism or procedure is provided for by national legislation (e.g. **BG, DE, MT, SI, SV**). In a few jurisdictions interim measures decisions do not usually provide for a special monitoring mechanism (e.g. **AT, FR, PL, NL**) while in other jurisdictions obligations to report on compliance or specific steps ensuring compliance are usually provided for in such decisions (e.g. **CZ, FR, IT**). **LT** has developed and applies in practice in all cases a specific mechanism for monitoring the implementation of interim measures. **RO** is obliged to monitor the implementation of interim measures.

3.4.5. Judicial review

In almost all jurisdictions where interim measures may be granted, such decisions may be appealed (e.g. **AT, BE, BG, CY, CZ, DE, EL, ES, EU, FR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SI, SV, UK**). In e.g. **FI**¹⁵² and **SK**¹⁵³ such decisions cannot be appealed.

An appeal may be filed by:

- the complainant (e.g. **AT**¹⁵⁴, **BE, BG, CY, EL, ES, FR, NL, UK**);
- the undertaking targeted (e.g. **AT, BE, BG, CY, DE, EL, ES, FR, LU, MT, NL, PL, RO, SV, UK**);
- third parties that can prove a legitimate interest (e.g. **BE, CY, EL, NL, RO**);
- the parties to which the order has been notified (e.g. **CZ, SI**);
- the minister (e.g. **BE, EL**).

An appeal against the decision on the merits of the first appeal may be filed in e.g. **BG, CY, DE, ES** and **LU**.

In approximately half of the jurisdictions, appeals against interim measures decisions are exercised according to general provisions applicable also to other types of decisions that the competition authority is empowered to take (e.g. **AT, BE**,¹⁵⁵ **EL, ES, FR**¹⁵⁶, **PL, NL, SK**,

¹⁵² The Finnish Competition Authority shall make a decision on the principal issue or a proposal for a penalty payment under Section 12(3) to the Market Court within 60 days of issuing an interlocutory injunction. Upon application by the Authority within that period, the Market Court may extend the time limit. If the Finnish Competition Authority fails to make a decision on the principal issue, or fails to make a proposal within the time limit, the injunction or obligation will expire.

¹⁵³ In **SK**, the parties can appeal to the Council of the Office, i.e. an administrative review is possible.

¹⁵⁴ The party that applied for interim measures at the Cartel Court.

¹⁵⁵ Only decisions ordering interim measures are appealed according to general provisions, i.e. an interim measure decision of the President of the Competition Council will be appealable to the Brussels Court of

SV), while the respective laws of the other half contain a special provision regarding appeals against interim measures orders (e.g. **BE**,¹⁵⁷ **BG, HU, IT, LV, LT, MT, SI**).

In some jurisdictions it is provided for by respective provisions that the lodging of an appeal does not have suspensive effect, therefore the courts shall not stay the execution of the interim measures order (e.g. **BE, BG, DE, FR, LT, MT**¹⁵⁸, **PL, SK**¹⁵⁹, **SV**¹⁶⁰ and **UK**). In **AT**, the Cartel Court may grant suspensive effect to appeals against interim measures after weighing the respective interests of all parties concerned. In **DE** three circumstances are provided for where the lodging of an appeal may have a suspensive effect if there are either serious doubts about the legality of the appealed measure or the enforcement of the measure would constitute an undue hardship for the appellant: (a) discretion of the competition authority to decide whether or not to defer enforcement; (b) obligation of the competition authority to defer enforcement if the latter would constitute an undue hardship for the appellant that was not necessary because of overriding public interests; (c) discretion of the court to order that the suspensive effect be restored wholly or partly, following a request by the appellant. In **BE**, the Court of Appeal may issue a decision to suspend the interim measures before judging on the merits.

3.5. Other types of decisions and actions

In the context of the ECN, only a few competition authorities (e.g. **BE, DE, NL, RO, SV**) have the power to adopt “other decisions”, that is decisions different from those already mentioned in the previous sections¹⁶¹.

In **PL**, apart from the right to issue decisions assessing the practice as restricting competition and ordering to refrain from it, the President of the Competition Authority may issue a decision assessing the practice as restricting competition and declare its discontinuation.

Appeal. In the case of rejection of requests for interim measures by the Competition Prosecutor, these decisions can be appealed to the President of the Competition Council whose decision is not appealable.

¹⁵⁶ Only the standard deadline to bring appeals is shortened to 10 days for appeals against the imposition of interim measures.

¹⁵⁷ Only decisions ordering interim measures are appealed according to general provisions. A special procedure of appeal is provided for in the case of rejection of requests for interim measures. Such rejection decisions are appealed before the President of the Council whose decision is not appealable.

¹⁵⁸ Unless it is directed otherwise by the Competition and Consumer Appeals Tribunal.

¹⁵⁹ Relates to the administrative appeal only.

¹⁶⁰ However, the parties can specifically ask the court for a stay of proceedings. The court may choose to deny this.

¹⁶¹ The category of “other decisions” does not comprise, in this context, findings of inapplicability (considered briefly in the context of section 3.3) nor decisions aimed at withdrawing the benefits of Commission’s Block Exemption Regulations in individual cases (decisions which are explicitly mentioned in the context of Article 29 of Regulation 1/2003 and decisions taken in some national legal systems (**BG, DE**) - whose aim is to permit the adoption of a prohibition decision.

The existing powers of adopting “other decisions” are quite different and seem to be aimed at pursuing different goals.

In some cases, in particular, the special decision powers granted to the competitions authorities appear aimed at ensuring the effective enforcement of the competition rules (e.g. **DE**, **NL**¹⁶², **SV**). In other cases, the special powers conferred to competition authorities appear intended to monitoring the activity of public authorities (e.g. **RO**, **SI**) or to solve problems related to specific regulated markets (e.g. **BE**).

In the context of the powers aimed at ensuring the effective enforcement of the antitrust rules, it is to be mentioned, in particular, the power conferred on the competition authority in **DE** of adopting decisions aimed at issuing an order to *levy* the economic benefits gained by an undertaking under the requirements of § 34 (1) of the German Competition Law ("ARC"): “Where an undertaking gains an economic benefit by deliberately or negligently violating a provision of the ARC or Article 101 or 102 TFEU or a decision by the cartel office (...)”. It is to be noted that such power does not apply, however, as far as the economic benefit has been levied by means of compensation or fines paid or by order of forfeiture. Moreover, where an undertaking has paid damages or fines after the German competition law has made use of its power pursuant to §34(1) ARC, the sum paid by the undertaking has to be reimbursed accordingly.

The **NL** competition authority also has the possibility to impose a binding instruction to comply with the Dutch Competition Act and Articles 101 and/or 102 TFEU. In the event of a violation of a binding instruction, the competition authority may impose an administrative fine or an order, subject to periodic penalty payments. In practice the competition authority has never used this instrument in relation to Articles 101 or 102 TFEU.

Another case of powers aimed at ensuring the effective enforcement of the competition rules is the power of the competition authority in **SV** to issue *fine orders*. Fine orders may be issued if the Swedish NCA considers that the material circumstances regarding an infringement are clear and in cases which are not contested. The fine order does not entitle the infringing undertakings to any rebate on the fine due to the underlying principle that companies who choose to defend themselves in court should not be punished by a higher amount of fines. Despite the fact that no rebate applies, a fine order resembles a settlement procedure to the extent that it gives companies the benefit of avoiding a costly court procedure and of decreasing the amount of negative publicity associated with a court trial. By consenting to a fine order, an undertaking accepts the amount of the fine calculated by the Swedish NCA. The consent does not, however, prevent the undertaking from denying having committed an infringement in possible follow-up civil enforcement proceedings.

The undertakings subject to a fine order may reject to accept it, in which case the Swedish NCA will file a case with the Stockholm District Court. If an undertaking consents to a fine order within a specified period of time, the Swedish NCA may not institute court proceedings against that undertaking. It is always up to the Swedish NCA to decide whether a fine order is considered appropriate in an individual case. A fine order is generally not considered appropriate if there is need to develop precedents regarding a particular legal issue or where

¹⁶² In this case a binding instruction.

the circumstances surrounding the infringement are not clear. A fine order that has been accepted is regarded to be a legally binding judgment, but it can, under specific conditions, be set aside upon appeal to the Stockholm District Court.

In the context of the powers whose aim is better monitoring the activity of public authorities and their possible negative impact in the affected markets, of particular note is the power of issuing decisions against anti-competitive interventions of the public authorities which is conferred on the competition authority in **RO**.

In the same context in **SK**, where Article 39 of the Act on Protection of Competition empowers the competition authority to investigate cases and sanction state administration authorities with regard to the performance of state administration, local self-administration authorities with regard to the performance of self-administration and transferred tasks of state administration, and special interest bodies which perform transferred tasks of state administration, where these provide evident support giving advantage to certain undertakings or otherwise restrict competition.

A similar example is to be found in **SI**, where Articles 64 and 71 of the Slovenian Competition Act declare that the Government, state authorities, local community authorities and holders of public authority may not restrict the free performance of undertakings or prevent competition on the market. Moreover, in cases in which the provisions of the law or other regulations restriction competition or the proper functioning of the market, the Slovenian NCA can issue and send to the competent authorities an opinion on measures appropriate to eliminate or prevent the restriction of competition.

Finally, in **BE**, the chambers of the Competition Council can take decisions on appeal against some decisions by sector regulators. In those cases where the Competition Council adopts decisions as an appellate court for decisions by sector regulators, the appellate body is the Supreme Court (Court of Cassation). Moreover, the chambers of the Competition Council can also take decisions on dispute between undertakings providing electronic communications networks or services. As underlined by the **BE** competition authority, the Competence Council acts as a national regulatory authority in this regard.

The use of guidance letters or similar instruments seems, at the moment, not particularly frequent in the context of the ECN. About one third of the competition authorities, indeed, employ such instruments, though in very different ways.

In some jurisdictions, in particular, the sending of a guidance letter is used essentially with reference to individual cases (e.g. **DE, LT, LU, MT, NL, RO** and **BE**). In some of these jurisdictions the sending of such an individual guidance letter (informal opinion) seems to be discretionary (e.g. **DE, LU, NL, RO**).

In other jurisdictions, rather than individual guidance letters, the competition authority may publish general “opinions” or “notices” aimed at giving specific guidance in relation to competition issues. Such a discretionary power is used, in particular, in **EL, EU, FR** and **IE**. In **LU** general “opinions” or “notices” are compulsory and must be issued by the Competition Council before the adoption of any national law dealing with competition issues.

4. PROCEDURE

4.1. Start of proceedings

4.1.1. Priority setting

The different jurisdictions analysed can be divided as regards the possibility of priority setting between (i) those which are subject to the legality principle and (ii) those having the possibility to set priorities.

(i) The following competition authorities are bound by the principle of legality (i.e. they are obliged to deal with each case that is brought to their attention): e.g. **BG, CY, CZ, EE¹⁶³, ES, FR, LU, LV** and **RO**.

In **HU**, the obligation to deal with the case is subject to three cumulative conditions: (i) the conduct or situation may violate the provisions of the Competition Act, (ii) the competition authority has the power to proceed in the case, and (iii) the proceeding is necessary to safeguard the public interest.

AT and **PL** indicated that a 'public interest' criterion is applied.

(ii) Like the European Commission, many jurisdictions e.g. **BE, DE, DK, EL, FI, IE, LT, LU, MT, NL, PT, SI, SV, UK** have the possibility to choose the cases on the basis of what is considered to be a priority.

In some cases (e.g. **EL, EU¹⁶⁴, FI¹⁶⁵, NL, SV, UK**), guidance on the applicable priorities are set out in policy documents. In **PT**, during the last quarter of each year, the competition authority is legally bound to publish on its Internet site the competition policy priorities for the following year, though making no sectoral reference where its sanctioning powers are concerned.

