Comparative report: National judicial review of competition law enforcement in the EU and the UK

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This Chapter takes a bird's eye view, highlighting general trends and providing observations on the judicial review of competition law enforcement by national courts in the EU and the UK. Based on the data presented in the previous chapters of the book, we look at: (i) the structures of the national enforcement systems, (ii) the total number of judgments rendered

in each jurisdiction, the ratio of appeals, success rates and the outcome of judicial review, (iii) the types of appellants, (iv) the competition rules subject to review, (v) the grounds of review, (vi) the use of preliminary references, (vii) leniency and settlements in appeals, and (viii) the role of third parties. The chapter also (ix) points to the lack of publication of judgments in many of the EU Member States and outlines a plea for greater transparency as a precondition for effective and uniform protection of competition law throughout the internal market. Finally, it (x) concludes by submitting that the current system of judicial review of EU and national competition law enforcement by national courts does not fully match the integration aims of EU law in general, and Regulation 1/2003 in particular.

We offer some comparative insights about the impact and functioning of the administrative and judicial enforcement systems including the role of specialist and non-specialist courts, across the above features of judicial review. In addition, we point to some commonalities in the judicial review institutional context and practical experience in the Central and Eastern European (CEE) Member States.

Unless indicated otherwise, the figures herein capture the period covered by this study, that is, from the entry into force of Regulation 1/2003 on 1 May 2004 and 30 April 2021.

1. Structure of the National Enforcement Systems

The institutional design of competition law enforcement delineates the allocation of power between the body with primary jurisdiction over antitrust matters, on the one hand, and the reviewing courts or tribunals, on the other.[1] Yet, as was detailed in Chapter 1, EU law does not impose strict requirements on the institutional design of the NCAs or national courts. This section demonstrates that as a result, there is great divergence in terms of the institutional design of the NCAs (judicial or administrative model), the number of instances of appeal on the NCAs' decisions, the degree of specialisation of the reviewing courts in competition law matters, the standard and intensity of review, and the type of NCAs' decisions that could be subject to judicial review.

1 Javier Tapia and Santiago Montt. 'Judicial Scrutiny and Competition Authorities: The Institutional Limits of Antitrust' in Ioannis Lianos and Daniel Sokol (eds) The Global Limits of Competition Law (Stanford University Press, 2012), 141-157, 141.

1.1. Institutional Design of the NCAs (The Administrative/Judicial Models)

There are two main institutional models for competition law enforcement systems in the EU.[2] Under the *administrative model*, one (the monist administrative model) or two (the dualist administrative model) administrative authorities investigate competition law infringements and make enforcement decisions. Such administrative bodies normally also have the power to impose fines. According to the *judicial model*, by comparison, after the administrative authority investigates a case, it must introduce proceedings before a court or a tribunal (or refer it to a prosecutor who brings it to court). The court or tribunal rules on matters of substance and has the power to impose fines. Scholars have pointed to different benefits and shortcomings related to each model.[3] They suggest that the judicial model rates highly in terms of accountability, independence, and transparency of decision-making as the administrative authorities' enforcement actions are always scrutinised, finalised and made effective by court rulings. The judicial scrutiny stage is designed to ensure protection for the procedural due process rights of the investigated parties. Yet, this comes at the price of expertise, as courts are typically less specialised and knowledgeable in matters related to competition law enforcement in comparison with competition authorities.[4] This model also often entails a longer duration for infringement proceedings. By comparison, the administrative model ensures a higher level of expertise. It focuses on protecting the substantive correctness of the competition law analysis in complex and technical matters, but it may provide, to varying extents, a lower degree of accountability, transparency, and procedural efficiency.[5]

Figure 1 demonstrates that while most of the Member States of the EU and the UK have followed the administrative model, Austria, Finland, Ireland,[6] Malta, and Sweden (until its

2 European Competition Network, 'Decision-Making Powers Report' ECN Working Group Cooperation Issues and Due Process of 31 October 2012, available here: https://competition-policy.ec.europa.eu/document/download/b423e02b-d850-4c52-9dfa-95a4b5bcb3f7_en?filename=decision_making_powers_report_en.pdf, 5-3. Also see Michael J. Trebilcock and Edward M. Iacobucci 'Designing Competition Law Institutions' (2010) 25(3) World Competition 445.

3 Ibid., 460-464.

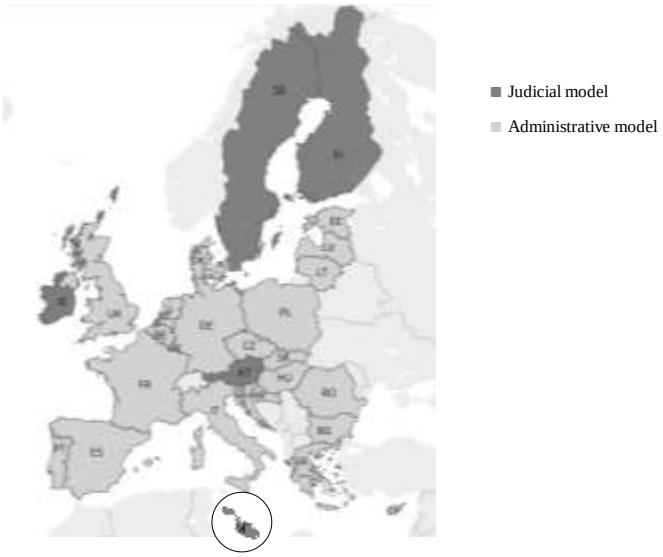
4 Ibid.

5 Ibid.

6 Following the cut-off date of the project, Ireland transformed its public enforcement structure. The Competition (Amendment) Act of 2022, introduces an administrative penalty mechanism for enforcing competition law.

2021 reform) had an institutional structure based on the judicial model during all or part of the period covered by this study.

Figure 1 Institutional Design of the NCAs



In some countries, including Belgium, Croatia, Denmark, Malta, and Sweden, there was a change in the enforcement model during the relevant period. Figure 1 thus refers to the situation at the end of the relevant period of this study (April 2021). Belgium, for example, shifted from a judicial enforcement to an administrative system in 2013, following the European Court of Justice's (ECJ) *Vebic* judgment.[7] While Croatia's enforcement framework is currently based on the administrative model, antitrust infringements were considered misdemeanour offences until 2009, meaning that the competition authority could only make findings of infringements, and the authority had to initiate separate proceedings in front of a misdemeanour court to impose a fine.[8] Until 2021, the Swedish NCA did not have the power to adopt infringement decisions or to impose fines, but rather had to bring an action before the Stockholm District Court (or after reforms, the Patent and Market Court). Nonetheless, it was transformed from a judicial to an administrative model as part of the transposition of the ECN+ Directive in 2021. As part of this reform, judicial review moved from a system involving

7 Belgium report, Chapter 4.
8 Ireland report, Chapter 16.

a single instance of appeal to two instances of appeal.[9] Between 2011 and 2019, Malta had embraced the administrative enforcement model but following domestic jurisprudence it switched to the judicial model.[10]

As elaborated in the national reports, each NCA's institutional structure may have particularities, which means that even those which belong to the same model can differ. Greece, Hungary, Latvia, and the Netherlands, for example, follow the administrative model, yet their enforcement processes can be characterised as *quasi*-judicial proceedings, involving a fully-fledged oral hearing before the adjudicatory body of the NCA. In the relevant period, Slovenia also separated the decision-making within the NCA but on a different basis. The Slovenian NCA's enforcement consisted of two types of proceedings: first, the NCA had to initiate an administrative procedure aimed at bringing to an end an infringement of the competition rules. In practice, only after this decision was final, could the NCA have opened a separate minor offence procedure, where fines can be levied. Each of the procedures was subject to different rules, involved different teams within the NCA, and was subject to different judicial review rules and procedures.[11] Croatia also followed a similar system, which was abandoned in 2009.[12]

Other systems differ even more significantly. Denmark currently has an administrative model, whereby public enforcement of competition law is the responsibility of the Danish Competition and Consumer Authority (DCCA) and the Competition Council (CC). However, for the main period covered by the study, it was a hybrid judicial/administrative model. The primary administrative tool was the power to stop an infringement by a formal decision, whereas the imposition of fines was a matter for the ordinary courts. This allocation of powers changed with the implementation of the ECN+ Directive and it is now for the CC to impose civil fines on companies whereas fines on individuals (and possible imprisonment) are initiated by the public prosecutor and imposed by the courts. A complicated enforcement system also characterises Estonia. While, in principle, Estonia follows an administrative enforcement model, in practice, enforcement is performed through an intricate combination

9 Sweden report, Chapter 29.
10 Malta report, Chapter 21.
11 Slovenia report, Chapter 27.
12 Croatia report, Chapter 6.

of four different types of procedures: criminal, misdemeanour, state supervision, and administrative procedures (in which no fines can be imposed, and in relation to which no actions were launched in the relevant project period). Estonia is currently, belatedly, transposing the ECN+ Directive by reforming its competition law enforcement framework to a fully administrative system.[13]

The choice of enforcement model is sometimes a matter of national constitutional law. In Ireland, for example, the Competition (Amendment) Act 1996 did not grant the administrative competition agency either competence to make determinations on substantive infringements of competition law or to impose fines. Instead, during the period covered by this study, the authority only had investigation powers and had to initiate an action before a court seeking either a declaration that particular conduct violated competition law and/or an injunction. This institutional design derives from an interpretation of the national constitution to the effect that justice must be administered by courts.[14]

1.2. Number of Instances of Appeal

1.2.1. Tiers of Review

Figure 2 presents the number of possible instances of appeal in competition law matters (as of April 2021). It demonstrates that in most competition law enforcement systems examined by this study (nineteen out of the twenty-eight), the NCAs' decisions are subject to two levels of appeal. This, in particular, is characteristic of many of the systems which have adopted the judicial model. In eight of the jurisdictions, three instances of appeals were available (in addition, Hungary provided three levels of appeals until 2020). The figure represents the appeal system as of April 2021.

13 Estonia report, Chapter 10.
14 Ireland report Chapter 16.

Figure 2 Tiers of Review

At one far end of the spectrum, Austria has a single instance of appeal. Adhering to the judicial model, a decision of the Cartel Court in Austria (the NCA in the meaning of Regulation 1/2003) can only be appealed before the Supreme Cartel Court on matters of law.

Other jurisdictions also have a limited number of appeal instances. In Croatia, there is normally a single-tier judicial review system, whereby an NCA decision may be challenged in 'administrative dispute' proceedings in front of the High Administrative Court, a review court for appeals in administrative matters. Yet, exceptionally, a request for an extraordinary review of the legality of a final judgment may be filed against such judgment before the Supreme Court (only a single judgment was recorded in the database in the relevant period).[15] There is also typically a single-tier judicial review system in Malta, whereby the decisions of the Civil Court (Commercial Section, acting as the NCA), can be appealed before the Court of Appeal alone. Nevertheless, the limited types of decisions that can be adopted directly by the Office for Competition in Malta (i.e., rejection of complaints and adoption of commitments),

15 Croatia report, Chapter 6.

are subject to two instances of appeal, before both the Civil Court (Commercial Section) and the Court of Appeal.[16]

This single-tiered review was more common in the EU in the past. Ireland used to have a single-tier judicial review until 2014, when a new appeal court was established.[17] In the relevant period of the study, Sweden could also be categorised as having a de facto one-instance appeal system: until 2016, decisions on infringements and fines could only be appealed to the Market Court. The 2016 reform, which introduced the Patent and Market Court of Appeal as the new first-instance review court, also provided it with discretion to allow a second-instance appeal to the Supreme Court.[18] Finally, until 2015, the Supreme Court in Cyprus would hear both first and second-instance appeals, albeit before different panels. The first-instance appeal would be examined by a single Justice panel, whereas second-instance appeals would be examined by a panel of three and subsequently five Justices. In 2015, a new first-instance Administrative Court was formed, and its decisions can be appealed to the Supreme Court.[19]

At the other end of the scale, in Denmark, there are potentially four instances of review. Any decision of the NCA can be appealed first to the Competition Appeal Tribunal, and from there to the ordinary courts: the Maritime and Commercial Court at second instance, and next to one of the two Danish High Courts or the Supreme Court.[20]

In some jurisdictions, the number of appeal instances depends on the type of NCA decision subject to an appeal. For example, although Finland generally has two instances of appeals, it has only one instance of appeal for the review of fines imposed by the Market Court.[21] In Slovenia, in the relevant period, administrative decisions of the NCA could have been reviewed in 'administrative dispute' proceedings before the Administrative Court and

16 Malta report, Chapter 21.

17 Ireland report Chapter 16.

18 Sweden report Chapter 29. Yet, there were no such appeals in the relevant period, and more generally, appeals involving administrative fines are generally scarce.