In terms of further specificities, the following examples can be highlighted:

- In **BE¹⁶⁶**, priorities are established by the College of Competition Prosecutors and are based on economic and consumer interest, with a preference for hard core

¹⁶³ In administrative procedures, the authority can return the application without review, if the application is clearly unjustified. In case of receiving complaint concerning a misdemeanour or a criminal offence, the competition authority has a period of 15 days in misdemeanour procedures and 10 days in criminal proceedings for deciding on the opening of the proceeding if there are grounds and reasons for it.

¹⁶⁴ Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C101, 27.4.2004, p.65.

¹⁶⁵ According to Article 32 of the Competition Act, the competition authority can arrange its tasks according to the order of importance and also refrain from investigating a case e.g. if an investigation is not necessary to safeguard competition on the market or if it is unlikely that competition rules have been infringed.

¹⁶⁶ At the same time, the Competition Council *sensu stricto*, in all cases referred to it by the College of Competition Prosecutors, is bound by the principle of legality, i.e. it cannot refrain from taking a decision on grounds of lack of available resources or prioritisation (on the basis of an appeal case before the Brussels Court of Appeal in re. 'Association of Pharmacists', 07/04/2009).

cartels, abuses, liberalised sectors, consumer goods and financial services (and where the priority for investigations is set by making use of the "MOSCOW principle"¹⁶⁷).

- In **CZ**, general objectives are set by the law and year to year goals and priorities are determined exclusively by the management of the NCA, according to experience (number of complaints and monitoring and analysis of the market).
- In **DE**, the competition authority aims at preserving a high degree of flexibility and thus has abstained from laying down written rules.
- In **EL**, the Board of the competition authority has issued a decision outlining the criteria for the prioritization of cases and the setting of strategic goals (essentially, a "Notice on Enforcement Priorities").
- In **LV**, the competition authority may decline to initiate a case where the possible infringement is insignificant, i.e. the harm to competition that has been caused or might occur is not appreciable.
- **MT** is in the process of drafting guidelines. In the **NL** (where the competition authority is bound by the principle of legality only when a reasonable suspicion of an infringement exists), prioritization criteria are established in its Priority Guidelines 2012.
- In **PL**, the NCA is obliged to pursue every case whenever the "public interest" criterion is satisfied.
- In **SI**, the NCA may *ex officio* issue an order for the commencement of proceedings when it learns of circumstances that raise the probability that the provisions of Articles 6 or 9 of the Competition Act or Articles 101 or 102 TFEU have been infringed (Article 23 of the Slovenian Competition Act).
- In **SV**, in deciding which cases to investigate, the NCA considers the seriousness of the problem, the need for precedents and if any other authority is better suited to deal with the problem.
- In the **UK**, the decision on the selection of a case is taken following the "OFT Prioritisation Principles", published in October 2008, on the basis of its impact, strategic significance, risks and resources.

¹⁶⁷ MOSCOW, an acronym standing for:

Must have: these are **Priority 1** files with a fixed status for which resources are made available and where there is an internal time commitment.

Should have: these are **Priority 2** files with no fixed status (meaning they can be suspended or put on hold). Usually only limited resources are made available and there is no internal time commitment.

Could have: "stand by" files where investigation is still uncertain.

Won't have or Waste: files to be classified.

When a case is not found to be a priority, **AT**, **IE**, or **FI** are examples of jurisdictions where it would be closed by means of a simple closure. Similarly, in **DE** a case would be closed by simple closure, informal letter or a phone call to the complainant, without a possibility for appeal.

In **FI**, as a general rule, a complainant is entitled to receive a decision, an answer or other response from the NCA. Furthermore, an informal tip-off system on its website has recently been developed, which announces that no reply will be provided by the NCA to such tip-offs.

In the **NL**, in case of an informal request to issue a decision, the case is closed by means of a simple closure.

In contrast, in jurisdictions including **BE**, **CZ** and **PT** a formal decision or letter is required. In **EL**, where cases have not been found to fulfil the priority requirements and have been awarded low priority points, a rejection decision is issued by the Chairman of the competition authority which is notified to the complainant within 30 days following its issuance.

In **SV**, a case can be closed by either a formal decision or by means of simple closure. The NCA also generally informs complainants by sending an informal letter or a copy of the decision.

The decision (simple or not) to close a case without an investigation is subject to judicial review in e.g. **BE**¹⁶⁸, **EL**, **EU**, **LU**, **LV** and **UK**. In **IE** and **SV**, there is no right of appeal but there is a right of private action, as is the case in other jurisdictions.

4.1.2. Initiation of investigation

Similar to the **EU system**, most NCAs have indicated that proceedings can be started either ex officio (including on the basis of a leniency application) or following a complaint.

In some cases, in order to initiate an investigation there should be "grounds to believe that a specific behaviour may infringe the competition law" or "reasonable grounds for suspecting" or a similar requirement (e.g. **UK**).

Like Article 2 of Regulation 773/2004, the authorities in e.g. **BE**, **CY**, **ES**, **FR**¹⁶⁹, **HU**, **IT**, **IE**, **LV**, **LT**, **PL**¹⁷⁰, **PT**, **RO**¹⁷¹ and **SI**, adopt a formal decision to initiate proceedings. In some

¹⁶⁸ If the College of Competition Prosecutors rejects the complaint or the request of the Minister because of lack of priority, it can be reviewed only before a chamber of the Competition Council sensu stricto. It is therefore important to note that in **BE**, the College of Competition Prosecutors, although being an investigative body, also exerts decisional competences to reject complaints or requests of the Minister. If the College of Competition Prosecutors considers that the case must be investigated, it refers it to the Competition Council sensu stricto which will have to examine it on the merits.

¹⁶⁹ For ex officio cases.

cases (e.g. **CZ, ES, EU, RO, SK**), a press release is published or an announcement is made on their respective websites when proceedings are opened. In **BG** this decision is an "administrative order", while in **CY** it is an order from the Commission to the Service.

In a number of jurisdictions e.g. **AT, DE, DK, EL, FI, LU, MT** and **NL**, no formal opening decision is required. Nevertheless, in **DE**, in case that unannounced inspections are not envisaged, the undertakings concerned will be notified by letter, when the decision to start investigations is taken by the competent division of the NCA. In **FR**, the reception of a complaint initiates the opening of internal proceedings automatically, but formal proceedings are only initiated when the SO or a report proposing the closure of the case is issued. In **SK** an investigation is opened by sending the notice on the commencement of the proceedings to the parties. In the **UK**, when a formal investigation is opened, the companies under investigation are normally sent a case initiation letter setting out brief details of the conduct that is being looked into, the relevant legislation, the indicative timescale and key contact details, including who is the decision maker.¹⁷² In **SV**, the opening of proceedings is an administrative, non-formal decision.

In **PL**, a differentiation is made between "explanatory"¹⁷³ and "antimonopoly" proceedings; the former are conducted "in a case" and their aim is to evaluate the likelihood of a breach of competition law, whereas antimonopoly proceedings are conducted "against a specific undertaking".

4.1.2.1. Timing of opening of proceedings

In some jurisdictions the opening of the proceeding is normally before the "first investigative measure"¹⁷⁴: e.g. **BE, BG, CY, DE, FI, FR, LU, MT, PT, RO, SI, SV**, while in others it would normally be after such first investigative measure: e.g. **EE**. In **PL** usually, the first investigative measures are initiated during the "explanatory proceedings", i.e. before the opening of the "antimonopoly proceedings".

In the **EU system**, **COM** will initiate proceedings at any point in time, but not later than the date on which it issues a preliminary assessment or a SO, whichever is the earlier.

In some jurisdictions, e.g. **EE, HU**, and **IT** the opening is normally the first investigative measure. In **LV**, it is "before" the first formal investigative measures in most cases, but there

¹⁷⁰ In **PL**, the President of the Office of Competition and Consumer Protection is required to issue a formal resolution on the initiation of the proceedings.

¹⁷¹ When starting proceedings, an investigation order will be issued by the President of the Romanian competition authority.

¹⁷² The **UK** competition authority will also publish on its website a case opening notice setting out basic details of the case.

¹⁷³ Before instituting antimonopoly proceedings the Polish competition authority may initiate explanatory proceedings. The explanatory proceedings should be completed within 30 days, or in complicated cases, within 60 days. This time limit is of an instructive character and it may be legally extended.

¹⁷⁴ As referred to in Article 11(3) of Regulation 1/2003.

have been cases where the proceedings are initiated after some investigative activities have been performed as a consequence of which the Council finds evidence indicating an eventual infringement. Investigative measures might be carried out before opening of the proceedings particularly during sector inquiries.

In the **UK**, the decision to open a formal investigation means deciding whether the legal test that allows the UK competition authority to use its formal investigation powers has been satisfied and whether the case falls within its casework priorities. Accordingly the formal opening of the proceedings normally takes place before the first investigative measure.

4.1.2.2. Informing the parties

The suspected undertakings are informed about the opening or existence of proceedings against them at different moments of the investigation in each jurisdiction:

In **AT**, there is no legal requirement to inform the parties, but they will nevertheless normally be informed by the competition authority.

In **BE**, the College of Competition Prosecutors informs the parties and sends them a copy of the "report" simultaneously with the submission of this report (equivalent to a SO) before the Competition Council *sensu stricto*. In practice however, the use of an investigative measure (request for information, inspection) will alert the parties earlier to the existence of the investigation.

In **BG**, parties are informed right after the opening of formal proceedings or at the moment of an inspection.

In **CY**, **FI**¹⁷⁵, **LU**, **PT**, **RO** and **SV**, and, in practice, in **FR**, parties are normally informed about proceedings against them when they are inspected or receive a request for information; at the latest they are formally informed when receiving the SO. Similarly, in **LV**, they are informed as soon as the first formal investigative activity is performed (inspection of the premises or request for information) as that is the moment when the parties to the case can claim that their procedural rights be fully respected.

In **DK**, the parties are informed about the opening of proceedings normally shortly after the Board of Directors has decided to run the case.

In **EE**, it depends on the kind of procedures; in administrative ones, it is for the authority to decide when to approach the undertakings; in criminal procedures, they will be informed in the course of some procedural act.

In the **EU system**, **COM** informs the parties concerned by the initiation of proceedings before making it public.

¹⁷⁵ In **FI**, the NCA informs the subject of enforcement activities what it is suspected of as soon as this does not harm the investigation.

In **HU**, parties are informed by means of the order on the opening of formal proceedings. In **IE** they would be informed before the decision to initiate proceedings is issued.

In **IT**, parties are informed right after the decision to open a proceeding is adopted; usually, this is communicated in the context of the first inspection. In **LT** parties are informed three days after the decision to open an investigation is signed, except in cases where the announcement of the resolution may be detrimental to the course of the investigation and must be kept confidential.

In **MT**, the suspected undertakings are informed simultaneously with the first formal investigative action or before being asked to attend a meeting with the authority.

In the **NL**, suspected undertakings are informed of the investigation when using a formal investigative measure for the first time; when no formal investigative measure is used during the investigation, the suspected undertakings will not be informed of the opening of procedures. In this case, the suspected undertakings will only be informed when the SO is sent to them.

In **PL**, parties are informed by means of an official notification by the competition authority after the initiation of antimonopoly proceedings.

In **SK** and **SI**, parties are sent a notice when the NCA officially starts proceedings, and in **UK**, if appropriate, the parties receive a "case initiation letter", setting out brief details of the conduct that is being looked into, the relevant legislation, the indicative timescale and key contact details, including who is the decision maker.¹⁷⁶

4.1.3. Duration of proceedings and time limits

While the laws in some jurisdictions do not foresee any time-limit for the proceedings, in others the overall duration is set while, in a small number of jurisdictions, the specific time-limits for the different steps of the procedure are fixed.