19 Cyprus report, Chapter 7.

20 The appeal system has changed in 2021, upon the implementation of the ECN+ Directive. When a case is appealed directly from the Maritime and Commercial Court to the Supreme Court, the Supreme Court must decide if the appeal should be heard by it, or rather referred to the High Court. If the case ends up in the High Court it can only be appealed further on to the Supreme Court, if permission is granted. See Denmark report, Chapter 9.

21 Finland report, Chapter 11.

thereafter the Supreme Court. Minor offence decisions, by comparison, could have been reviewed by the Local Court of Ljubljana, and thereafter by the High Court of Ljubljana, and some extraordinary remedies, which have considerable limitations in terms of scope and standing, could have been sought at a third instance appeal before the Supreme Court.[22]

In Spain, the Administrative Chamber of the National High Court is in most cases the only instance of appeal against the NCA's decisions. Nonetheless, second-instance appeals to the Administrative Chamber of the Supreme Court are available on limited grounds.[23]

The national reports indicated that a greater number of review instances leads to the lengthening of the procedure, particularly where a second- or third-instance appeal can be remitted back to a lower instance court (e.g., Spain).[24] This may also hinder deterrence, especially in systems where the fine for an infringement of the competition rules is not due until the appeal is final (e.g., Poland),[25] or is subject to initiation of a separate, consecutive procedure (e.g., Slovenia).[26]

1.2.2. Constitutional Review

Some countries have also adopted constitutional types of review, outside of the regular appeals system, focusing on the protection of fundamental rights and the rule of law. As elaborated in Chapter 2, the review of competition law decisions by constitutional courts was only included in the database of this study where the constitutional court examines appeals on the NCA's final decisions. The study does not cover constitutional complaints, alleging that the decision of the NCA or the judgments of the lower courts have violated human rights (e.g., in Croatia, Slovenia, and Spain). Such judgments were not included in the database but discussed within the national reports.

In Portugal, second-instance appeal judgments can be appealed to the Portuguese Constitutional Court if certain pre-requisites are met. This has been used very often, whereby 27% of the judgments in the relevant period were Constitutional Court judgments.[27] In Malta,

22 Slovenia report, Chapter 27. The review system has changed in 2023, as detailed in the report.
23 Spain report, Chapter 28.
24 Ibid.
25 Poland report, Chapter 23.
26 Slovenia report, Chapter 27.
27 Portugal report, Chapter 24.

while constitutional proceedings may be instituted where the parties believe that there has been a breach of their fundamental rights during the infringement procedure, this was used only in a single case following an NCA decision.[28]

1.2.3. Internal Review

Our study also highlights that in some jurisdictions, an NCA internal appeal-like review process must be completed before an appeal can be submitted to a court. In the Czech Republic, for example, decisions by the Vice-Chairman of the UOHS (known as the NCA's 'first instance decisions') may be appealed to the Chairman of UOHS by the parties to the proceedings. The Chairman has full jurisdiction to confirm, annul, or return any such decision to the Vice-Chairman for further investigation or to amend the decision. Only this 'second instance decision' of the Chairman is subject to potentially three instances of appeal before the courts.[29] Similarly, in Slovakia, the Council of the PMÚ, which is chaired by the President of the PMÚ, acts as a collective appellate body to review any decisions of the PMÚ that are signed by the Vice-President. In contrast with the Czech system, however, decisions by the PMÚ and the Council are considered a single administrative procedure that is subject to review by the courts.[30]

In the Netherlands, an undertaking must lodge an objection with the NCA and request the decision to be reconsidered before submitting a subsequent appeal to the courts. The NCA must review and reconsider its decision in its entirety in light of the undertaking's objections, which may relate to all aspects of the decision. The NCA then has full discretion to uphold, modify or withdraw its decision. Only at that stage is an appeal available to the courts. This type of procedure is common in other types of administrative law enforcement in the Netherlands and is designed as a procedure to solve disputes between citizens and the government, to avoid lengthy, formal legal proceedings before the administrative courts.[31]

28 Malta report, Chapter 21.
29 Czech Republic report, Chapter 8.
30 Slovakia report, Chapter 26.
31 The Netherlands report, Chapter 22.

1.3. Degree of Specialisation

The existence, composition and functions allocated to a specialist competition court or tribunal are major factors in the institutional design of a legal system to deal with competition litigation, and there has been a proliferation of specialist competition courts and tribunals across jurisdictions worldwide over the last twenty-five years.[32] The main potential advantage of a specialist judicial body is that it may lead to better decision-making due to a greater appreciation of the complexities of the case law arising from its specialist knowledge and experience, resulting in more informed opinions.[33] Nonetheless, as *Roth* has stressed, the degree of specialisation required is partly dependent on the role and functions to be performed by the particular court or tribunal. Roth has suggested various additional advantages which may arise from the creation of a specialist court: it may assist in the process of judicial training; it can adapt its processes and procedures to the specialist context; and it may be afforded a greater degree of deference by appeal courts.[34]

During the negotiations leading to the adoption of Regulation 1/2003, many stakeholders called for harmonised rules on the degree of specialisation of the relevant national appeal courts. The European Parliament,[35] its Committee of Economic and Monetary Affairs,[36] and the Economic and Social Committee,[37] for example, suggested that appeals against NCAs'

32 See Barry Rodger, 'Introduction' in Barry Rodger (ed.), Landmark Cases in Competition Law: Around the World in Fourteen Stories (Kluwer Law International, 2011), 17; Despoina Mantzari, Courts, Regulators, and the Scrutiny of Economic Evidence (OUP 2022), 141.

33 D.S. Savrin 'Specialized Antitrust Courts: A Practitioner's Observations', Chapter 8, 116-117; P. Roth 'Specialized Antitrust Courts', Chapter 7, 105, both in B. Hawk (ed.), Annual Proceedings of the Fordham Competition Law Institute (Fordham Competition Law Institute, 2013). See also J. Rakoff, 'Lecture: Are Federal Judges Competent? Dilettantes in an Age of Economic Expertise', (2012) 17 Fordham Journal of Corporate and Financial law 4, 6; Michael R. Baye and Joshua D. Wright, 'Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals' (2011) Journal of Law & Economics, 54/1, 1-24.

34 See D. Bailey, 'Early Case-Law of the Competition Appeal Tribunal', in B. Rodger (ed.), Ten Years of UK Competition Law Reform (DUP, 2010), Ch. 2.

35 European Parliament resolution on the Commission White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty (COM(1999) 101 – C5-0105/1999-1999/2108(COS)) of 18 January 2000, para. 18.

36 Committee on Economic and Monetary Affairs, Report on the proposal for a Council regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No. 1017/68, (EEC) No. 2988/74, (EEC) No. 4056/86 and (EEC) No. 3975/87 (COM(2000) 582 ñ C5-0527/2000 ñ 2000/0243(CNS)) A5-0229/2001, 25-26.

37 Opinion of the Economic and Social Committee on the 'White Paper on modernisation of the rules implementing Articles 81 and 82 of the EC Treaty – Commission programme No 99/027' (2000/C 51/15), para. 2.3.2.8.

decisions should only be heard by specialised courts dealing solely with competition law matters, or at least by special sections within a generalist court, to ensure consistency and legal certainty in the application of EU competition law.[38] Yet, these proposals were not adopted. Provisions on the nature of national courts were absent from Regulation 1/2003 and, consequently, a considerable degree of divergence in the extent of specialisation in the national courts persists.

Nonetheless, our study has confirmed that the classification of a reviewing court as a generalist or as a competition law specialist body is not binary, but rather a matter of degree. The range of legal systems studied demonstrate a wide variance in terms of the degree of specialisation, *de jure* and *de facto*, of the different instance appeal courts. Some systems have no specialist courts or panels at all; some systems have created panels within a generalist court, and in others, legislation has established a single first-instance specialist court or tribunal, with an onward appeal to generalist courts. *Tapia* and *Montt* suggested that *s*pecialisation is a comprehensive concept composed of three parts (according to which a generalist court would lack one or more components):[39] the judicial level of knowledge in the specific substantive area subject to consideration and judgments (competition law); the courts' experience, that is the accumulation of knowledge and skills over a sufficiently large number of decisions; and the object-specificity of the court, namely the choice of the legislature to establish a specialist court aimed at protecting the specific public policy. These authors also noted that the scope of judicial scrutiny would match the institutional characteristics of the reviewing body, namely, that non-specialist courts should pay greater deference to the NCAs' decisions on questions of policy, facts, and law.[40]

In some Member States, the courts are not specialised at all (e.g., Ireland, Croatia, Czech Republic, Hungary, and Greece). Other national courts are 'hyper-specialised' appeal bodies, with wide competence to confirm, set aside, vary or remit the NCA's decision, and make any other decision that the competition authority could have made (e.g., the Competition Appeals Tribunals in the UK and Denmark).[41]

38 Also see DG COMP, White Paper on the Reform of Regulation 17-Summary of the Observations, 29 February 2000, para. 5.2.
39 Tapia and Montt (supra n. 1), 143.
40 Ibid., 144.
41 The UK report, Chapter 30; Denmark report, Chapter 9.

Courts which examine several areas in addition to competition law, reflect a medium level of specialisation. The Market Court in Finland is a specialist court that hears market law cases, competition cases and public procurement cases as well as cases regarding energy market regulation. There are also part-time expert members who participate in the consideration, *inter alia*, of competition cases. A part-time competition expert is added to the panel in the most significant cases. The Market Court annually decides on only a handful of competition law cases (normally one to three cases).[42]

Some Member States have a specialised chamber within a generalist court. In France, for example, a specialised chamber of four professional judges (as of January 2023), within the Paris Court of Appeal, rules on appeals against the NCA's decisions.[43] The only instance of appeal in Austria is to the Supreme Cartel Court, which is a specialised senate at the Supreme Court. The Supreme Cartel Court sits in panels of five judges, of which three must be professional judges and two must be expert lay judges.[44] In Belgium, specialisation has been enhanced since 2016, upon the establishment of a special section within the Brussels Court of Appeal, having exclusive power to hear appeals in competition cases at first instance.[45]

In some countries, only the first instance court is specialised in competition law matters (e.g., Poland and the UK), while in the Netherlands, both the first instance Rotterdam District Court and the second instance Trade and Industry Appeals Tribunal are specialist courts, having exclusive competence to review the public enforcement of competition law. Their expertise is not only tied to their exclusive competence but also develops because only a limited number of judges and legal court assistants in each of the two courts deal with competition law cases. When needed, substitute judges (e.g., academics) may be called on because of their special expertise within the field. The two-tiered system of judicial expertise was justified by the Dutch legislator given the specific expertise needed to engage in economic notions when applying the rules.[46] Similarly, in Sweden, the Patent and Market

42 Finland report, Chapter 11.
43 France report, Chapter 12.
44 Austria report, Chapter 3. In the case of the need for a reinforced senate, the panel consists of seven professional judges and two expert lay judges. Judges serve both the panel on competition law matters (Supreme Cartel Court) as well as several panels dealing with other legal issues, meaning that their expertise is not exclusively focused on competition law
45 Belgium report, Chapter 4.
46 The Netherlands report, Chapter 22.

Court is a specialist court, composed of legally trained judges, lay judges, and economic experts. The court has the discretion not to include economic experts when it believes the case does not involve complex economic questions. Following the shift to a two-tier appeal system in 2021, both the first and second-instance appeals in Sweden are dealt with by specialist courts.[47]

Some of the national reports revealed a gap between formal and *de facto* specialisation. In Poland, the Court of Competition and Consumer Protection, the first instance court, has exclusive competence to deal with competition law matters. However, scholars have critiqued the level of competition law competence and knowledge of some of the judges, arguing that competition law expertise has rarely been evidenced in practice and depends on the particular judge.[48] Similarly, in Portugal, judges appointed to the Competition, Regulation, and Supervision Court do not have any prior knowledge or experience in competition law. This, together with the high turnover of judges, results in a lower level of specialisation in practice.[49]

A degree of specialisation can be achieved de facto by having a single court hearing competition law matters. In Italy, only the Regional Administrative Tribunal of Rome can hear appeals concerning decisions of the NCA. While it is not a body specialised in competition law matters, entrusting competence to hear appeals to a single Regional Administrative Tribunal is justified by the need to ensure coherence and uniformity in the judicial review of the competition rules.[50] Similarly, in Spain, first-instance appeals are heard by magistrates serving in the Administrative Chamber of the National High Court, reflecting the assumption that specialisation in competition law will be acquired through the repeated performance of their work in the matters allocated to them.

Likewise, in Romania, there is no competition law specialisation and all judges receive the same training. However, inherent *de facto* specialisation occurs since competition law cases have been exclusively assigned to a limited number of judges.[51] In Greece, a 2011 Law calling

47 Sweden report, Chapter 29.
48 Poland report, Chapter 23.
49 Portugal report, Chapter 24.
50 Italy report, Chapter 17.
51 Romania report, Chapter 25. This is also the case for Croatia, as detailed in the national report (see Chapter 6).

for the creation of specialised competition law chambers within the first-instance court has yet to be implemented, presumably in view of the low number of cases per year and most importantly the generalist character of the Greek Courts.[52]

In Germany, appeals against decisions of the NCA are examined by OLG Düsseldorf. Competition law-related appeals are concentrated in specialised cartel senates, with approximately fifteen judges dealing with competition law. Those judges do not necessarily have specific competition law expertise when starting their assignment, yet as they usually stay in the cartel senates for a long time, most judges become highly competent and experienced in evaluating and applying competition law. The same is true for the second-instance appeal. The Bundesgerichtshof has a specialised senate for competition law, the Cartel Senate, with around eight professional judges.[53]

Some scholars have suggested that specialist courts create incentives to enhance the scope of judicial discretion and show less deference to the NCA's assessment, leading such courts to revisit all aspects of the reviewed decision. According to this argument, since specialist courts determine competition law disputes on a continuous basis, they are likely to feel more confident in their own capabilities when dealing with topics that in principle would appear to fall within the exclusive specialist remit of competition authorities – and hence they may be open to review technically complex matters.[54]

The degree of specialisation of the first instance court might also inform the scope of subsequent judicial review. The non-specialised second-instance Court of Appeal in the UK, for instance, noted that it would afford deference to first-instance judgments by the Competition Appeal Tribunal given the latter's particular level of specialisation in competition law matters.[55]

Given the heterogeneity of the national judicial systems and the degree and nature of their specialisation, testing the hypothesis regarding the more intrusive role of specialist courts is not an easy task. Defining a more detailed metric for specialisation might be necessary. The empirical data on the success rates of first-instance courts presented in section 2.3 below, do

52 Greece report, Chapter 14. In practice, competition law cases are normally assigned to specific chambers, which allows for a certain degree of specialisation.
53 Germany report, Chapter 13.
54 Tapia and Montt (supra n. 1), 144. Also see discussion in Mantzari (supra n. 32), 141.
55 The UK Report, Chapter 30.

not point to a strong correlation between the degree of specialisation and the success rates of appeals. While some highly specialist courts have often interfered in the NCA's judgment (e.g., in the UK and Poland), others have shown considerably greater deference (e.g., Denmark). Similarly, while some non-specialist courts have mostly confirmed the decisions of the NCA (e.g., Hungary and Croatia), others have often overturned the decisions of their NCAs (e.g., Ireland, Greece). Hence, other characteristics of both the NCA enforcement framework and judicial review system beyond the degree of court specialisation appear to have a greater influence on the issue of deference to NCA decisions.[56]

1.4. Standard and Intensity of Review

The concepts of the standard and intensity of review refer to the depth of investigation performed by an appeal court.

Each legal system has a different scope for review that is set by statute or precedent, making provision for the grounds for review, and the extent to which this may involve questions of law, fact, and/or procedure.[57] First-instance courts in almost all the examined countries were competent to exercise full review of matters relating to both facts and law. There are two notable exceptions. First, the single-instance Supreme Cartel Court in Austria may only review the Cartel Court's decisions on questions of law. While since 2017, appeals can also be launched where the files raise significant doubt as to the correctness of the relevant facts upon which the Cartel Court based its decision, such appeals are limited to exceptional cases.[58] Second, the Administrative Court in Cyprus exercises only marginal review of administrative decisions, limited to testing their legality.[59]

Our study also discussed matters of intensity of review. Commentators use different terminology to describe the degree of intensity of review and the scope of judicial deference accorded by courts to the NCAs' decisions. However, most agree that intensity of review is a

56 For a discussion of that wider context, see, for example, Maciej Bernatt, 'Transatlantic Perspective on Judicial Deference in Administrative Law', (2016) 22(2) Columbia Journal of European Law 275-325, 279; Annalies Outhuijse, 'The Effective Public Enforcement of the Prohibition of Anti-competitive Agreements: Which Factors Influence the High Percentage of Annulments of Dutch Cartel Fines?' (2020) 8(1) Journal of Antitrust Enforcement 124 DOI: 10.1093/jaenfo/jnz020.

57 Tapia and Montt (supra n. 1), 144.

58 Austria report, Chapter 3.

59 Cyprus report, Chapter 7.

spectrum of control ranging from a more lenient test of whether an authority could have lawfully and reasonably arrived at a particular decision, to an intensive 'on the merits' review, including questions as to whether the decision was correct and appropriate in the specific case.[60] In Cyprus, although review of fines does not exist and review on substance is limited by law, the courts vigorously scrutinised the NCA's decisions on matters of procedure.[61] In Poland, the courts do not afford the NCA a noticeable margin of appreciation with respect to complex economic assessments.[62]

Our project also confirms that the intensity of review has sometimes evolved through judicial practice, rather than by law reform. In Italy, for example, whereas the court of first instance had historically taken a limited review approach, the Council of State held that administrative judges have the power to exercise an in-depth, full, and effective review, including on complex economic matters. This transformation was inspired both by the jurisprudence of the European Court of Human Rights (ECtHR) and the powers of EU Courts in competition law matters.[63] On the flipside, while the reviewing courts in Croatia and Romania have the legal power to undertake a full review of the NCA's decision, in practice, they have been reluctant to exert their powers.[64]

1.5. The Types of NCA Decisions Subject to Review

EU law does not precisely prescribe which types of NCAs' decisions could be subject to judicial review. While infringement decisions imposing sanctions are subject to judicial review in all

60 Tom Zwart, 'The Scope of Review of Administrative Action from a Comparative Perspective' in Oda Essens et al. (eds) National Courts and the Standard of Review in Competition Law and Economic Regulation (Europa Law Publishing 2009) 23; Cosmo Graham, 'Judicial Review of the Decisions of the Competition Authorities and the Economic Regulators in the UK' in Oda Essens et al., National Courts and the Standard of Review in Competition Law and Economic Regulation (Europa Law Publishing 2009). On the intensity of review also see Dubravka Aksamovic, 'Judicial Review in Competition Cases in Croatia and Comparative Jurisdictions' (2017) 67 Zbornik PFZ 405, 437; Damien Geradin and Nicolas Petit. 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment' in Massimo Merola and Jacques Derenne (eds), The Role of the Court of Justice of the European Union in Competition Law Cases (Bruylant 2012); Bo Vesterdorf, 'Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement' (2005) 1 Global Competition Policy 3-27, 9; Ioannis Lianos et al., 'Judicial Scrutiny of Financial Penalties in Competition Law: A Comparative Perspective', CLES Research Paper 3 (2014), available at: https://research.vu.nl/ws/portalfiles/portal/1244324/CLES2014%282%29.pdf; Bernatt (supra n. 56).

61 Cyprus report, Chapter 7.

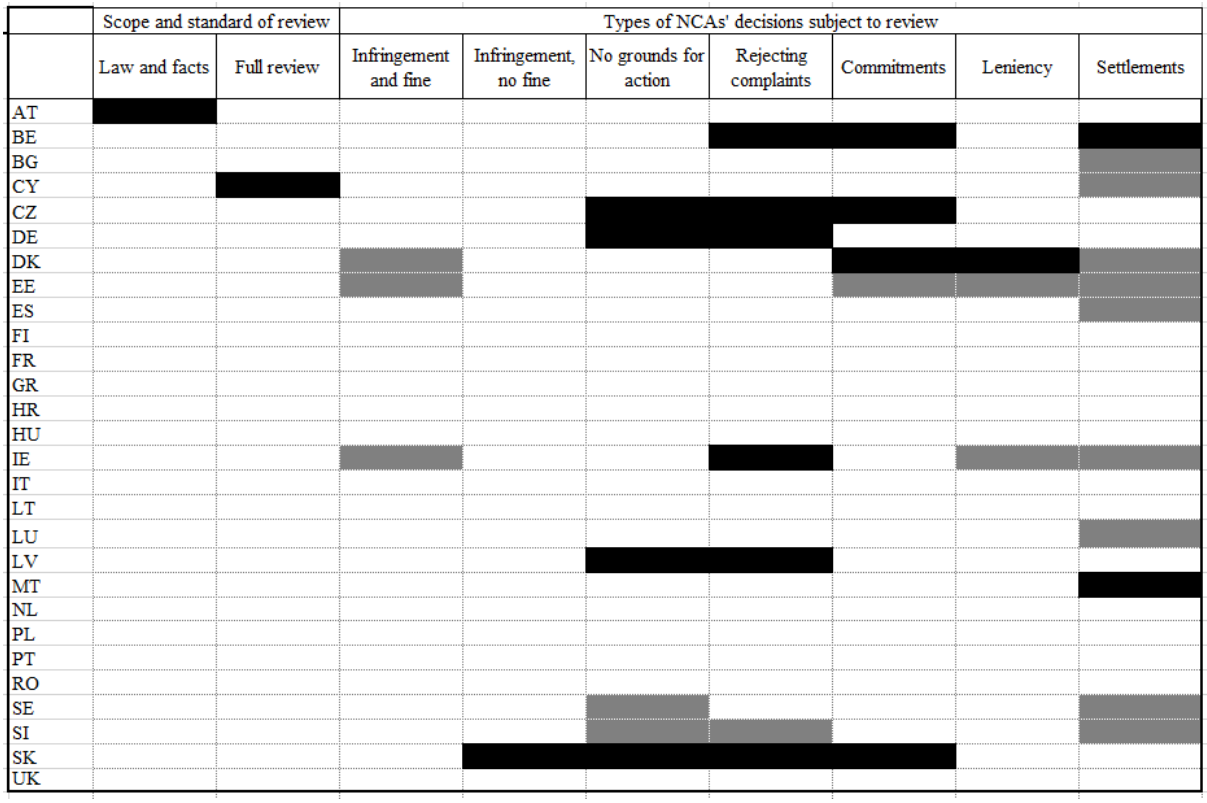
62 Poland report, Chapter 23.

63 Italy report, Chapter 17.

64 Croatia report, Chapter 6; Romania report, Chapter 25.

Member States,[65] Figure 3 illustrates that no ground for action findings and decisions to close investigations, reject complaints, or accept commitments could only be subject to review in some Member States. Moreover, in some legal systems, the type of NCAs' decisions that could be subject to an appeal changed over time.[66] The figure represents the law as of April 2021. The same is true when it comes to appeals launched against an NCA's decision involving leniency or settlements applications, as will be discussed later in section 4 below.

Figure 3 The Types of NCAs' decisions subject to review



■ Not subject to judicial review ☐ Subject to judicial review ■ NCA cannot adopt such decisions

Some national systems explicitly declare that certain types of decisions are not subject to judicial review (e.g., decisions rejecting complaints and commitment decisions in Belgium,[67] commitment decisions in Denmark[68]). In others, the types of decisions that can be appealed result from the type of decisions adopted by the NCAs. These differences are particularly

65 This is true for all jurisdictions where the NCAs can impose administrative fines for an infringement of the competition rules, that is, with the exclusion of Ireland and Estonia.

66 For example, while in the past all final decisions in infringement cases were subject to judicial review, following the 2006 Competition Act judicial review of decisions rejecting complaints was no longer available (see Belgium report, Chapter 4).