Similar to the **EU system**¹⁷⁷, several jurisdictions, e.g. **AT, BE, BG, DE, DK, EE, FI, FR, LU, MT, NL, RO, SI, SV, UK**¹⁷⁸ do not foresee any time-limit for the proceedings (other than limitation periods). The duration depends on the complexity of the case.

¹⁷⁶ Giving the parties a case initiation letter at the start of the case may not be appropriate if it may prejudice the investigation, such as prior to unannounced inspections or witness interviews. In these cases, the letter will be sent as soon as possible.

¹⁷⁷ At the State of Play meeting which is held shortly after the opening of proceedings, the Directorate-General for Competition will normally indicate a tentative timetable for the case. This tentative timetable will, if appropriate, be updated at following State of Play meetings, see para 63 of the Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C308, 20.10.2011, p.6.

¹⁷⁸ The **UK** competition authority will publish on its website a case-specific administrative timetable for the investigation, which will be updated on an on-going basis throughout the life of the investigation.

In many jurisdictions, the authority should act within a reasonable time and/or timing is subject to a general principle of "good administration". Additionally in **FI**, goals concerning mean processing times have been set in the authority's performance agreement with the Ministry.

In **IT**, the timing is decided on a case by case basis: when the NCA adopts a decision of opening of proceedings, it decides on duration of the proceedings as a whole and informs the parties of the moment when it shall adopt a prohibition or positive decision. There is no specific time limit from the initiation of the proceeding to the notification of the SO; the final decision is usually adopted after 90 days from the communication of the SO. On the possibilities for extension of the deadlines, this is decided according to the specific circumstance of the case, but it must fit within the timetable for the duration of the proceedings overall.

In some jurisdictions, e.g. **EL**, **ES**, **LT** and **NL**, there are specific time-limits for certain periods of the procedures, which are fixed by the competition laws or an internal rule:

In **EL**, the SO is submitted to the Board 4 to 6 months following the assignment of the case to the Rapporteur. The SO is notified to the parties following its submission to the Board along with an invitation to the oral hearing. The decision is adopted within 12 to 14 months following the assignment of the case to the Rapporteur.

In **ES**, the competition authority has 12 months from the formal opening of the procedure until the submission to the Council of the proposed decision. The Council then has 6 additional months to adopt the final decision, the maximum length being therefore of 18 months after the notification of the starting of procedures to the parties. Moreover, Article 37 of the Competition Law provides for a number of reasons for suspension of the procedure, including coordination with other NCAs and **COM**.

In **LT**, the NCA has five months for investigations, which are extendable each time it is deemed necessary by three months. In practice, cases take an average of 17-19 months.

In the **NL**, according to the Dutch Competition Act, the NCA has 8 months between the SO and the final decision. The time limit cannot be extended formally, but the power to adopt a decision will not lapse after the time limit has passed. According to relevant national case law, two years is in principle a reasonable time limit within the framework of Article 6 ECHR for the administrative decision-making process, including an administrative appeal to the authority. When two years are exceeded, the fines can be reduced by the courts.

In **PL**, the NCA has 30 days (60 days in complex cases) for carrying out explanatory proceedings and 5 months for antimonopoly proceedings. These deadlines may be extended (e.g. where the NCA requires more time to gather information from undertakings).

In **PT**, the first phase of the proceedings must be concluded within 18 months, whereas the second phase (from SO until the final decision) must be concluded within 12 months. The NCA may extend these deadlines.

Finally, some jurisdictions (e.g. **HU, LV, SI, SK**) have overarching time-limits for the global handling of a case.

In **HU**, the general deadline for reaching a final decision is 6 months, extendable twice by a maximum of 6 months each time. Taking this into account and considering the 30 days deadline of Article 11(4) of Regulation 1/2003 (whereby the European Commission is informed about an envisaged decision applying Articles 101 and/or 102 and may make observations thereon), the preliminary position of the Competition Council of the competition authority has to be adopted 150, 330 or 510 days after the initiation of proceedings at the latest.

In **LV** and **SI**, there is a general time frame of 2 years for the adoption of a decision. There are no individual deadlines for the different procedural steps.

In **SK**, the deadline concerning the commenced administrative proceeding gives the NCA 6 months to issue a decision from the date on which the proceedings commence. In complicated cases, the Chair of the competition authority may allow, also repeatedly, an appropriate extension of the time limit for the issuance of a decision by a maximum of 24 months in total. If the NCA is unable to take a decision within the six months deadline, it is required to notify the parties to the proceedings indicating the reasons for not issuing such decision.

4.2. Main procedural steps

4.2.1. Statement of Objections (SO)

4.2.1.1 The power to issue a SO

Similar to **COM**, most competition authorities have the power to issue a SO or an equivalent document to set out their preliminary position (**BE, BG, CY, CZ, DE, DK, EL, ES, FI¹⁷⁹, FR, HU¹⁸⁰, IT, LT, LU, LV¹⁸¹, MT, NL, PT, RO, SI, SK¹⁸², SV¹⁸³, UK**).

In **EE**, a document describing the main findings of the authority or a draft decision will be submitted to the parties in administrative proceedings (mainly to the parties who are under investigation). In misdemeanour proceedings, a misdemeanour report is submitted. In criminal proceedings, the statement of charges shall be submitted to the accused at the end of pre-trial investigation. In **FR**, after the SO is issued to which all the parties can reply, a

¹⁷⁹ A draft decision or draft proposal for fines.

¹⁸⁰ Preliminary position adopted by the Competition Council after the receipt of the investigative report prepared by the case-handlers.

¹⁸¹ Parties are informed in writing about competition concerns.

¹⁸² "Call before issuing a decision".

¹⁸³ A draft decision or a draft summons application.

second document ("final report of the investigation services") is issued and sent to the addressees of the SO who are entitled to respond in writing within a two month period.

A SO or its equivalent is normally issued at the end of the investigation period.

In **PL**, a SO is not issued, however, parties are informed of the concerns of the competition authority: antimonopoly proceedings¹⁸⁴ commence with a reasoned resolution on their initiation. Accordingly, an official statement addressed to the undertaking specifies the scope of the antimonopoly proceedings.

No SO is foreseen in the following other jurisdictions:

- In **AT**, the competition authority has to issue a statement to the possible defendant in the Cartel Court's procedure informing about the main results of its investigation and giving opportunity to comment.
- In **IE**, the competition authority prepares a file for the Office of Director of Public Prosecutions (DPP) who decides on whether to bring the case to a trial.

4.2.1.2 Possibility to issue a supplementary SO

In the **EU system**, a supplementary SO may be issued if additional objections are issued or the intrinsic nature of the infringement is modified, e.g. to extend the duration or geographic scope of the infringement. Similarly, in many jurisdictions an additional report/SO or draft decision will be submitted to the parties if additional evidence is received (e.g. **BE, BG, CY, CZ, DE, DK, EL**¹⁸⁵, **ES, FI**¹⁸⁶, **FR, HU, IT, LT, LV**¹⁸⁷, **NL, PT, RO**¹⁸⁸, **SI, SK, SV, UK**).

In **EE**, an amended document with main findings or a draft decision (administrative proceedings) or misdemeanour report (misdemeanour proceedings) shall be submitted to the person concerned. In criminal proceedings, the prosecutor can prepare a new statement of charges upon the need to raise new or substantially different charges.

Some jurisdictions do not provide for a supplementary SO, e.g. **AT, IE** and **PL**.

¹⁸⁴ See further *section 4.1.2*.

¹⁸⁵ This is ordered by virtue of a decision of the Greek competition authority.

¹⁸⁶ Supplementary draft decision.

¹⁸⁷ Not very frequent.

¹⁸⁸ In practice, a second Investigation Report was issued.

4.2.1.3 Right of parties to reply to a SO

Almost all jurisdictions allow the parties to the proceedings to reply to the SO or its equivalent, similar to the **EU system (BE, BG, CY, CZ, DE, DK, EL, ES, EE, FI, FR, HU, IT, LT, LU, LV, MT, NL, PT, RO, SI, SK, SV, UK)**.

In **AT**, the undertaking concerned may reply to the Statement of the competition authority. If a proceeding before the Cartel Court is started, the undertaking has the possibility to express itself before the Court, which is similar to the case in **IE** if proceedings have been brought before the national courts.

In **EE**, in administrative procedures the party (or addressee) has always a right to be heard and to reply to the SO. This is also the case in misdemeanour procedure. Failure to grant the right to be heard will result in the annulment of the possible decision.

In **PL**, a SO as such is not issued but parties are provided with sufficient and timely information about the facts and competition concerns in the form of a resolution on the initiation of the antimonopoly proceedings¹⁸⁹ which gives the parties the opportunity to respond to the presented concerns.

The time-limit for replies may be a minimum time-limit (e.g. **BG**¹⁹⁰, **CZ**¹⁹¹, **ES**, **EU**¹⁹², **IT**¹⁹³, **LU**¹⁹⁴, **PT**¹⁹⁵, **UK**¹⁹⁶), a fixed time-limit (**DK**¹⁹⁷, **EL**¹⁹⁸, **FR**¹⁹⁹, **LT**²⁰⁰, **LV**²⁰¹, **NL**²⁰², **SI**²⁰³) or there may be discretion to set it, e.g. in **BE**, the time-limit will be set by the chambers' president, in **CY** the time limit is decided by the competition authority and is stated in the SO

¹⁸⁹ See further *section 4.1.2*.

¹⁹⁰ Not shorter than 30 days.

¹⁹¹ Not shorter than 14 days.

¹⁹² At least four weeks, and in most cases 2 months.

¹⁹³ At least 30 days.

¹⁹⁴ No shorter than 1 month.

¹⁹⁵ Not shorter than 20 working days.

¹⁹⁶ At least 40 working days.

¹⁹⁷ 3 weeks. At the time of publication of the report, a bill to amend the Danish Competition Act has, however, been presented to extend the fixed time-limit to 6 weeks. If new significant factual information arises from the replies, the bill furthermore allows the parties to reply to the draft decision with a fixed time-limit of 3 weeks. If the bill is passed by the Danish Parliament the amendment to the Danish Competition Act come into force the 1 March 2013.

¹⁹⁸ At the latest 30 days prior to the date of the scheduled oral hearing.

¹⁹⁹ 2 months.

²⁰⁰ 14 days.

²⁰¹ 10 days.

²⁰² 6 weeks.

²⁰³ Maximum 45 days.

and in **MT** the time limit is determined by the Director General. Similarly, e.g. in **DE**²⁰⁴, **FI**²⁰⁵ and **RO**²⁰⁶, no deadline is foreseen by the procedural rules. In **SV**, the time-limit shall be "reasonable". In **HU**, the parties may reply until the final decision of the Competition Council has been adopted.

4.2.2. Commitment procedures and procedural rights of parties

In the **EU system**, preliminary competition concerns are normally expressed in a preliminary assessment²⁰⁷. In some jurisdictions, e.g. **BE, BG, CY, CZ, EL, HU, LU, SK** (second phase of the investigation), the undertakings concerned are informed of the competition concerns through a **SO** (or an equivalent report). In the **UK**, if a person or persons wish to offer commitments prior to the issue of the competition authority's **SO** and the authority considers that the case is one in which commitments may be appropriate, the authority will issue a summary of its competition concerns to such person or persons.

In **PT**, like in the **EU system**, commitment decisions may be adopted before or after a full **SO** is issued. In the case that the commitment route is followed before a **SO** is issued, the parties will be informed of a preliminary assessment of the facts.

In **DE**, a communication setting out competition concerns is sent after the preliminary assessment. In **DK** a notification of competition concerns is sent to the parties. In **FR** competition concerns are normally expressed in a preliminary assessment. In **LT**, competition concerns are expressed in a statement on the completed investigation. In **RO**, a document stating the competition concerns is raised.