67 Ibid.

68 Denmark report, Chapter 9.

notable when it comes to appeals on no grounds for action findings or decisions rejecting complaints. In some countries, the NCA must adopt a formal – often reasoned – decision on such matters, and those decisions therefore will be generally subject to judicial review. In other countries (e.g., Germany, Latvia since 2016, Slovenia since 2008, and Poland since 2007), the NCA will simply close the case without adopting a formal measure, and such action would therefore not always be subject to judicial review.[69] The type of NCA's decisions that could be subject to an appeal is sometimes an indirect consequence of the institutional makeup of a domestic judicial review system. In the Czech Republic and Slovakia, for example, only decisions that were internally appealed to the head of the NCA may be reviewed by courts,[70] and complainants and other relevant third parties are not party to the proceedings. As a result, favourable decisions to the benefit of undertakings – such as no grounds for action, decisions accepting commitments, or decisions rejecting complaints – are never appealed because the undertakings will not appeal them.[71]

The different types of NCAs' decisions under review are also the consequence of what type of decisions the NCA can adopt. During the relevant period of the study or part thereof, the NCAs of Ireland, Denmark,[72] and Malta could not impose administrative fines for breach of the competition rules, and the Swedish NCA did not have the power to adopt grounds for action findings prior to 2021.[73]

Figure 4 moves from focusing on the rules to their operation in practice, by summarising the types of NCAs' decisions that were subject to an appeal in each country. The figure presents the proportions of first-instance judgments examining each type of NCAs' decisions.

69 For an empirical mapping of the national rules, see Or Brook and Katalin Cseres, 'Policy Report: Priority Setting in EU and National Competition Law Enforcement.' Available at SSRN 3930189 (2021) DOI: 10.2139/ssrn.3930189.

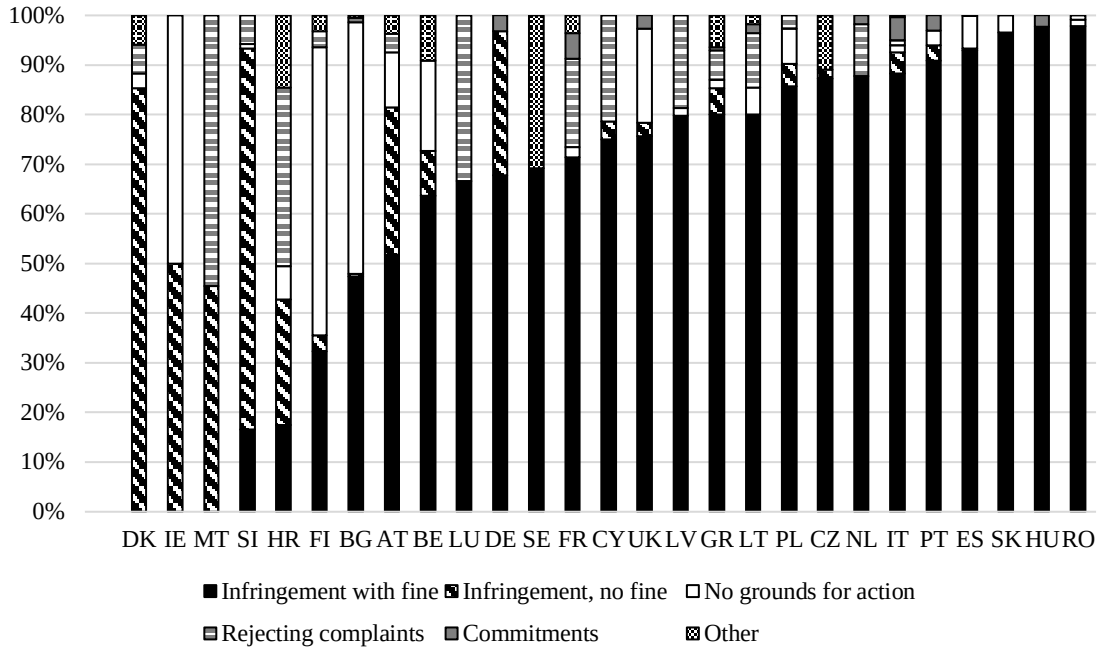
70 Text to supra n. 31.

71 Czech Republic report, Chapter 8; Slovakia report, Chapter 26.

72 This was changed following the implementation of the ECN+ Directive in March 2021. See Denmark report, Chapter 9.

73 Sweden report, Chapter 29.

Figure 4 Type of NCAs' Decisions Subject to First-Instance Appeals



In most jurisdictions, infringement decisions imposing fines have been the focus of judicial review. In Denmark, Ireland, and Malta – in which the NCAs could not impose fines during all or part of the relevant period of the study – findings of infringements that were not accompanied by fines were also the focus of review. The practice of appealing decisions to reject complaints and no grounds for action findings, has been prominent only in a few jurisdictions and completely absent in some.

The figure also demonstrates that in most jurisdictions, commitment decisions are never or rarely appealed. Some notable exceptions are France (ten first-instance judgments, later subject to three second-instance appeals)[74] and Italy (thirteen first-instance judgments, later subject to twelve second-instance appeals).[75]

2. Total Number of Judgments, Ratio of Appeals and Success Rates

2.1 Total Number of Judgments

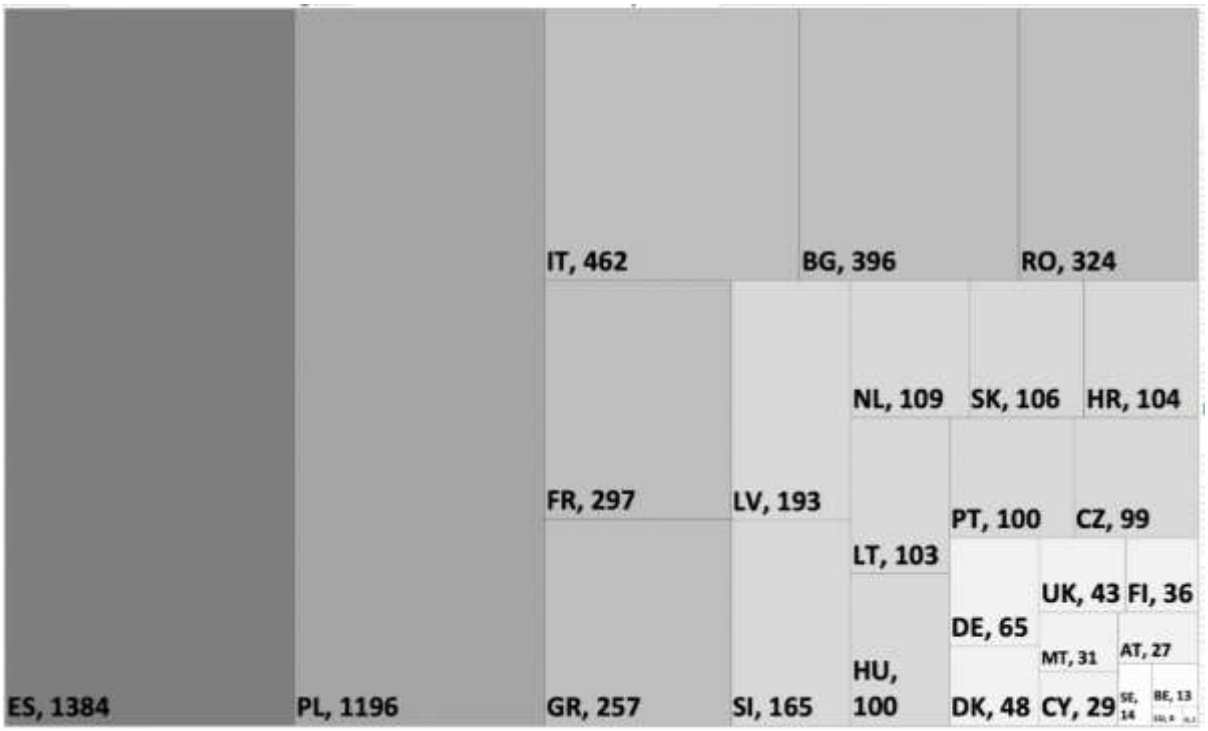
Figure 5 presents the total number of judgments included in the database in each jurisdiction, across all instances of appeal.

74 France report, Chapter 12.

75 Italy report, Chapter 17. As elaborated in the national report, around 30% of the commitment decisions adopted by the Italian NCA during the relevant period have been subject to an appeal

The figure reveals that there have been no appeals at all in Estonia and only two in Ireland, whereas the courts in Poland and Spain have issued the highest number of appeal judgments. Notably, the large number of appeals in those countries is not explained by a particularly high ratio of appeals on such NCA's decisions. Rather, only 36% of the Polish and Spanish NCAs' decisions were subject to a first-instance appeal (*see* Figure 7 below). In Poland, the high number of appeals is explained by the combination of the relatively high number of NCA decisions rendered during the relevant period (1,413),[76] and the frequent use of second and third-instance appeals (*see* national report, Chapter 23 and Figure 8 below).

Figure 5 Number of Judgments in the Database



In Spain, the large number of judgments is explained by the right of each undertaking to challenge any sanctioning decision with respect to its specific participation in the infringement in a separate proceeding.[77] This is illustrated by

Figure 6, which compares the number of appealed NCAs' decisions in each country (grey bars) to the overall number of first-instance judgments issued (black dots). The figure demonstrates that while in some countries, each NCA decision was always, or predominantly

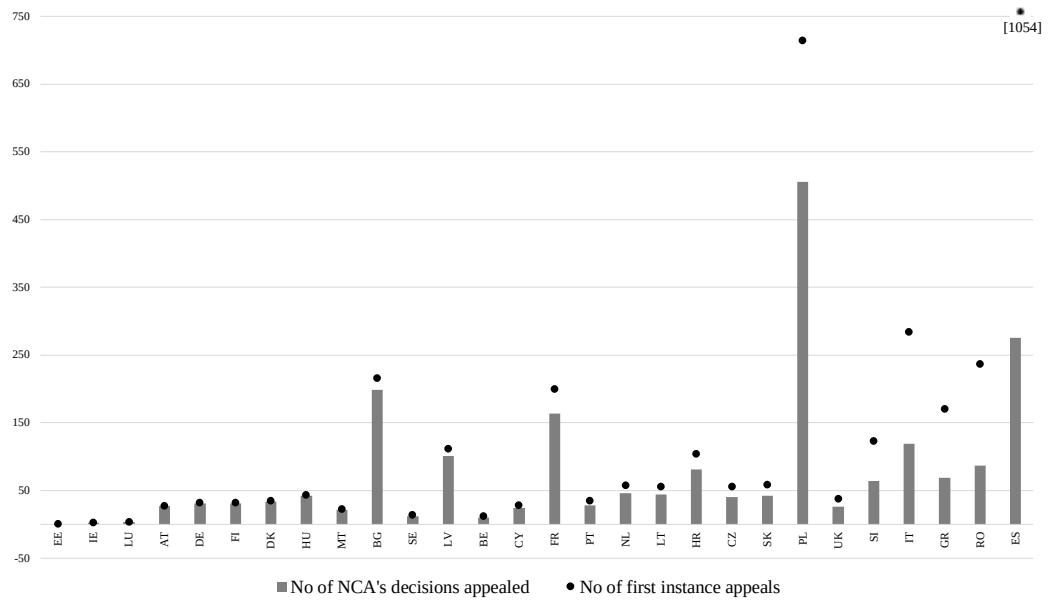
76 As indicated by the national report, the Polish NCA issued a particularly large number of decisions during the first ten years following the entry into force of Regulation 1/2003, which often related to repetitive and regional market practices.

77 Spain report, Chapter 28. In some instances, as elaborated in the Spanish report, a single NCA decision was subject to seventy first-instance appeals.

subject to a single first-instance appeal, in Poland, Italy, Greece, and Romania in addition to Spain, appeals on many NCAs' decisions have been reviewed in multiple first-instance judgments.

The practice of hearing multiple appeals on a single NCA decision created uniformity and consistency challenges in Spain.[78] Yet, in Greece, although appeals by multiple parties against the same NCA decision are generally dealt with in separate judgments, they are usually heard by the same judges whose judgments are often published on the same day.[79] In Romania, appeals are often heard by different judges, but some form of informal coordination exists.[80]

Figure 6 Number of First-Instance Judgments Versus the Number of Appealed NCAs' Decisions



Note: The number of first-instance judgments in this figure includes cases where the second or third-instance courts returned the case for re-examination by the first-instance courts.

2.2 Ratio of Appeals on NCAs' Decisions

Judicial review may also function as a tool for measuring and evaluating the effectiveness of competition law enforcement.[81] The ratio of appeals submitted against a competition authority's decisions is a common performance assessment indicator. At the same time, there

78 Ibid.
79 Greece report, Chapter 14.
80 Romania report, Chapter 25.
81 Mats A. Bergman, 'Quis Custodiet Ipsos Custodes? Or Measuring and Evaluating the Effectiveness of Competition Enforcement' (2008) 56(4) De Economist 387-409, 389 DOI: 10.1007/s10645-008-9101-6.

is no 'perfect' ratio of appeals. On the one hand, '*quasi*-automatic appeals', where almost all decisions of a particular NCA are being appealed, may point to a low level of acceptance of the NCA's decisions by the undertakings concerned or to a flawed institutional structure. A very high appeal rate might thus be unsatisfactory from the point of view of public policy and good governance.[82] On the other hand, a low ratio of appeals may raise concerns that courts do not play a significant role in the overall competition law enforcement structure (e.g., that undertakings do not lodge appeals as they believe the courts would simply rubberstamp all of the NCA's decisions) or that there are undue obstacles to access to justice. Such a low ratio may also indicate a poor selection of enforcement targets by the NCA, for example, that the authority focuses on small and financially weak firms or seeks only minor concessions from infringing firms,[83] or overly relies on leniency and settlement applications or commitments.[84] Moreover, it has been suggested that decreasing rates of appeals can be associated with improvement in the quality of NCAs' enforcement action.[85]

Against this backdrop, Figure 7 presents the percentage of NCA's decisions in each jurisdiction that were appealed from the total number of NCA's decisions that could be subject to an appeal (the 'ratio of appeals'). The number of NCA's decisions that could be subject to appeal was generally calculated on the basis of the figures reported in their annual reports or from decisions that are publicly available. It corresponds to the types of NCAs' decisions that could be subject to an appeal in each of the examined jurisdictions (*see* section 1.5 above). This figure should be interpreted with caution: (i) since the total number of NCA decisions is mostly based on the NCA's calculations which might not always be fully accurate or adequately reflect the different types of decisions appealed, and when the NCA's calculations are not available - on external sources (e.g., France, Germany, Greece, Malta, the Netherlands, Romania, Slovenia, Spain); (ii) since not all NCA enforcement action and

82 Frank Montag, 'The Case for a Radical Reform of the Infringement Procedure under Regulation 17' 17(8) E.C.L.R. 17(8), 428-437, 428, 433 (1996); Annalies Outhuijse, 'Effective Public Enforcement of the Cartel Prohibition in the Netherlands: A Comparison of ACM Fining Decisions, District Court Judgments, and TIAT Judgments' in Anne Looijestijn-Clearie et al. (eds), Boosting the Enforcement of EU Competition Law at the Domestic Level (Cambridge Scholars 2017).

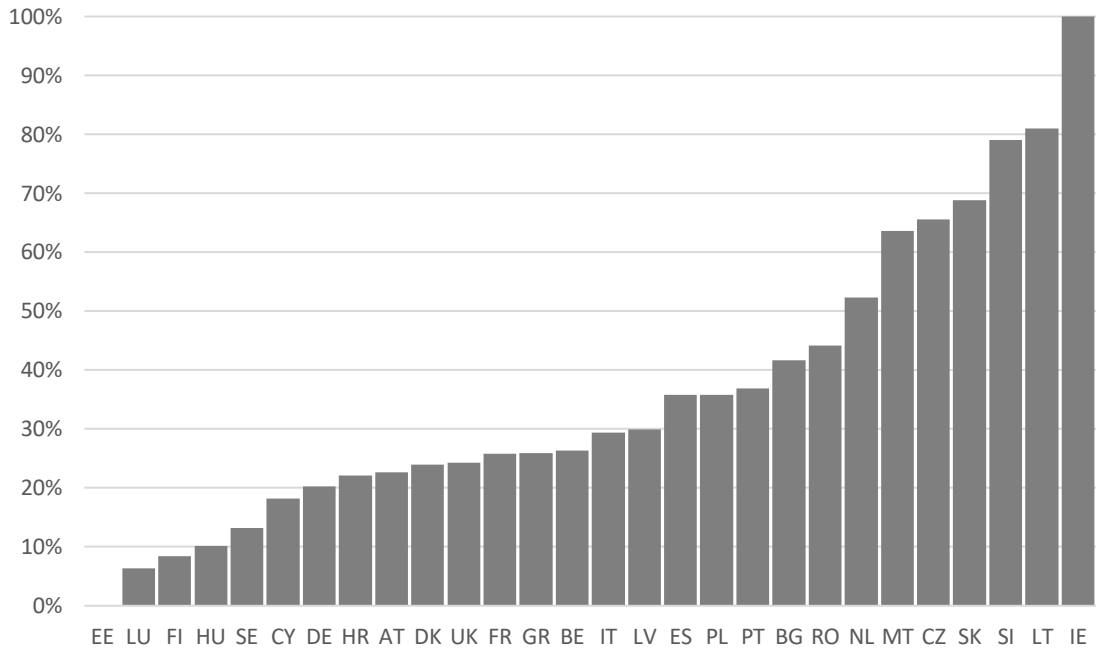
83 Bergman (supra n. 81), 390.

84 Or Brook, 'Do EU and UK Antitrust "Bite"? A Hard Look at "Soft" Enforcement and Negotiated Penalty Settlements.' (2023) 68(3) The Antitrust Bulletin 477-518 DOI: 10.1177/0003603x231180245. Also see section 7 below.

85 Svetlana Avdasheva et al., 'Distorting Effects of Competition Authority's Performance Measurement: The Case of Russia' (2016) 29(3) International Journal of Public Sector Management 288-306, 290 DOI: 10.1108/ijpsm-09-2015-0168.

subsequent appeal judgments are published (or were not published throughout the entire period of the study) in all jurisdictions (*see* section 9 below); (iii) given the time-lag between rendering and publishing judgments, which can amount to a few years in some jurisdictions. However, the figure might provide a rough estimate of the ratio of appeals in each jurisdiction, and allow for some comparative insights.

Figure 7 Ratio of Appeals (Estimate)



The figure points to a high heterogeneity in this regard. In eleven of the examined jurisdictions, less than 30% of the NCAs' decisions were appealed to the first-instance appeal court, of which there was an appeal ratio of no more than 10% in Luxemburg, Finland, and Hungary. In seven jurisdictions the appeal rate was higher than 50% (Czech Republic, the Netherlands, Malta, Slovakia, Slovenia, Lithuania, and Ireland). Ireland is an extreme case with 100% of decisions challenged, although as noted above, there were only two such decisions.

Most of the CEE jurisdictions are at the higher appeal rate end of the spectrum (with the exception of Hungary and Croatia). The high ratio of appeals in the CEE Member States supports the hypothesis that jurisdictions having less experience in competition law enforcement are expected to demonstrate high rates of successful appeals.[86] Newly established NCAs spend at least a decade defending challenges in relation to almost every

86 William E. Kovacic and Marianela López-Galdós, 'Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes' (2016) 79 Law & Contemp. Probs. 85, 106-107.

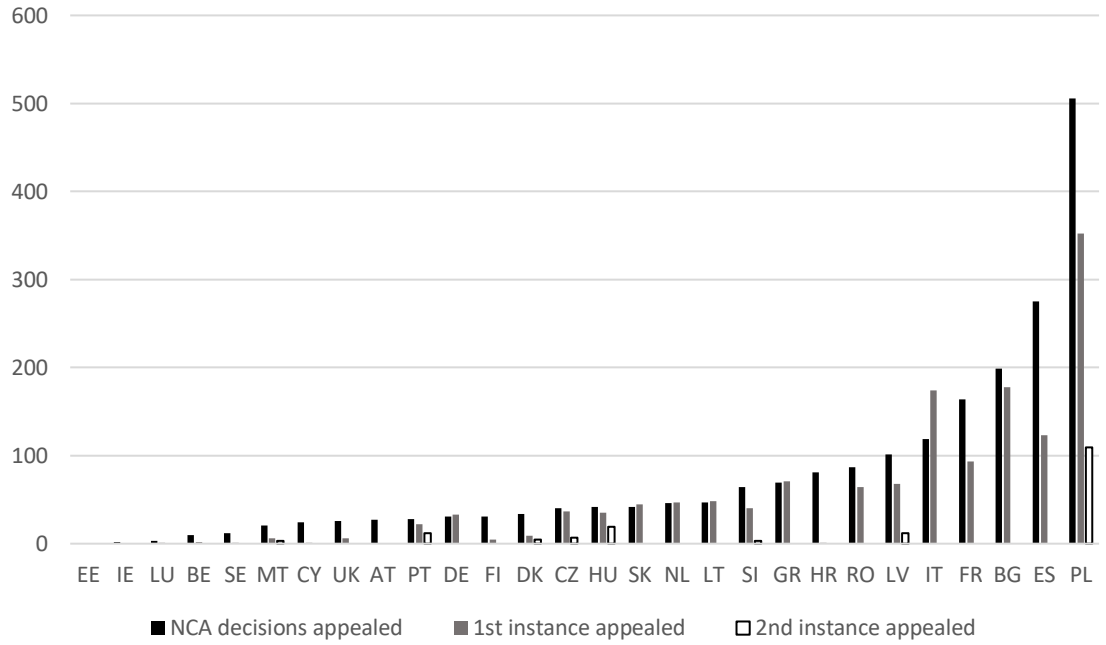
significant aspect of their authority, including the power to gather information, the application of the substantive mandate to challenge business behaviour, and the power to impose sanctions. It can easily take two decades or more to establish a sufficient strand of case law to 'either sustain the agency's efforts to exercise its legal mandate or make clear that further legislative reforms are necessary'.[87] Hence, it is to be anticipated that the initial operation of an NCA is likely to elicit challenges before the courts.

In the Czech Republic, 66% of the NCA's final decisions have been appealed. As noted in section 1.2.3 above, only findings of infringements that have been internally reviewed by the Chairman can be appealed to court. As mentioned in the national report, most of the Chairman's decisions that were not appealed concerned cases where the Chairman upheld the undertakings' challenge to the original NCA decision, as the parties to the proceedings have no incentive to challenge such a decision before the court. In Bulgaria, the ratio of CPC's decisions subject to appeal is 42%. One possible reason for the high rate of appeal is the relatively low cost of legal services and very low court fees to be borne by the appellants in administrative cases. Given the substantial amounts of fines imposed by the CPC, appealing the NCA's decision and any subsequent appeal of the first-instance judgment thus present an attractive option for undertakings targeted by the CPC's fines.[88]

A high level of second, third, and fourth-instance appeals raises concerns as to the effectiveness of the judicial system. Once again, Figure 8 reveals much divergence in the national practices. In Bulgaria, Spain, and Poland, for example, not only were a considerable number of the NCA decisions subject to a first-instance appeal, but subsequent second and third-instance appeals were also regularly launched. Portugal, Hungary, and Latvia also experienced frequent use of third-instance appeals. This inevitably leads to a considerably longer duration of those competition law proceedings and to high procedural economy costs. This has been observed in particular in Hungary and Spain.[89] Furthermore, the success rates of such appeals, as presented in the next section, reveal that in those jurisdictions, a significant rate of second- and third-instance appeals were fully or partially accepted.

87 Ibid.
88 Bulgaria report, Chapter 5.
89 Spain report, Chapter 28; Hungary report, Chapter 15.

Figure 8 Number of NCAs' Decisions Appealed and Subsequent Appeals



Notably, the figure does not point to a clear correlation between the choice of the administrative or judicial model and the success rates of appeal. Austria, Finland, and Sweden had low appeal rates, as expected from national systems following the judicial model because the decisions of the administrative authorities had to be confirmed by the courts. However, Ireland, which follows the judicial model, had a relatively high appeal rate (albeit it should be noted that this has not resulted in a large number of judgments in absolute terms, as the NCA issued few decisions during the project period).

2.3 Success Rates

The ratio of successful appeals is another popular performance assessment indicator of the operation and effectiveness of competition authorities.[90] This assessment indicator, like the ratio of appeals, has its limitations, and interpreting the meaning behind success rates is not a straightforward task. The application of the law is not a mechanical process, and no court operates quotas.[91] The expected (or 'optimal') success rates are expected to differ across

90 Avdasheva et al. (supra n. 85), 290; Yannis Katsoulacos, 'On the Choice of Legal Standards: A Positive Theory for Comparative Analysis' (2019) 48 European Journal of Law and Economics 125, 133-134 DOI: 10.1007/s10657-019-09616-7, 159; Bergman (supra n. 81), 389; Montag (supra n. 82).