In **FI**, the NCA expresses its competition concerns in the negotiations with the parties. A memo may be submitted. In **SV**, competition concerns can be communicated by informal meetings or in a written form. There are no formal requirements for these documents.

In **AT**, a **SO** is not issued in commitment procedures. There is no special form or content legally foreseen for the assessment. Similarly, in **HU** in the first phase of the proceedings, competition concerns are expressed informally (orally) or during a formal hearing of the parties. There is no special form. In **IT**, no separate document is issued. The decision to start an investigation informs the parties about the authority's competition concerns. In the **NL**, the competition concerns are normally communicated in a state of play meeting. Parties that indicate that they are prepared to offer commitments will receive the competition concerns in writing. In **PL** the resolution on the initiation of the proceedings mainly constitutes the basis for an undertaking to propose commitments.

²⁰⁴ The German competition authority has to grant "sufficient time" to the parties for replying.

²⁰⁵ In practice, the Finnish competition authority provides approximately one month to comment. Upon application the time limit may be extended.

²⁰⁶ At the latest during the oral hearing.

²⁰⁷ Unless commitments are offered after the **SO**.

In several jurisdictions, e.g. **BE, BG, CZ, DE, DK, EL, ES, FI, HU, LT, LU, LV, MT, PL, SI, SK,** and **SV** there is no difference between the procedural rights of the parties in commitment proceedings and in prohibition proceedings. In **SV**, however, the final commitment decision cannot be subject to appeal by the parties. In the **UK**, like in the **EU system**, the document setting out the summary of competition concerns of the competition authority in commitment proceedings is not a replacement for the **SO** which is issued if the prohibition route is followed. In **IT**, the procedural rights of the parties in commitment proceedings are similar to rights granted in prohibition proceedings; however in the context of the commitment proceedings, an **SO** is not issued and a final oral hearing is not held.

In **FR**, the right to be heard of the parties in commitment procedures applies at different stages of the procedure (e.g. opportunity to provide comments on commitment proposals, market test notice, and hearing).

In the **NL**, in a commitment procedure, the competition authority publishes the draft decision and provides access to those documents which are reasonably necessary for an evaluation of the draft decision for parties with a legitimate interest. As far as the documents consist of confidential business information, access need not be provided.

4.2.3. Procedural rights of parties with regard to other types of decisions

With regard to other types of decisions, in several jurisdictions such as **AT, BE, CZ, DE, DK, ES, IE, PL, SI,** and **SK**, the procedural rights are the same as in prohibition proceedings. In many jurisdictions (e.g. **BG, IT, LU, LV, NL, PL, RO, UK**) parties have the right of access to file, the right to submit comments, the right to be heard and the right to appeal the final decision.

In some jurisdictions there are differences with regard to interim measures proceedings due to their urgent nature (e.g. **DE, EU, FI²⁰⁸, FR²⁰⁹, SV²¹⁰**).

In **EL**, no procedural rights are provided for in cases where the complaint is rejected because it falls outside the competence of the competition authority or because it is manifestly unfounded. In all other types of procedures the procedural rights are the same as in prohibition proceedings.

²⁰⁸ Right to be heard of the parties unless the urgency of the matter or some other specific reason demands otherwise.

²⁰⁹ No **SO** is issued and the final report of the investigation services is made orally during the hearing before the Board.

²¹⁰ In interim measures proceedings there is no obligation to communicate with the parties but the Swedish NCA may find it appropriate.

4.2.4. Access to file

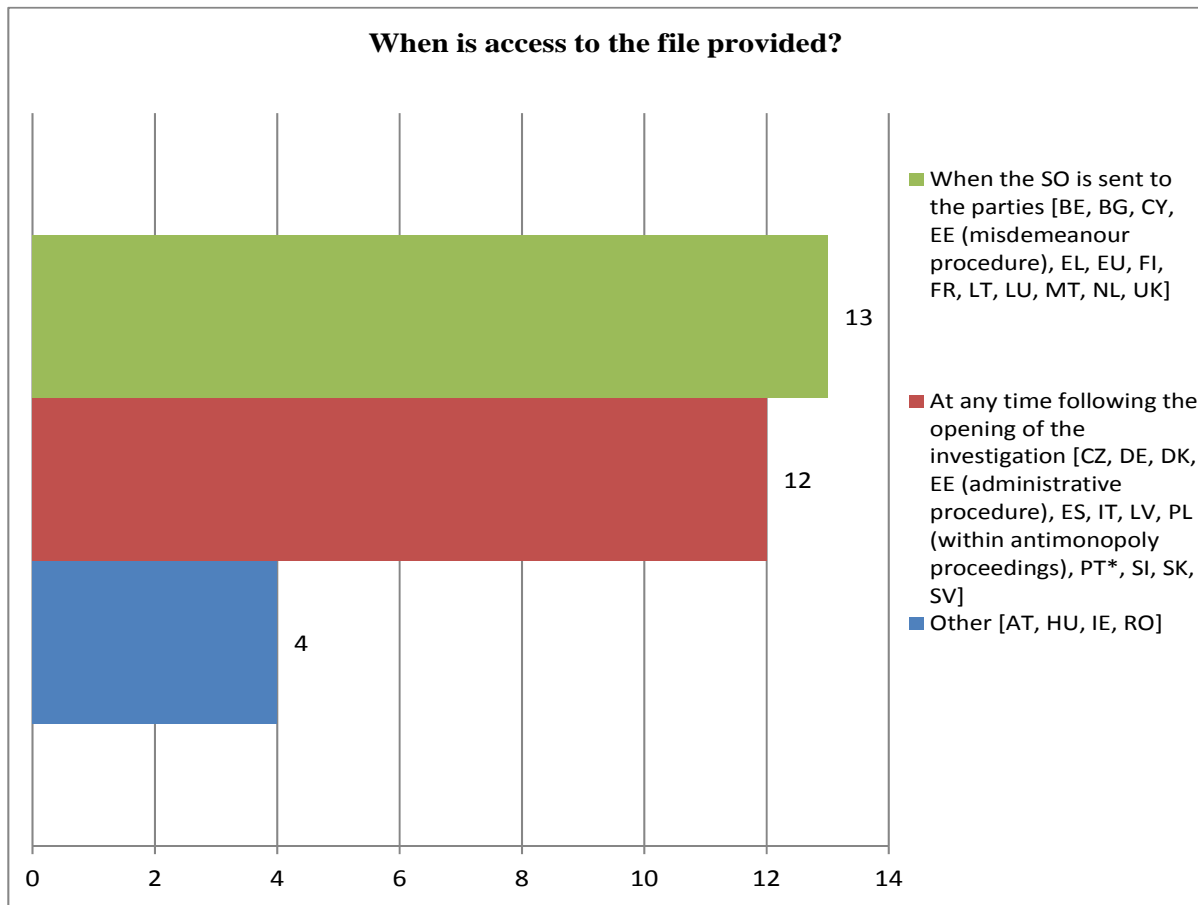
Similar to the **EU system**, all jurisdictions grant access to the file of a case.

Some authorities give access to the file: (i) at the opening of the investigation, (ii) after the SO or its equivalent has been sent to the parties or (iii) at some other point in time, e.g. in **AT** this is given as soon as the case is brought before the cartel court²¹¹, in **HU** it is granted once the investigation is complete²¹², and in **RO** parties have access after the transmission of the investigation report (equivalent to a SO) and before the date of the hearings. In **SV**, all documents issued or received by an authority are public and access must be granted upon request, to the extent information contained in such documents is not covered by secrecy rules (such as those related to business secrets or investigation secrecy). The parties generally have more extensive rights to access to file than third parties. The NCA has the obligation to grant access to file ex officio to the parties at the latest when the authority issues a SO.

²¹¹ Access is granted to the court's file. Third parties are granted access to the file only with the consent of the parties to the proceedings.

²¹² However, as an exception, in some cases access is given also before the completion of the investigation phase of the procedure – i.e. before the case handler's report which forms the basis for the preparation of the SO, would be final.

Graph 13



*In **PT**, access to file can be refused until the notification of the SO in cases where the proceedings are subject to secrecy of proceedings and whenever it considers that such access may harm the investigation.

4.2.5. Meetings with parties

In many jurisdictions, informal meetings with parties may be held (e.g. **AT**, **BE**²¹³, **BG**, **CZ**²¹⁴, **DE**²¹⁵, **DK**²¹⁶, **EL**, **ES**, **EU**, **FI**, **FR**, **IE**²¹⁷, **IT**, **LT**, **LU**, **LV**, **MT**, **NL**, **PL**, **RO**, **SI**, **SK**, **SV**, **UK**). In **EE**, in criminal and misdemeanour proceedings no informal meetings are foreseen and informal meetings with parties are not allowed in **HU**.

²¹³ In **BE**, once the SO (report) of the College of Competition Prosecutors is submitted to the Competition Council *sensu stricto*, all the meetings with the parties are formal and framed in the procedure of the chamber of the Competition Council (*sensu stricto*) hearing the case.

²¹⁴ Upon request of the parties.

²¹⁵ In **DE** a distinction is made between administrative and fines proceedings. In administrative proceedings informal meetings take place but this is not the general rule. Those meetings have to be distinguished from oral hearings. In fine proceedings informal meetings are regularly offered to the parties.

²¹⁶ Parties can always request a meeting with the case-team.

²¹⁷ The authority can summon witnesses to appear before it.

The following specificities have been noted:

- In **COM** proceedings, State of Play meetings are held at key points in the proceedings to inform the parties about the status of proceedings and to facilitate full and frank discussion. This does not preclude holding other discussions with the parties, complainants or third parties on substance or timing issues as appropriate, as well as so-called triangular meetings to hear two or more opposing views.²¹⁸
- In **EE**, informal hearings can be asked for in administrative proceedings.
- In **PL**, informal meetings may be held. However, due to a general rule that proceedings shall be conducted in a written form, the participants to informal meetings are asked to provide information in writing.
- In **UK**, the competition authority generally updates parties by phone or in writing. It will also offer each party under investigation separate opportunities to meet with representatives of the case team and the relevant decision-maker (or at least one of the three-person Case Decision Group post-SO) to ensure they are aware of the stage the investigation has reached and to facilitate discussions between the case team and each of the parties under investigation.²¹⁹ The competition authority may also meet with parties on other occasions where appropriate.

In terms of the documentation of meetings, in some jurisdictions, e.g. **BE** (meetings held by the College of Competition Prosecutors), **CZ**, **DE**²²⁰, **EE**²²¹, **FI**, **IT**, **LT**, **LV**²²² written minutes are normally required. In **COM** proceedings, a brief note will be prepared by the services and will be made accessible to the parties to the investigation. The parties, complainants or third parties are invited after meetings or substantive phone calls to substantiate their statements in writing²²³. In **SK**, minutes can be made which become then formal parts of the file. Otherwise, the undertaking can submit its expression in writing. In **CZ**, **EE** and **IT**²²⁴ the minutes are signed by the parties at the end of the meeting.

In **MT**, minutes are taken of formal meetings and documented in the relative file. In **SV**, formal meetings can be held during an investigation. The Swedish competition authority takes minutes which must be included in the file if they contain information which is relevant for

²¹⁸ Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C308, 20.10.2011, p.6 at paras 63-70.

²¹⁹ At these ‘State of Play’ meetings, the case team will also generally share their provisional thinking on a case. The **UK** competition authority offers a minimum of one meeting shortly prior to the SO being issued and one after written/oral representations, with a further meeting soon after opening of the case (unless this would prejudice the investigation).

²²⁰ In fine proceedings minutes may be used as evidence.

²²¹ Administrative proceedings.

²²² If it is a formal meeting.

²²³ Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C308, 20.10.2011, p.6 at paras 42-45.