91 P. Takis Tridimas and Gabriel Gari. 'Winners and Losers in Luxembourg: A Statistical Analysis of Judicial Review Before the ECJ and the CFI (2001-2005).' (2010) 2 European Law Review 133 DOI: 10.1023/a:1010645411771.

jurisdictions having different legal systems, and it is not apparently clear how to interpret deviations.

Tridimas and Gari, for example, warned that a very high success rate for undertakings' appeals signals a serious value divergence between the branches of government and may be unsustainable at least in the medium to long term.[92] Yet, they suggested that despite the limitations of using success rates to evaluate the effectiveness of judicial review, success rates matter because: (i) they have a political significance (whether a court which has the ultimate authority to determine the outer bounds of political power trumps the government's choices frequently, sometimes, or rarely); (ii) statistical analysis of success rates in quantitative and qualitative terms can provide a measure of constitutionalism, namely the extent and degree to which the executive and the legislature comply with the constitution within a legal system; and (iii) the rate of success of judicial review reflects the constitutional equilibrium.

By comparison, others contend that high success rates in overturning decisions of the NCAs might indicate strong performance by the NCA and the national enforcement system.[93] In his seminal, albeit idealistic paper, *Shavell* argues that applicants only initiate proceedings against unlawful decisions. Hence, a welfare-enhancing judicial review system – one which eradicates all decisional errors – should reverse all challenged decisions.[94] Shavell argues that the optimal 100% annulment rate cannot be observed in practice, simply because annulment applicants often erroneously (or opportunistically) challenge lawful decisions. Shavell's article implies that a welfare-enhancing system of judicial review will at least quash a minimal number of negative decisions. A low rate of annulment judgments, therefore, would be viewed by some as problematic.[95]

A low success rate may also indicate that the legal system favours the competition authority or that the authority has a defensive litigation strategy.[96] An NCA can increase its success rate in court, for example, by only taking enforcement action against blatant legal

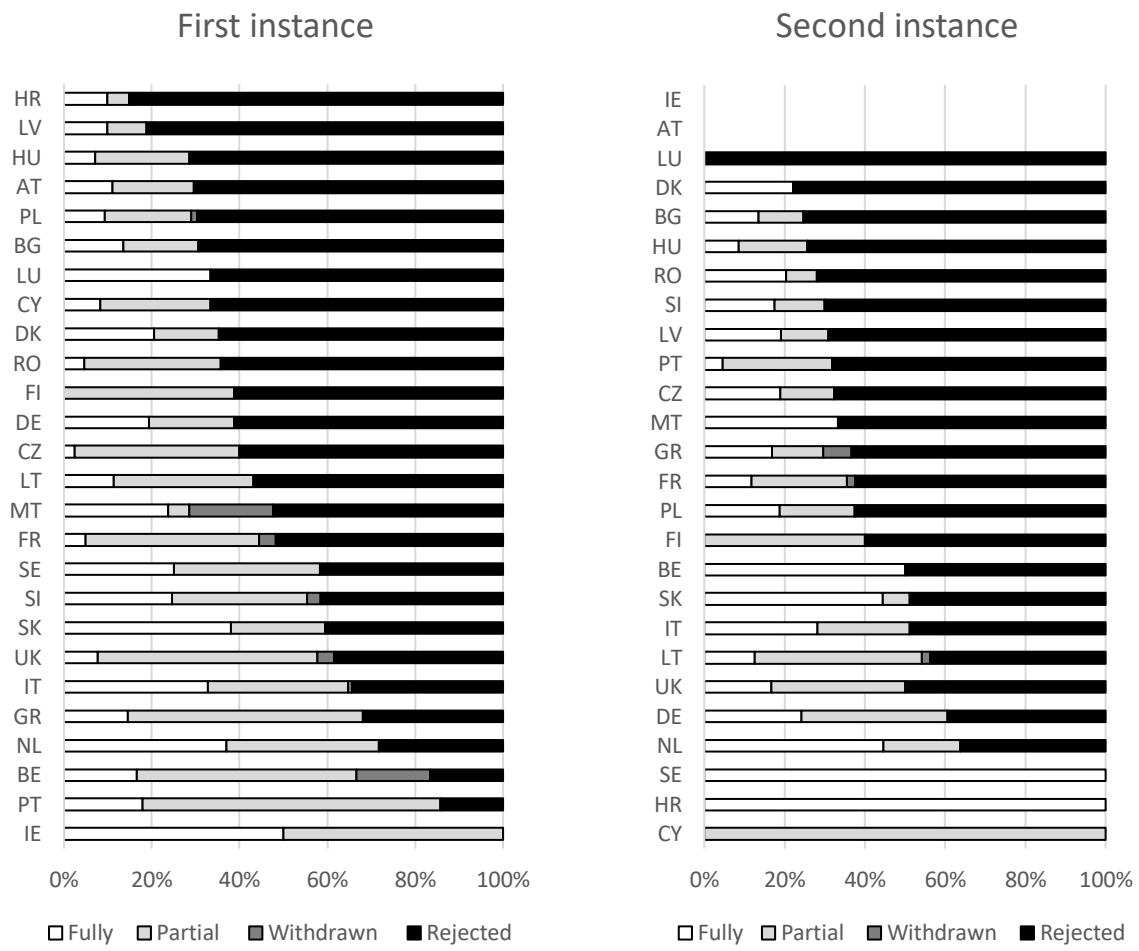
92 Ibid., 133. Note that independent NCA's may not fit ideally within the branches of government framework depicted here.
93 Bergman (supra n. 81), 391.
94 Steven Shavell, 'The Appeals Process as a Means of Error Correction' (1995) 24(2) The Journal of Legal Studies 379. See also Geradin and Petit (supra n. 60), 63.
95 Ibid., 61-62.
96 Bergman (supra n. 81), 391.

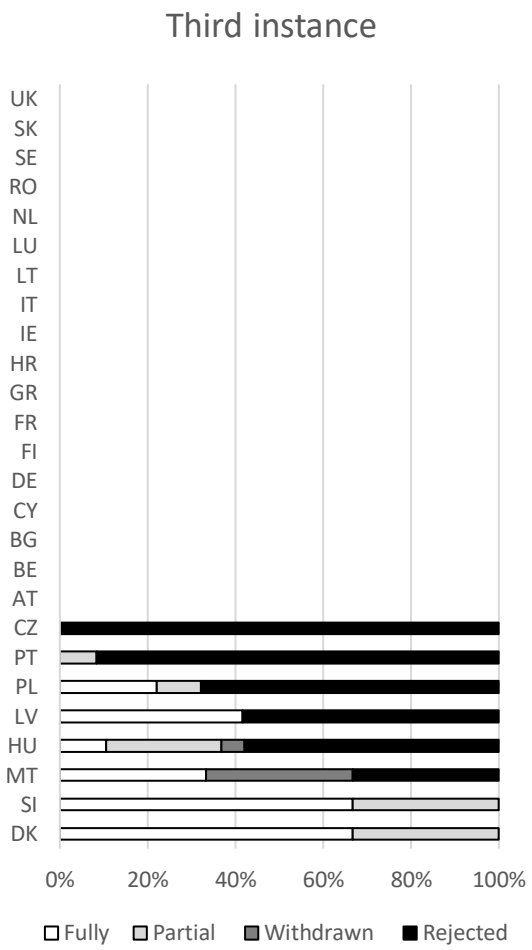
violations of the law,[97] or focusing on negotiated penalty settlements.[98] This entails that the success rates of appeals might affect the selection of enforcement targets by the NCA. *Katsoulacos* has argued that competition authorities select their cases not only in a bid to maximise the expected benefits to competition, consumers, or society more generally but also on the basis of their public image or reputation.[99] As a result, authorities are more likely to pursue by-object infringements, especially in younger jurisdictions in which the competition authority is uncertain about the courts' choice of standards.[100]

Keeping these limitations in mind, Figure 9 presents the success rates of appeals in all jurisdictions,[101] across the first-, second-, and third- instances of appeal. The data is presented from the perspective of each NCA's decision subject to appeal or previous instance judgment. For example, NCAs' decisions that have been dealt with by multiple first- instance appeal judgments, are aggregated as one case in the figure (*see* section 2.1 above). Importantly, this figure captures the appeals submitted by all types of appellants (undertakings, NCAs, and third parties). The types of appellants will further be discussed in section 3 below.

97 Ibid., 390.
98 See section 7 below.
99 Katsoulacos (supra n. 90), 127.
100 Ibid., 159.
101 No data is available with respect to Spain, but the national report provides data on the success rates of judicial review of NCA fining decisions (see Chapter 28).

Figure 9 Success Rates





Several observations can be made. First, the empirical findings demonstrate that some first-instance courts have almost always accepted at least some of the claims of the applicants. In Portugal, Belgium, and the Netherlands, less than 30% of the first-instance appeals were fully rejected. In Ireland, 100% of the appeals were fully or partially accepted, but it should be stressed that there were only two appeal court judgments in total and accordingly these percentages should be interpreted with caution. At the other end of the scale, in Hungary, Latvia, and Croatia over 70% of the first- instance appeals were rejected.

Second, the figure demonstrates high rates of success at second- and third-instance appeals in some countries. These findings should also be interpreted with caution, mindful of national particularities, and keeping in mind that in many countries only a small proportion of first-instance judgments were subject to second- and third-instance appeals. Notably, while in Bulgaria, Poland, Portugal, Hungary, and Latvia many first-instance judgments were subject to second and third-instance appeals (*see* section 2.2 above), most of those appeals were fully rejected.

In Latvia, 56% of appeals against previous instance judgments failed: in most of those cases, a prior judgment was partially or fully overturned because the lower court was found to have erred on points of law.[102] In Portugal, most appeals at second and third instance appeal were unsuccessful, and appeals to the Constitutional Court have almost always – save in one case – been unsuccessful (albeit it has not deterred undertakings from routinely filing such appeals).[103]

Third, the empirical findings do not point to a clear correlation between success rates and the model of enforcement, administrative or judicial. In the Member States following the judicial model of enforcement, as mentioned, infringement decisions are adopted by a court or tribunal following the administrative authority's investigation. Since a judicial body had already reviewed the administrative authority's decision, one might expect lower success rates on appeal.[104] This hypothesis was not confirmed by the empirical findings. Some of the first-instance courts in the Member States following the judicial model have regularly fully rejected any appeals (Austria), some to a similar extent as the EU-wide average (Sweden, Finland), and some have often accepted the appeals (Ireland). Similar findings are observed when breaking down the success rates according to the grounds of appeal, as elaborated in section 5 below.

Similarly, the empirical findings do not point to a clear trend of higher success rates in those legal systems where the reviewing courts were highly specialised. Such a trend was observed in the UK. The high rate of fully or partially successful first-instance appeals may have reflected the Competition Appeal Tribunal's standard of review and its high level of expertise in competition law matters, such that it would even consider whether there had been a substantive infringement of the rules, irrespective of an earlier decision by the competition authority to the contrary.[105] However, the Competition Appeal Tribunal in Denmark has rejected 65% of the appeals within the project period. Nevertheless, as Section 5 will demonstrate, the degree of specialisation of the courts might affect the type of grounds examined and accepted. Similarly, both comparably very high (e.g., Ireland, Greece) and very

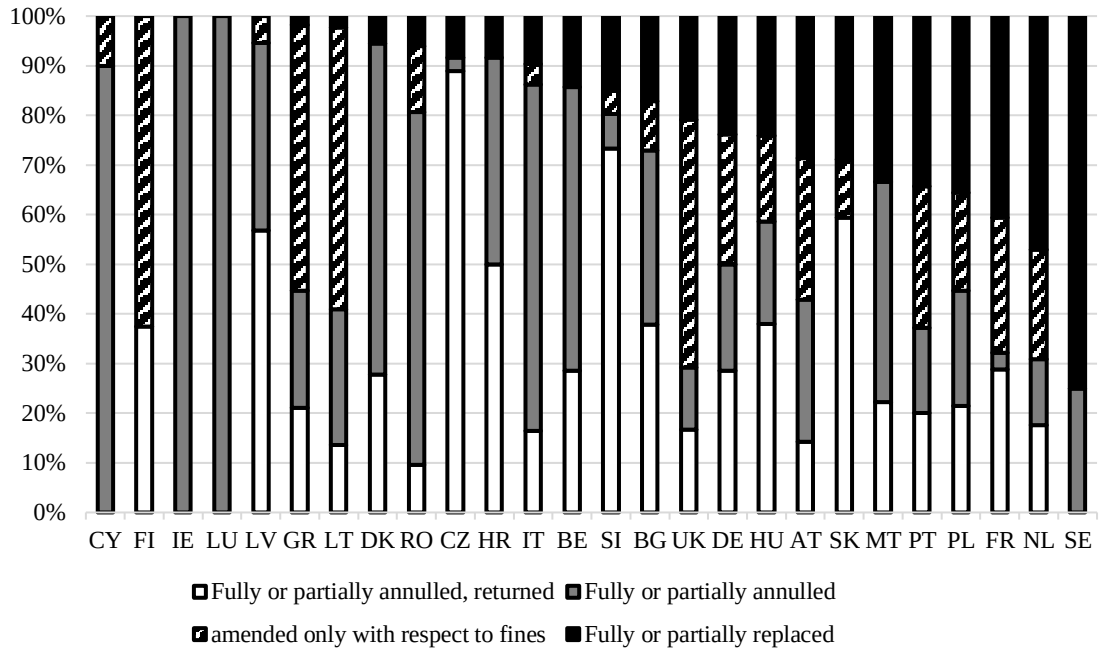
102 Latvia report, Chapter 18.
103 Portugal report, Chapter 24.
104 See section 1.1 above.
105 The UK report, Chapter 30.

low (e.g., Hungary and Croatia) success states were reported in first-instance courts which are not specialised.