²²⁴ They are formally part of the file of the case.

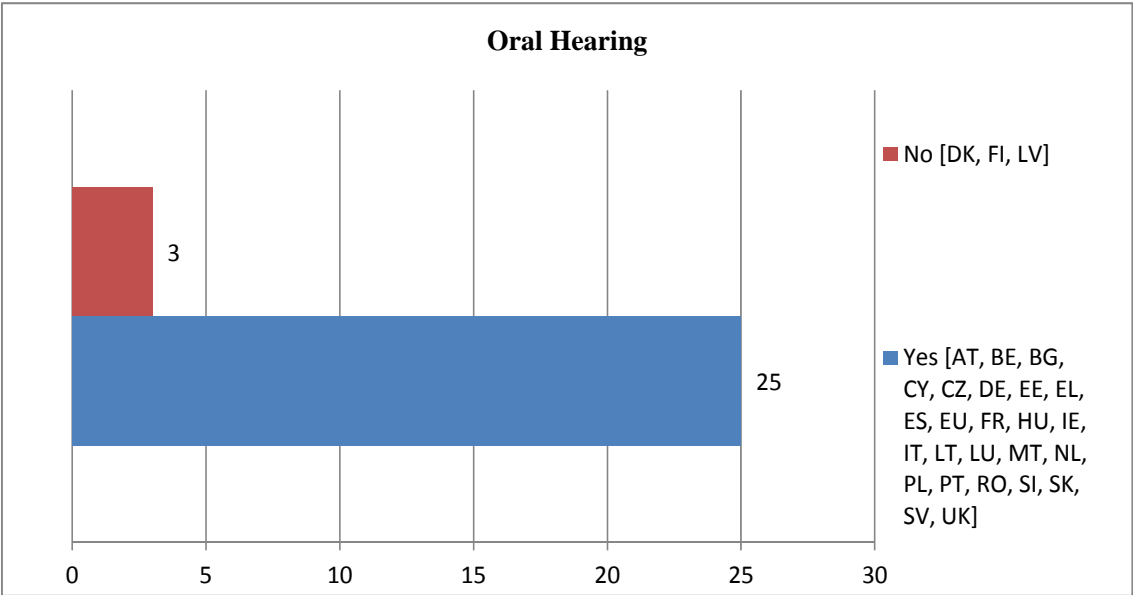
the investigation.

4.2.6. Oral hearing

All jurisdictions provide for the right to be heard orally in some form.

In most jurisdictions there is at least some form of oral hearing:

Graph 14



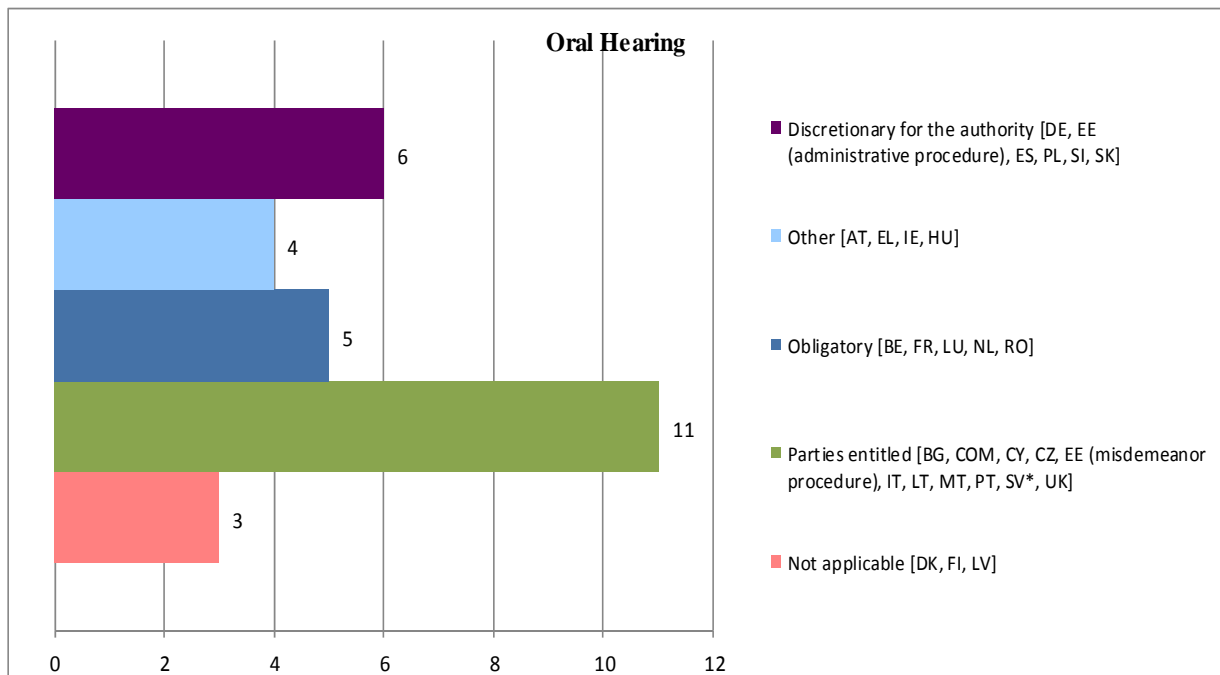
In **DK**²²⁵, **FI** and **LV**, there is no formal oral hearing as such but parties have the opportunity to make their view known orally.

In a few jurisdictions the oral hearing is obligatory for the authority²²⁶, in over one third of jurisdictions the parties are entitled to ask that a hearing be held and in several jurisdictions oral hearings are held at the discretion of the authority. In **EL** and **HU**, oral hearings may be held on request and/or as deemed necessary by the authority (**DE**, **EE** (administrative procedure), **ES**, **PL** (administrative hearing), **SI**, **SK**).

²²⁵ The parties have a right to give an oral presentation before the Competition Council prior to a decision being taken.

²²⁶ In the **NL**, strictly speaking an oral hearing is not obligatory. However, it is standard practice to provide for an oral hearing.

Graph 15



* There is no specific legal provision giving parties the right to an oral hearing in competition cases. In practice, the Swedish competition authority however always offers the parties the possibility of an oral hearing.

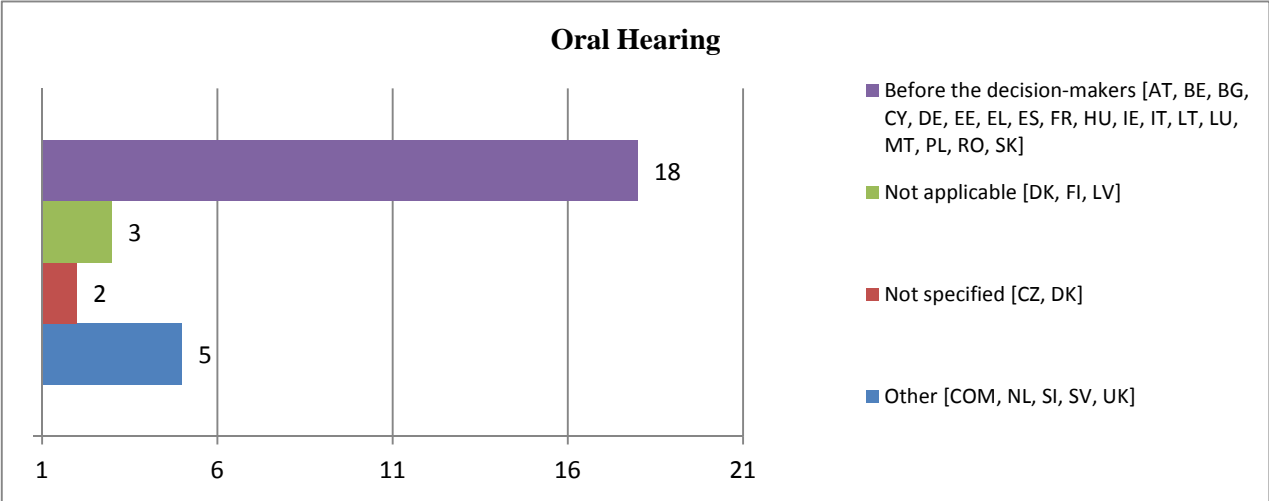
In more than half of the jurisdictions the oral hearing takes place before the decision making body which in **AT** means the Cartel Court and in **IE** means the national courts.

In several jurisdictions the oral hearing takes place by other means e.g. before a senior official who has not hitherto been involved in the case (e.g. **SV**). In **EU** proceedings, it takes place before the Hearing Officer who has the function of safeguarding the effective exercise of procedural rights throughout competition proceedings. In the **UK**, the oral hearing is chaired by the Procedural Adjudicator. The Case Decision Group members (who have been appointed after the issuance of the SO as the final decision-makers on whether or not the business(es) under investigation have infringed competition law) are also in attendance and may ask questions.

In the **NL**, the first oral hearing will take place at the premises of the competition authority before the case team of the Legal Department – the case team which prepares the decision for the Board of Directors (decision making body)²²⁷. In **SI**, the hearing is chaired by the case team.

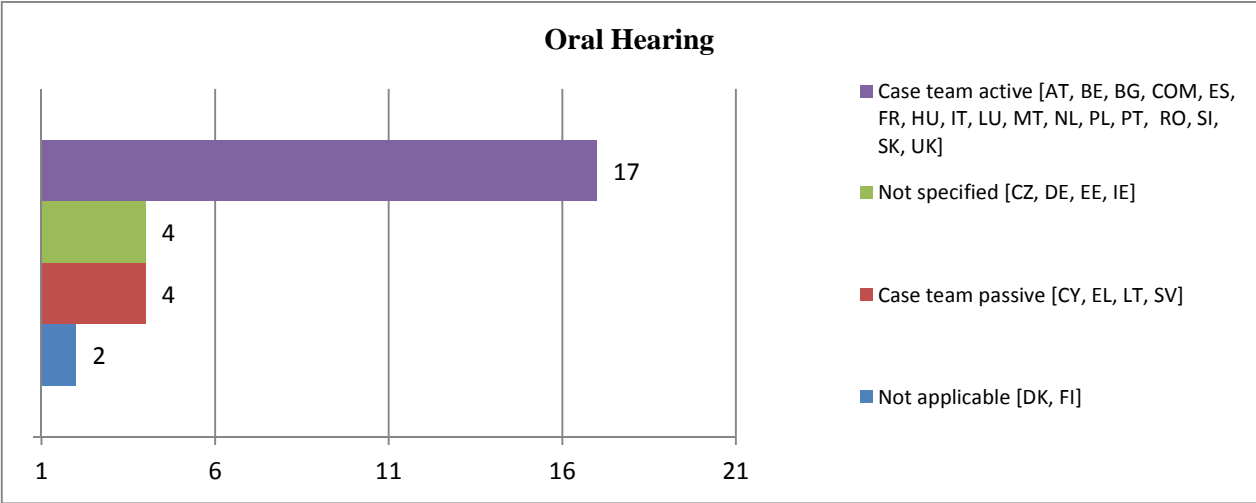
²²⁷ The Board of Directors is never in person involved in the oral hearing; the case team of the investigative phase (Competition Department) has a passive role at the hearing. If the parties appeal the decision (administrative appeal), the case is heard a second time, but this time before an independent Advisory Committee. Based on their findings during the oral hearing, the Advisory Committee then advises the competition authority on the decision to be taken.

Graph 16



In more than half of the jurisdictions the case team "actively"²²⁸ participates in the oral hearing whereas in a few jurisdictions it plays a passive role:

Graph 17



²²⁸ The use of the term "active" also encompasses the presentation of the case by the case team. In **FR**, although the case team presents its report before the parties and the decision-makers, it is allowed to intervene again only if the chairman of the board expressly invites them to do so. In the **NL**, the investigation case team has a passive role, whereas the case team that drafts the final decision (Legal Department) has an active role.

4.2.7. Other procedural steps leading to decision-making

The following specificities can be highlighted:

In some jurisdictions e.g. **BG** and **EL** the case may be sent back for an additional investigation with a mandatory instruction.

In the **UK**, where, having considered any written and oral representations made on the Statement of Objections, the Case Decision Group (appointed post-SO to be the final decision-makers on a case) is considering reaching an infringement decision and imposing a financial penalty on a party, the UK competition authority will give that party the opportunity to comment in writing and orally (at a separate oral hearing on issues of penalty alone) on a draft penalty statement before a final decision on infringement and the appropriate penalty is taken. The draft penalty statement will set out the key aspects relevant to the calculation of the penalty that the UK competition authority proposes to impose on that party, based on the information available to it at the time. The draft penalty statement does not constitute a provisional decision of the UK competition authority and is without prejudice to any decision subsequently reached by the UK authority as to whether there has been an infringement.

In some jurisdictions, e.g. **BE**, **FR** and **LU**, the last stage of the decision-making process is the deliberation by the Board on the case/ the chamber of the Competition Council (*sensu stricto*) hearing the case, in which the investigation service is not allowed to participate, nor can be present. In **EL**, the last stage of the decision-making process is the deliberation by the Board on the case, in which the investigation service participates only to provide explanations about the file.

4.2.8. Publication of decisions

Most jurisdictions provide for publication requirements.

Similar to the **EU system**, most competition authorities publish a non-confidential version in the official journal or equivalent of their respective jurisdictions (e.g. **BE**, **CY**, **EL**, **LV**, **NL**, **PL**, **SK**). Many competition authorities publish the non-confidential versions on their respective websites (e.g. **BE**, **BG**, **COM**, **CY**, **CZ**, **DE**²²⁹, **DK**, **EE**, **EL**, **ES**, **FI**, **FR**, **HU**²³⁰, **IE**²³¹, **IT**²³², **LT**, **LU**, **LV**, **MT**, **NL**, **PL**, **PT**, **RO**, **SI**, **SK**, **SV**, **UK**).

²²⁹ Case-summaries are published on the website. The full text in a non-confidential version of antitrust cases is also regularly published.

²³⁰ The Hungarian competition authority publishes the non-confidential versions of the decisions only on its website.

²³¹ If the authority feels that a decision is of public interest or raises a particularly interesting point of law, a decision note may be published.

²³² A non-confidential version is also published in the Journal of the Authority.

In **AT**, the competition authority has to inform the public about decisions taken by the Cartel Court and the Supreme Cartel Court. Important court decisions are published in a non-confidential version.

In **IE**, if the competition authority feels that a case that has not proceeded to court is of public interest or raises a particularly interesting point of law, a decision note may be published. Court decisions are usually published in the courts website.

In the **NL**, the competition authority is under a legal obligation to give access at its premises to all decisions imposing a fine for infringement of competition rules or imposing an order under penalty payments. This shall be done 5 working days after the decision or order is issued to the addressees.

Press releases may be published in most jurisdictions (e.g. **BE, BG, CY, CZ, DE, DK, EE**²³³, **EL, ES, EU, FI**²³⁴, **FR**²³⁵, **HU**²³⁶, **IT, LT, LV, MT, NL, PL**²³⁷, **PT, RO, SI, SK, SV, UK**).

4.3. Complaints/third parties

4.3.1. Formal complaints

A formal complaint is a complaint which needs to fulfil certain formal and/or substantive requirements, which may be combined with a requirement that the complainant has to show a legitimate interest.

Like in the **EU system**, the national procedural framework provides for formal complaints in most jurisdictions (e.g. **BE, BG, CY, CZ, EE, EL, ES, FR**²³⁸, **HU, IE, IT, LT, LU, LV, MT, NL, PL**²³⁹, **PT, RO, UK**).

There is no possibility to submit a formal complaint in e.g. **AT**²⁴⁰, **DE** and **SV**.

²³³ In cases of particular importance in administrative and misdemeanour proceedings.

²³⁴ In major cases.

²³⁵ Depending on the relevance of the case.

²³⁶ In important cases.

²³⁷ The most interesting decisions.

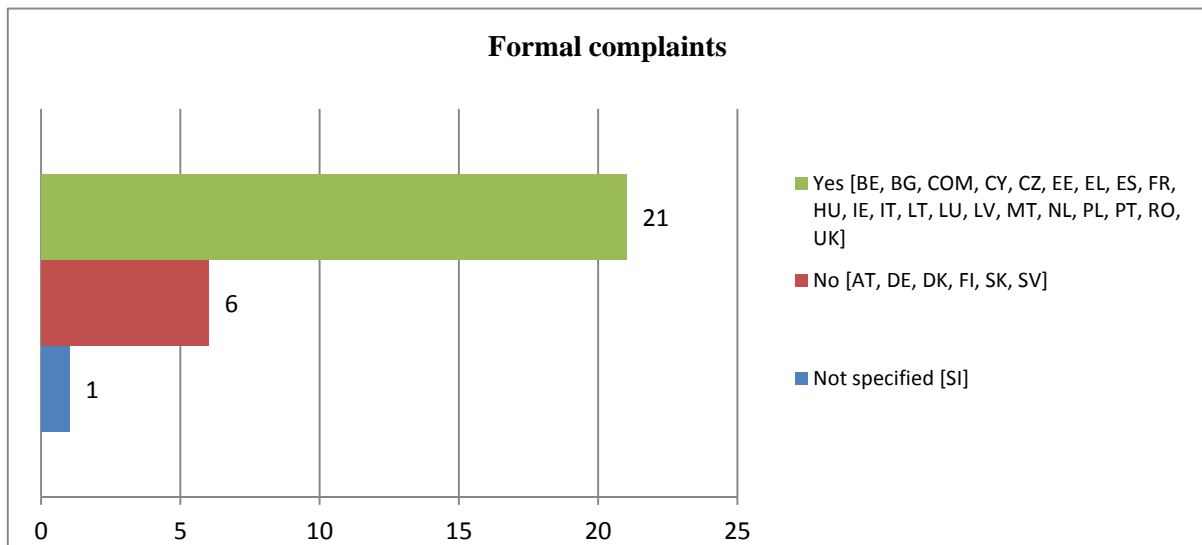
²³⁸ Only designated entities may submit such complaints.

²³⁹ Pursuant to Article 86.1 of the Act of 16 February 2007 on competition and consumer protection, “everybody may submit to the President of the Office a written notification concerning a suspicion that competition-restricting practices have been applied, together with a justification”. However, explanatory and antimonopoly proceedings can only be launched *ex officio*.

²⁴⁰ However, instead of filing a complaint to the competition authority, undertakings bearing a legitimate legal or economic interest may also file applications (except for the imposition of fines) to the Cartel Court, thereby acquiring full party status including the right to appeal decisions of the Cartel Court. Information in this section only refers to natural or legal persons complaining to the Competition Authority.

No distinctions are made between formal and informal complaints in e.g. **DK, FI** and **SK**.

Graph 18



4.3.2. Main features of the applicable procedure

Among the jurisdictions which allow formal complaints, more than half require that it be submitted in a written form (e.g. **BE, BG, CY, EL, FR, IE, HU, LT, LU, LV, MT, NL, PL, PT, RO, UK**). This is similar to **EU** proceedings where a written format is required. A model form has to be filled in some jurisdictions, e.g. **BE, BG, EL, EU, HU, NL, PT** and **RO**.

Complainants are notified about the admissibility of their complaint in e.g. **BE, CZ, EL, EU, HU²⁴¹, IT, LT, LU, PL²⁴²** and **RO**. In **BG** if the complaint fails to fulfil all the requirements, the complainant is informed about this and given 7 days to rectify the irregularities. If the complainant fails to rectify the irregularities within the time limit set in, the complaint shall not be examined by the competition authority. **LT** and **RO** have adopted a similar approach.

Similar to the **EU system**, legal provisions in some jurisdictions e.g. **BE, EL, FI, LT, NL, PT** and the **UK** provide for the possibility to reject a complaint due to different priorities or lack of resources. The same applies in **IE** and **SV**, although it is not expressly mentioned in the Competition Act. In **LV**, a complaint might be rejected because the infringement of

²⁴¹ The complainant may seek legal remedy against an order of the investigator that based on the data supplied by, or obtained in the procedure conducted on the basis of, the complaint that the conditions for the opening of an investigation are not fulfilled.

²⁴² This obligation is imposed on the President of the competition authority. Pursuant to Article 86.4 of the Act on Competition and Consumer Protection, "the President of the Office shall provide the notification submitter, within the time period specified in Articles 35 to 37 of the Act of 14 June 1960 – the Code of Administrative Procedure, with information in writing about the way of considering the notification together with its justification."

competition rules is considered minor and it lacks any substantial effect on competition. In several other jurisdictions (e.g. **CY, EE, FR, HU, IT**) complaints may not be rejected on such grounds. The competition authority is obliged to launch proceedings subsequently to the reception of the formal complaint, at least if it complies with minimum formal requirements, e.g. in **BG, EE**²⁴³, **FR** and **HU**²⁴⁴, whereas in e.g. **CY, CZ, EL, IT, LU, LV** and **PL**²⁴⁵ it is optional.

4.3.3. *Informal complaints*

All jurisdictions except for **CY, CZ, LT, MT, NL** and **RO** provide for the possibility to lodge informal complaints.

In **IE**, all complaints are treated formally, but in order to be considered, they need to be submitted in writing.

In some jurisdictions, such as **AT, BG, DE, EE, FI, HU, LU, SI** and **SV** investigations may be launched based on an informal complaint and a tip off might be the starting-point of investigating and intervening in cases of serious contraventions of the competition rules. In practice, however, most of such complaints do not give rise to proceedings.

In, for example, **BE, DK, EL, FR, LV** and **PL**, proceedings may not be instituted on the basis of informal complaints. However, the competition authority may act *ex officio* if the information provided by the complainant is sufficient to initiate proceedings.

4.3.4. *Rejection of complaints*

In contrast to Article 7 of Regulation 773/2004, there is no formal procedure for the rejection of complaints in e.g. **AT, CZ, DK, HU, PL**²⁴⁶ and **SI**.

²⁴³ Only in administrative proceedings.

²⁴⁴ But the obligation to deal with the case is subject to three consecutive conditions: i) the conduct or situation may violate the provisions of the Competition Act, ii) the competition authority has the power to proceed in the case, and iii) the proceeding is necessary to safeguard the public interest.

²⁴⁵ Pursuant to Article 86.4 of the Act on competition and consumer protection, "the President of the Office shall provide the notification submitter, within the time period specified in Articles 35 to 37 of the Act of 14 June 1960 – the Code of Administrative Procedure, with information in writing about the way of considering the notification together with its justification."

²⁴⁶ However, pursuant to Article 86.4 of the Act on competition and consumer protection, "the President of the Office shall provide the notification submitter, within the time period specified in Articles 35 to 37 of the Act of 14 June 1960 – the Code of Administrative Procedure, with information in writing about the way of considering the notification together with its justification."

A formal decision or an informal notification is communicated to the complainant in e.g. **AT, BE, CY, EE, EL²⁴⁷, EU, FR, IT, MT, LT, LU, LV, NL, PL, PT, RO, SV** and **UK**. In **SK** the complainant is informed about the rejection upon his/her request for further information.

In **BG** and **LT**, a complaint may be automatically rejected if the complainant does not correct it within a certain time limit.

In **DE** and **FI²⁴⁸**, complaints may be rejected by simple phone call or letter.

In **IE**, where all complaints are treated as formal complaints, they are assessed in three stages: simple closure, detailed evaluation and full investigation.