2.4 The Outcome of Judicial Review

Reflecting the EU principle of procedural autonomy, Member States have the power to determine the range of possible outcomes of successful appeals launched against NCAs' decisions. Many Member States have granted their national courts the power to issue a judgment that fully or partially replaces the decision of the NCA (sometimes known as a reformatory judgment). Other national courts only have the power to annul the decision, and others, to return the decision to the NCA or to the previous instance judgment court for re-examination. Figure 10 outlines the outcome of fully or partially successful appeals before the national courts, showing that many national systems allow a combination of those legal remedies. The figure presents the outcome from the perspective of each judgment rendered, across all instances of appeal in each jurisdiction.

Figure 10 Remedies in Fully or Partially Successful Appeals, Across All Instances



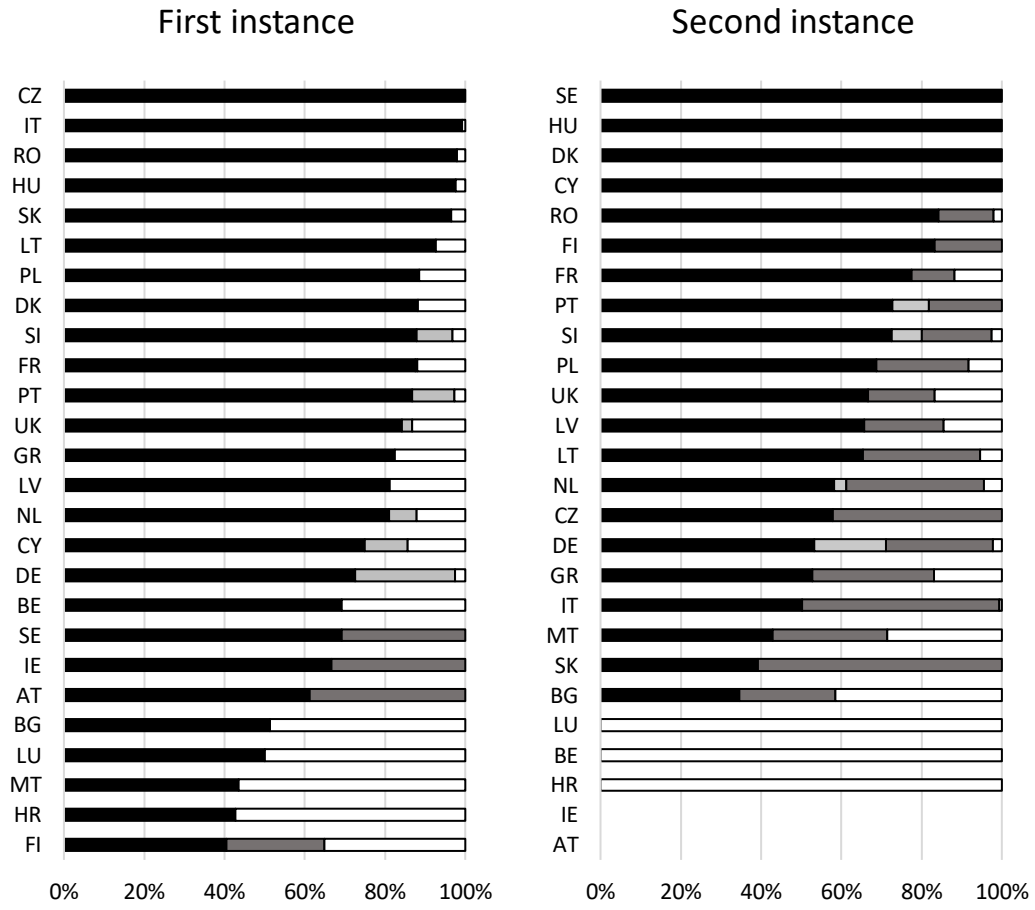
The figure demonstrates that many national systems allow reviewing courts to replace the NCA decision. These reformatory judgments were regularly used in Sweden (75% of the appeals) and are common also in the Netherlands and France (above 40% of the appeals). In other systems, upon accepting an appeal, the courts can only return the case for re-assessment by the NCA or the previous instance (e.g., Luxemburg and Cyprus). In Latvia, while

the courts were initially regarded as competent to amend any fines imposed by the NCA, this later changed, and they cannot replace the NCA's decision with their judgment.[106]

3. Types of Appellants

Judicial review is aimed at protecting the rights of all stakeholders, the undertakings subject to infringement decisions, the public interest, and other third parties affected by the NCAs' decisions.[107] As in other areas of competition law enforcement, EU law does not determine the identity of the parties that can appeal against them. Consequently, the national systems differ in the type and range of possible appellants in relation to NCAs' decisions and court judgments.

Figure 11 Appellants



106 Latvia Report, Chapter 18.
107 Geradin and Petit (supra n. 60), 58.

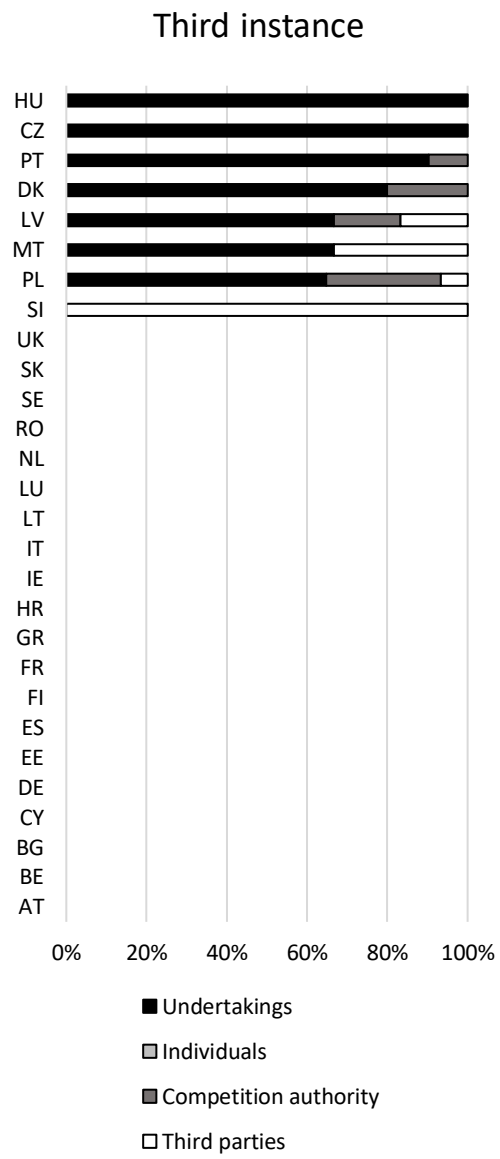


Figure 11 summarises the types of appellants for each judgment. Unsurprisingly, it reveals that those undertakings and associations of undertakings subject to the reviewed decision lodged the majority of appeals in the relevant period (black bars), especially at first instance. In addition, various appeals were initiated by individuals who were personally subject to administrative infringement decisions of EU and national competition rules (e.g., managers), in the jurisdictions where such proceedings are available (e.g., Germany, the Netherlands, Portugal and the minor offence proceedings in Slovenia).

Administrative competition authorities also submitted appeals following infringement decisions by courts in some of the countries following the judicial enforcement model (*see* section 1.1 above), namely in Finland, Austria, Ireland, and Sweden. As will be elaborated in

section 8 below, third parties (white bars) have played a significant role in launching appeals in some of the examined jurisdictions.

4. The Competition Rules That Are Subject to Judicial Review

The empirical mapping revealed great divergence in the competition law rules which were applied by the NCAs and subject to judicial review across the Member States and the UK. These differences relate both to the proportions of cases reviewing national and/or EU competition law prohibitions respectively and to the proportions of cases involving anti-competitive agreements or abuse of dominance. In many instances, these proportions mirror the focus of the enforcement efforts of the NCAs, as was indicated in the national reports.

Figure 12 examines the proportions of national and EU competition law prohibitions reviewed by first-instance courts. It reveals that many of the courts of CEE Member States (i.e., Bulgaria, Croatia, Czech Republic, Lithuania, Latvia, Poland, and Slovakia), as well as those of Germany, Malta, and Cyprus, have overwhelmingly reviewed decisions on the infringement of national competition laws alone (above 70% of all first-instance judgments rendered). By comparison, in Austria, Belgium, Ireland, Italy, and Luxemburg over 70% of the first-instance judgments rendered examined both EU and national competition laws. Earlier empirical research had already observed that the NCAs of some of the CEE Member States have mostly applied the national competition rules alone, and the authors suggested that this might result primarily from an inconsistent interpretation of the effect on trade test.[108]

The focus and classification of practices as solely infringing national competition laws entails that such NCAs' decisions and national courts' judgments escape the coordination and scrutiny mechanisms of Regulation 1/2003 that were examined in Chapter 1. It also means that the national courts that mostly reviewed purely national cases had played only a limited role when it came to safeguarding the effectiveness of EU law. This will be further examined in section 5.4 below.

108 Marco Botta et al., 'The Assessment of the Effect on Trade by the National Competition Authorities of the "New" Member States: Another Legal Partition of the Internal Market?' (2015) 52(5) Common Market Law Review 1. For an empirical study of the proportions of EU and national competition law enforcement in five Member States and interpretations of the effect on trade test, see also Or Brook, Non-competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU (CUP 2022), 356-359.