In several jurisdictions, complainants have the right to appeal the rejection decision in e.g. **BE, EE, EL, EU, FR, HU, IT, LU, LV, MT, NL, PT** and **RO**.

4.3.5. Formal status of complainants

Complainants have a formal status in proceedings in e.g. **BE, BG, CY, EE²⁴⁹, EL, ES, EU, FI, FR, IT, LT, LU, MT, NL** and **UK**. In **FI**, formal status is given to the complainant whose rights, interests or obligations are affected by the matter. In the **UK**, formal complaint status, in relation to an investigation, is given to any person who has submitted a written, reasoned complaint, who requests formal complainant status, and whose interests are, or are likely to be materially affected by the subject-matter of the complaint. Formal complainants have the opportunity to become involved at key stages of the investigation.

The complainant is considered, at least to some extent, as a party in e.g. **BG²⁵⁰, DE, EL, ES²⁵¹, FR, HU, LT, LU** and **LV**, whereas in e.g. **CZ, DK, EU, HU, MT, PL, PT, RO** and **SK** they are not considered as parties, but do have certain rights. In **HU**, *formal* complainants are considered as a party, but *informal* complainants are not although they do have certain rights. No formal status is granted in e.g. **AT, IE, SI** and **SV**.

²⁴⁷ In **EL**, a formal decision is communicated to the complainant.

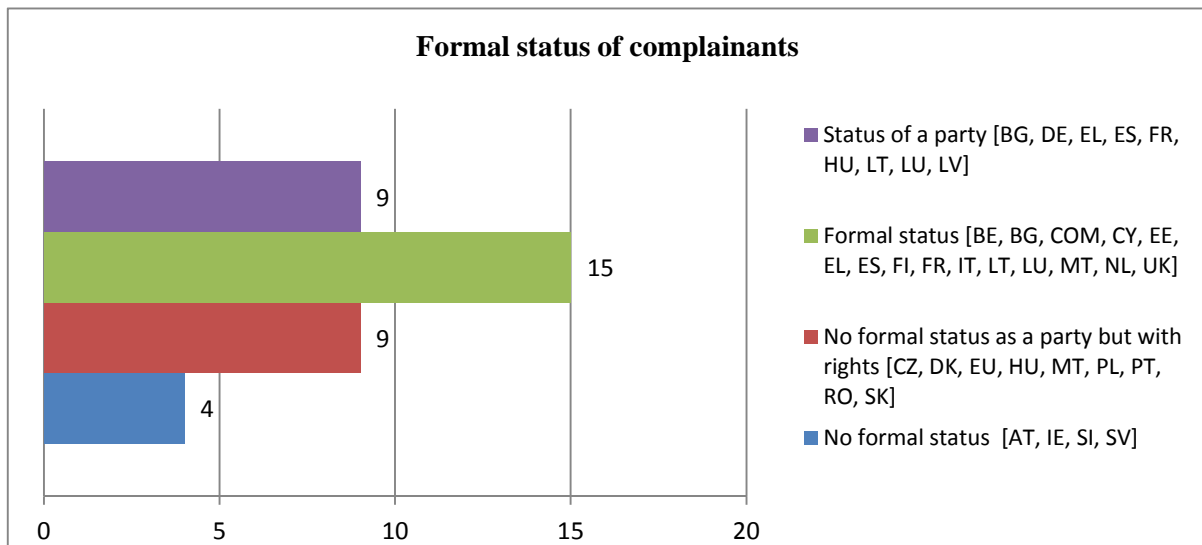
²⁴⁸ If prioritization requirements are met.

²⁴⁹ The complainant has a formal status in administrative proceedings. In criminal and misdemeanour proceedings, the complainant will enjoy procedural rights during the process if he/she is a victim of a particular offence.

²⁵⁰ In **BG**, the complainant has formal status as a party.

²⁵¹ If they are considered interested part of the procedure.

Graph 19



4.3.6. Rights of formal complainants

Similar to Article 6(1) of Regulation 773/2004, complainants receive the non-confidential version of the SO or its equivalent in several jurisdictions (e.g. **BG, CY, EL, ES, FR, IT, LT, LU, LV, MT, RO, UK**) and exceptionally in e.g. **BE, DK, EE, FI** and **NL**²⁵². In some jurisdictions e.g. **AT, CZ, HU, PL** and **PT** this is not allowed²⁵³.

In a majority of jurisdictions complainants may submit comments on the non-confidential SO or its equivalent (e.g. **BE, BG, CY, COM, EL, ES, FI, FR, IT, LT, LU, LV, MT, RO, UK**).

Similar to proceedings before **COM**, in e.g. **BE, BG, CY, DK, EE, EL, ES, FR, HU, IT, LT, LU, LV, MT, PL, RO** and **SK** complainants may take part in the oral proceedings. However, in e.g. **DK** and **EE** complainants have the right to be heard exceptionally. In e.g. **HU** and **PL** there is no formal right to participate in oral proceedings, while in the **EU** system, **LV** and **SK** it is only possible upon request. Complainants do not enjoy such right at all in e.g. **AT, CZ, NL, PT**²⁵⁴. In the **UK**, formal complainants and other third parties will generally not be invited to attend the parties' oral hearings.

In some jurisdictions, e.g. **IE** and **SV**, there are no procedural rights reserved for complainants.

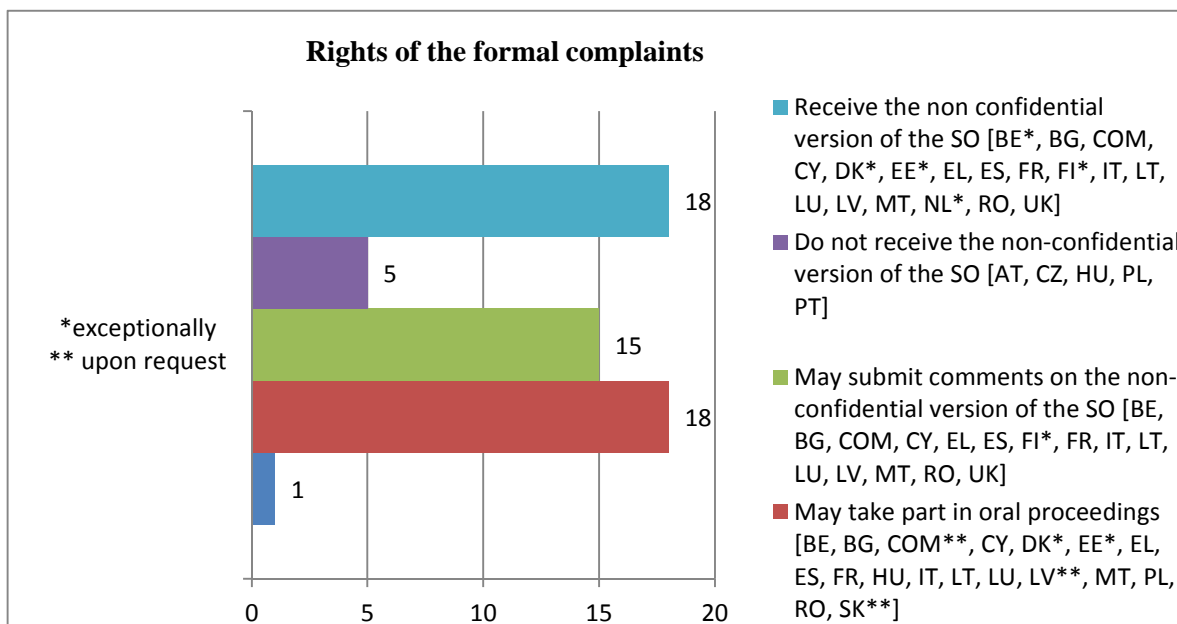
In the **NL**, complainants can lodge an administrative appeal to a sanctioning decision with the authority, and (only) then will they receive a non-confidential version of the file (dossier) and the report.

²⁵² Complainants may receive the non-confidential version of the case file only after having lodged an appeal against a decision imposing sanctions.

²⁵³ In **PT**, complainants may have access to file in the general terms foreseen in the law.

²⁵⁴ However, in **PT** a complainant may be heard by the competition authority during the investigation.

Graph 20

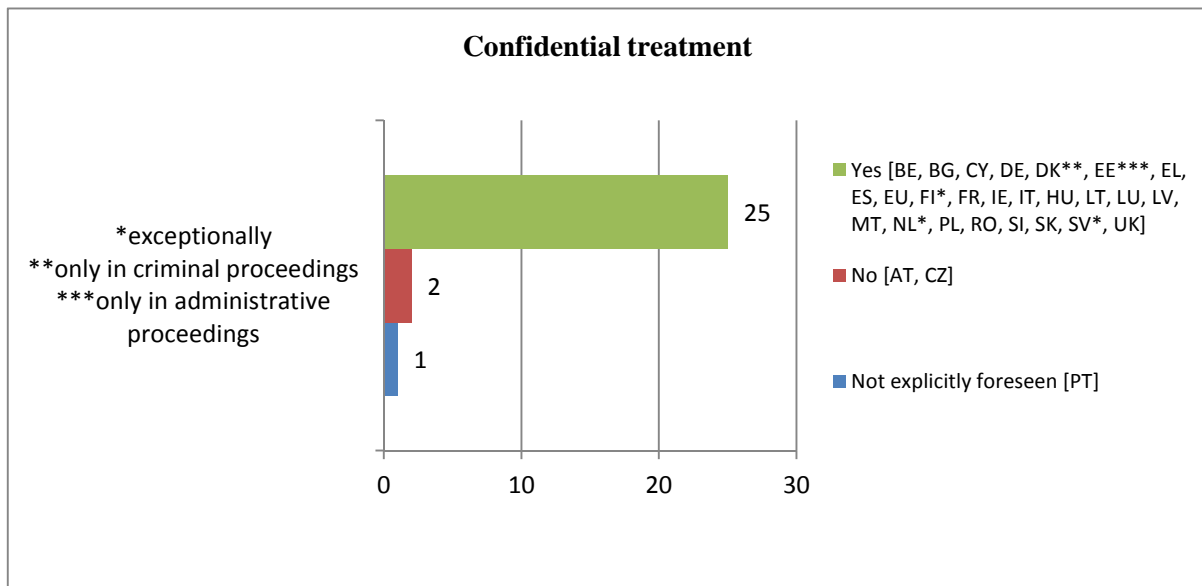


4.3.7. Confidential treatment

While the exact modalities may differ, complainants can be granted confidential treatment in the majority of jurisdictions (**BE, BG, CY, DE, DK, EE, EL, ES, EU, FR, IE, IT, HU, LT, LU, LV, MT, RO, SI, UK**) and only exceptionally in **FI, NL** and **SV**. In **DK** it is possible only in criminal proceedings, while in **EE** only in administrative proceedings. In **SK** and **PL**, this is not specified by law, but the competition authority is able to ensure confidential treatment of complainants' identity.

Complainants are not granted confidential treatment in **AT** and **CZ** and in **PT**, this is not explicitly foreseen.

Graph 21



4.3.8. Obligation to inform about initiation of commitment proceedings

Like the **EU system**, in most national jurisdictions there is no formal obligation to inform the complainant about the initiation of commitment proceedings (e.g. **AT, BE, CY, CZ, DE, DK, FI, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SK, SV**).

In **BG**, this obligation exists for the parties to the proceedings as well as to the interested third parties admitted to the proceedings.

In **FR**, the competition authority is required to inform complainants about the initiation of commitment proceedings.

4.3.9. Participation of third parties in proceedings

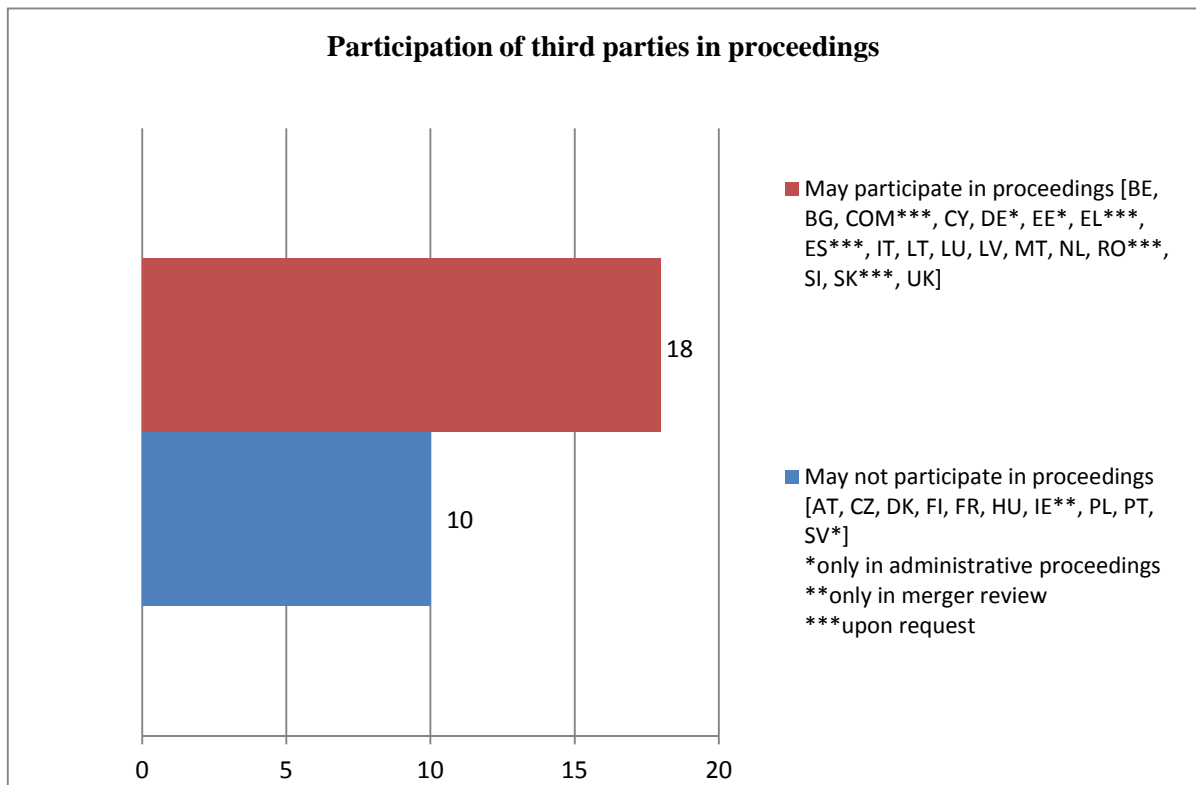
In most jurisdictions, third parties may, at least to some extent, participate in proceedings (**BE, BG, CY, DE, EE, EL, ES, EU, IT, LT, LU, LV, MT, NL, RO, SI, SK, UK**). In **DE** and **EE** it is possible only in administrative proceedings.

In **EL, ES, SI** and **SK**, such participation is allowed subsequently to a request formulated by the third party to be considered as an interested party in the procedure.

In several jurisdictions there is no such possibility (**AT, CZ, DK, FI, FR, IE, HU, PL, PT, SV²⁵⁵**).

²⁵⁵ Third parties may however intervene in court proceedings.

Graph 22



4.3.10. Criteria for third party participation

Among jurisdictions which allow third parties to participate in proceedings to a certain extent, most, like in the **EU system**, require the existence of a legitimate or sufficient interest (e.g. **BE, BG, CY, DE, EL, EE, ES, FI, IT, LT, LU, LV, MT²⁵⁶, NL, RO, SI, SK, UK**).

The following specificities exist:

- In **DE**, third parties may participate in administrative proceedings only.
- In **FI**, a third party with legitimate interest to participate in proceedings gains the status of party.
- In **RO**, such participation is possible only if the third party provides data relevant to the proceedings.
- In **AT, CZ, DK, FI, FR, HU, IE, PL, PT** and **SV**, third parties' participation in the proceedings is not guaranteed by law.

²⁵⁶ Although it is not specified in the relevant legal provisions.

4.3.11. *Third parties' rights*

Third parties receive the non-confidential version of the SO or its equivalent in several jurisdictions, e.g. **BE** (exceptionally in administrative proceedings), **BG**, **EE** (only in exceptional cases), **ES**, **IT**, **LT**, **LU**, **LV**, **RO** and **SI**.

In the **EU system**, admitted third parties are informed in writing about the nature and subject-matter of the procedure on which they may make their views known in writing.

In **HU** and **PT**, third parties may have certain rights of access to file foreseen by law.

In the **UK**, the competition authority may consider inviting interested third parties to comment on the SO. It will consult third parties who are, or are likely to be, materially affected by the alleged infringement, who request to be consulted, and who are likely materially to assist the competition authority in its investigation.

In, for example, **BE**, **BG**, **DE**, **DK**, **EE**, **EL**²⁵⁷, **ES**, **EU**, **FI**, **IE**, **IT**, **LT**, **LU**, **LV**, **MT**, **RO**, **SI**, **SK** and **SV** third parties may submit written and oral opinions. In **PL**, third parties are entitled to submit, in a written form, notifications concerning a suspicion that competition-restricting practices have been applied and, upon request of the President of the competition authority, are obliged to provide the explanations related to the essential circumstances of a given case.

Third parties have no rights in some jurisdictions such as **AT**.

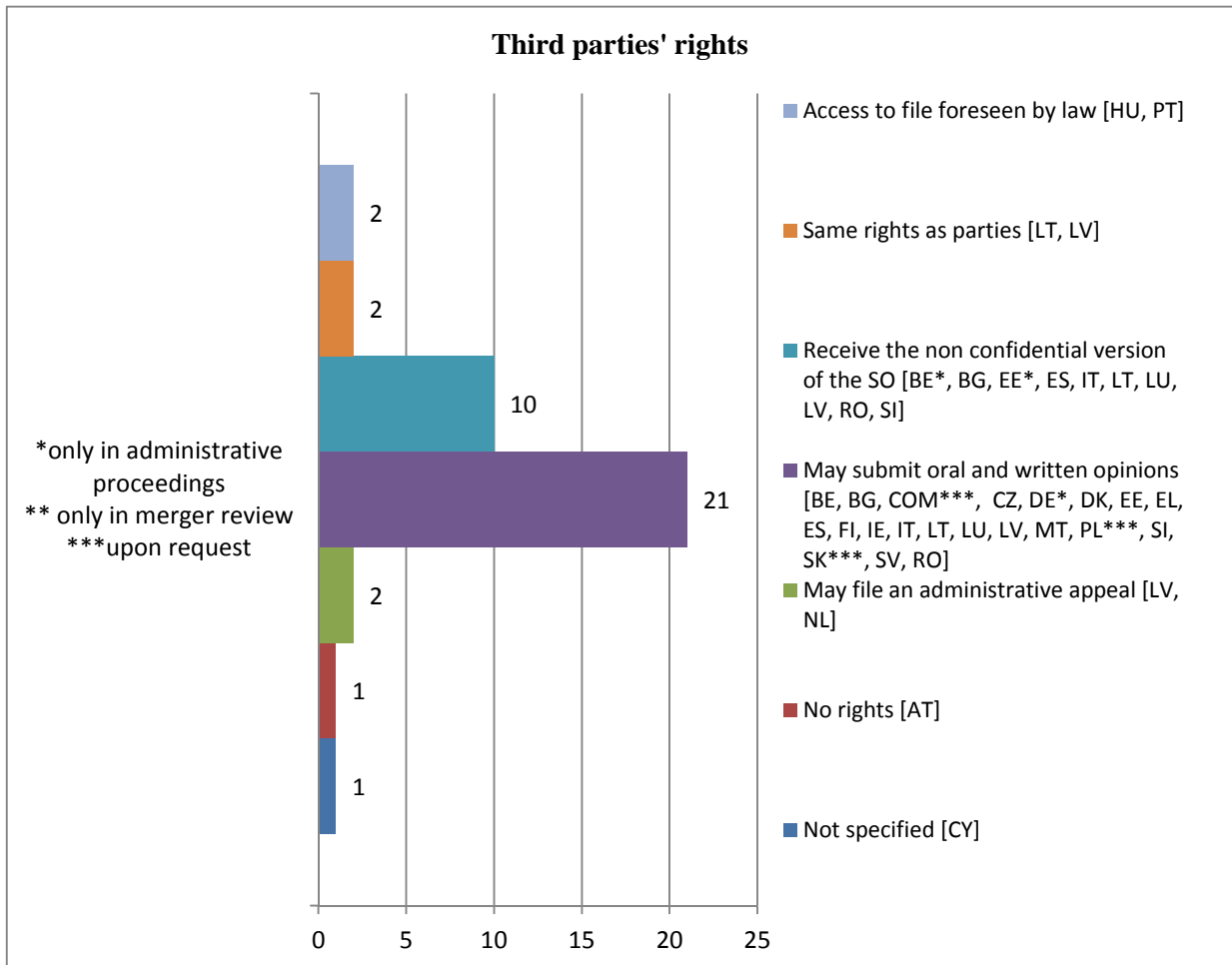
The following specificities exist:

- In **CZ**, third parties may submit written and oral submissions and are often consulted during market investigations of the competition authority. However, they have no rights regarding participation in the administrative proceedings or access to the file.
- In **DE**, third parties may participate only in administrative proceedings. Such participation is not possible in fine proceedings.
- In **DK**, third parties are often heard. This takes place based on a non-confidential copy of the draft decision. Third parties are also consulted when the competition authority carries out its market investigations, tests commitments etc.
- In **ES** and **IT**, third parties will enjoy the same rights as complainants, once they are recognized as interested parties.
- In **FI**, third parties with a legitimate interest are reserved an opportunity to express their opinion and to submit an explanation in this regard.
- In **FR**, third parties can be heard at the discretion of the competition authority.
- In **LT** and **LV**, third parties enjoy the same rights as parties to the proceedings.

²⁵⁷ In **EL**, third parties may submit only written opinions.

- In **MT**, third parties may submit written and oral opinions only if invited and where it is deemed necessary by the competition authority.
- In **SK**, third parties may submit written and oral opinions only upon request.
- In **SV**, third parties are able to make their arguments and offer evidence at any time during the investigation.
- Third parties in **LV** may file an administrative appeal.
- In the **NL**, interested third parties are able to file an administrative appeal only against a decision imposing a sanction and then have access to the file.

Graph 23



5. CONCLUSION

A significant degree of voluntary convergence of Member States' laws has been achieved to date. Basic elements of decision-making powers and procedures are present in all or in a very vast number of jurisdictions. For instance, the decision-making powers in terms of prohibition

decisions, commitment decisions, interim measures are very wide-spread. They are the main working tools of competition authorities while exemption and other 'positive' decisions play a more limited role. Moreover, procedural steps that are crucial in terms of safeguarding fair procedures (such as the right to be heard through a statement of objections or equivalent; access to file) are, in one form or another, present in all jurisdictions.

This demonstrates that national legislators have made clear efforts to make their procedures for the enforcement of Articles 101 and 102 TFEU more convergent. The trend to take account of developments elsewhere in the ECN is welcome. It has however not led to uniformity. Divergence subsists for a few fundamental questions such as whether competition authorities have the power to set priorities, as well as numerous aspects at a more detailed level, such as the criteria for adopting interim measures.

The question remains open to which extent a further harmonisation is desirable or needed, taking account of the cost involved. This Report can provide a basis for informed debate about the need for further procedural convergence within the ECN. The ECN will continue looking into this matter.

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