Figure 12 EU/National Rules Reviewed

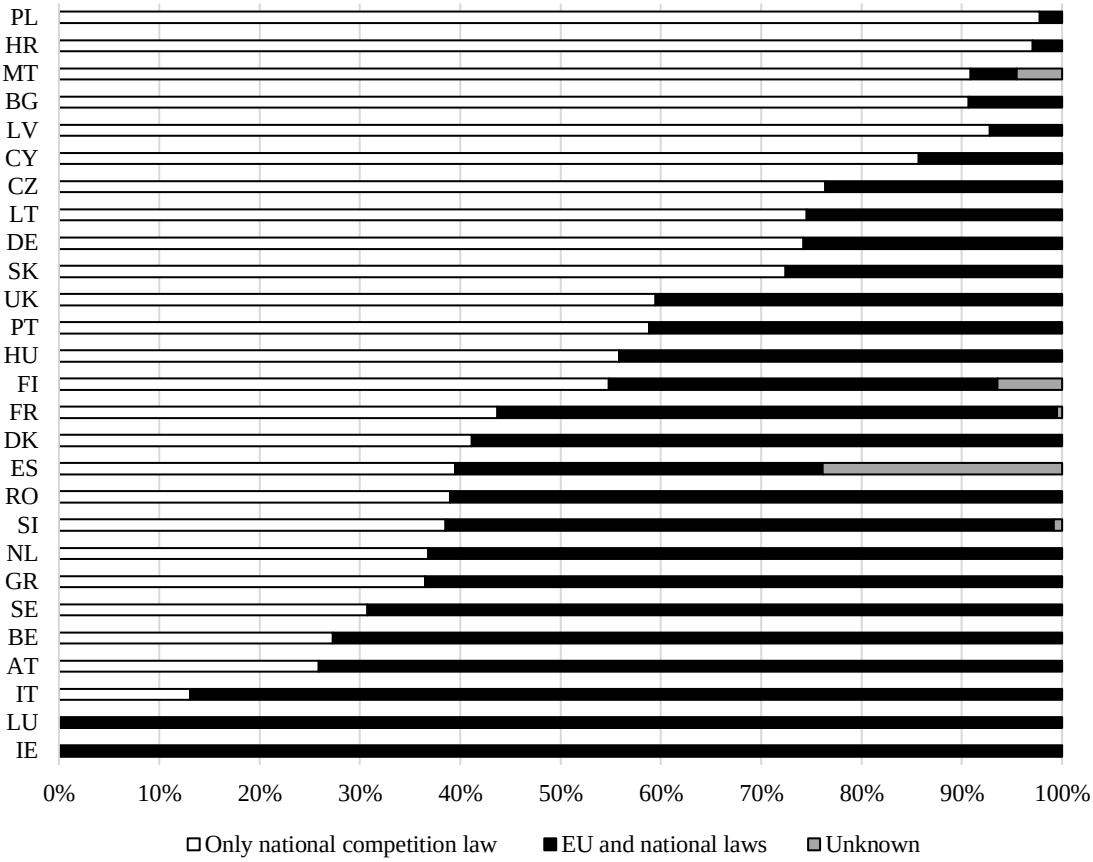
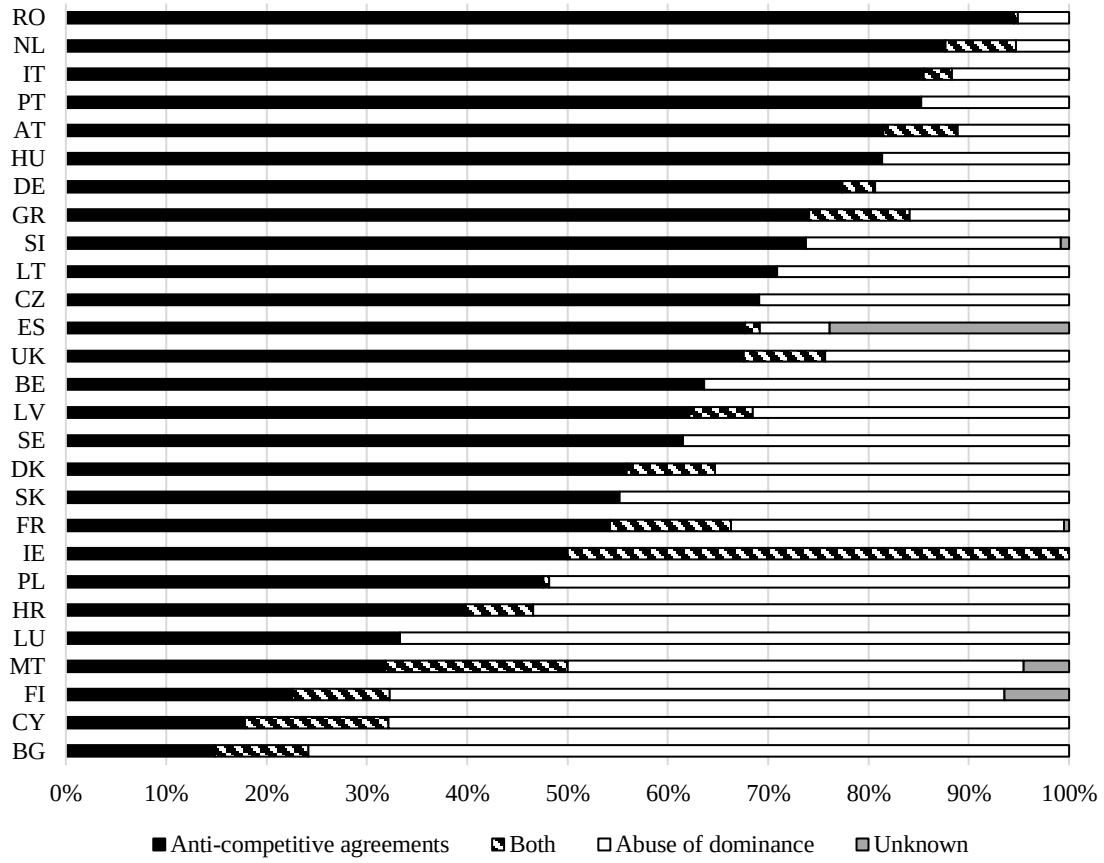


Figure 13 demonstrates that a similar divergence could be observed between national courts in relation to the proportion of first-instance judgments examining the prohibitions against anti-competitive agreements and abuse of dominance respectively. Although no general geographical trend was observed, the empirical findings indicate that the national first-instance courts of over a third of the examined jurisdictions have overwhelmingly dealt with the review of the application of the EU and national prohibitions against anti-competitive agreements. Accordingly, 70% or more of the first-instance courts' judgments in Austria, Greece, Germany, Hungary, Italy, Lithuania, the Netherlands, Portugal, Romania, and Slovenia examined the prohibitions on anti-competitive agreements alone.

In a small minority of (mainly CEE) States, the majority of appeals over the project period concerned the abuse of dominance prohibition(s). In Bulgaria, this was accounted for at least partly due to the competition authority's obligation to follow up on complaints, and similarly, in Croatia, a probable explanation for the disproportionately higher number of abuse of dominance appeals is that the majority of the authority's decisions rejecting a complaint

related to an abuse of dominance situation.[109] In Poland, a significant number of early abuse cases between 2004 and 2011 constitute a clear majority of all appeals, although there was a notable decline in later years between 2012 and 2021 (from circa 64% to 34% of all appeal judgments). A potential rationale for the level of abuse cases may be the particular focus of the NCA on dominance abuses in the years following the economic transformation in Poland, and their decline may partly be due to the change of economic policy that promoted state-owned enterprises (SOEs).[110] In Finland, it was suggested that the predominance of appeals involving exploitative abuses of dominance may have resulted from the heavy concentration of markets at a local level because of the small size of the country, arguably increasing the likelihood (or suspicion) of some form of exploitative abuse.[111]

Figure 13 Competition Rules Reviewed By First-Instance Judgments



The selection of enforcement targets by some of the NCAs, therefore, has considerably

109 Bulgaria report, Chapter 5; Croatia report, Chapter 6. Similarly see in Cyprus, Chapter 7. Note that in Luxembourg, the rapporteur could not provide an explanation for the data that 75% of all appeals concerned abuse of dominance (see Chapter 20).

110 Poland report, Chapter 23.

111 Finland report, Chapter 11.

constrained the opportunity of the national courts to examine the application and interpretation of those anti-competitive practices that were less frequently subject to review.

5. Grounds of Review

Our study seeks to capture the nature and scope of judicial review, in particular, by mapping out the appeal grounds raised by the parties across the Member States and the UK, and their success in each jurisdiction. The EU rules applicable to each category of appeal grounds and the significance of judicial review have been explored in Chapter 1. Moreover, as was elaborated in Chapter 2, one early finding of this study was that the European legal systems often classify similar grounds differently. For example, some jurisdictions regard limitation periods as a procedural matter, while in others they are viewed as substantive rules. To ensure a meaningful comparison, we have followed the comparative functional approach, where the classification of grounds was based on the function performed by the rules rather than their classification in accordance with the national legal framework. We believe that this approach is essential for studying multi-level governance networks such as those characterising EU competition law enforcement, in which the identical EU substantive rules are being applied by NCAs and national courts in a variety of national procedural rules and institutional settings.

It should be noted that the empirical findings presented in this section do not include Spain, on which such data was not collected for practical reasons,[112] and Estonia, where no administrative enforcement of competition law took place during the relevant period of this study.

5.1 Substantive Grounds

Judicial review is central to determining the direction and substantive evolution of EU and national competition laws.[113] EU and national competition laws are typically open-ended and do not define key terms, and consequently, various meanings may be attributed to those terms. As *Vickers* noted, '[t]he real substance of the law is fleshed out and evolves over time

112 The Spanish report, nevertheless, presents the grounds argued and accepted in a case study (see Chapter 28).

113 Cf. Pablo Ibáñez Colomo, 'Law, Policy, Expertise: Hallmarks of Effective Judicial Review in EU Competition Law' (2022) 24 Cambridge Yearbook of European Legal Studies 143-168, discussing the role of the EU Courts.

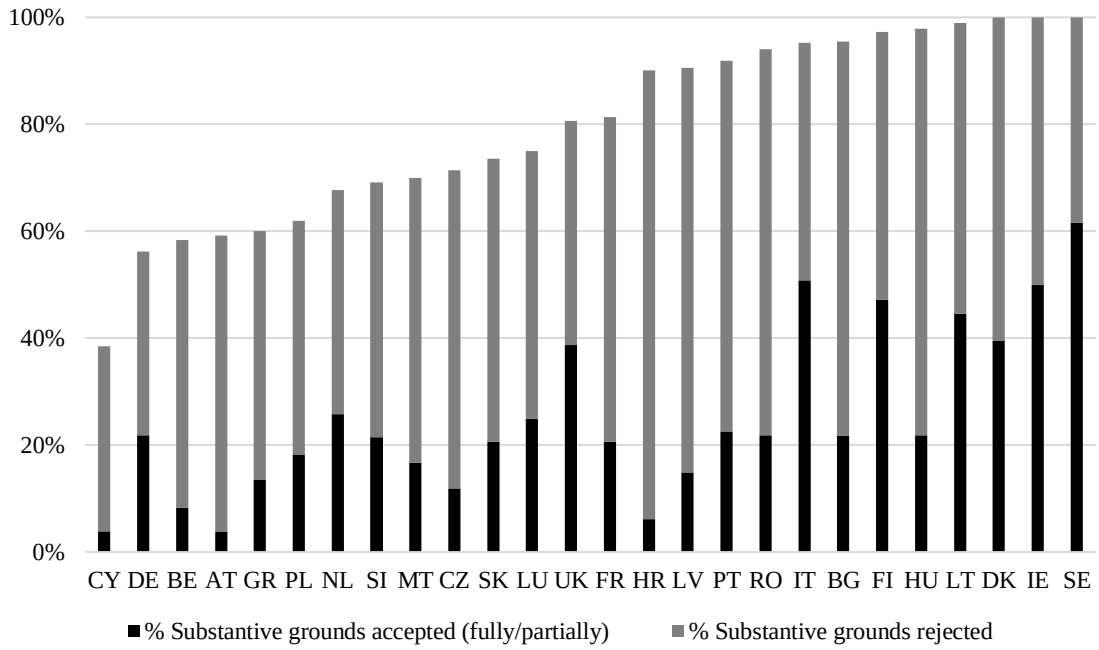
in the light of competition authority practice, and, above all, judicial precedent. The judicial interpretation of what a statute means in practical terms can change markedly over time in the light of experience and of legal and economic scholarship'.[114]

To this end, judicial review by the EU and national courts has two substantive aims: it is a mechanism for (i) correcting flawed decisions,[115] and (ii) establishing binding normative standards.[116] Especially given the complexity of competition law and the lack of conceptual homogeneity, competition law enforcement by the Commission and NCAs, in terms of the application of the substantive rules at least, may be prone to serious errors.[117] Judicial review can help to ensure that competition law is being enforced in the public interest,[118] and makes a significant contribution to shaping the substantive choices that define the boundaries of the competition law prohibitions.[119]

Figure 14 presents the percentage of judgments in which substantive grounds were raised by the parties, differentiating between the percentage of judgments in which those grounds were accepted (black bars) and rejected (grey bars). Substantive grounds were defined in our study as arguments based on or related to the definition of undertakings (e.g., state action, public/mix bodies, liability of parents/subsidiaries companies), the existence of agreements/concerted practices, restrictions by object/effect, the application of Article 101(3) TFEU, BERs, and the national equivalent prohibitions, market definition, the existence of dominance, abuse of dominance, *de minimis*, any EU or national exemptions or exceptions to the competition rules, lack of sufficient evidence to support a fact (excluding the admissibility of evidence), and the burden of proof. The data is presented from the perspective of each NCA's decision or previous instance's judgment which has been appealed, entailing that multiple appeals submitted on a single decision or judgments will be aggregated.

114 John Vickers, 'Central Banks and Competition Authorities: Institutional Comparisons and New Concerns' (2010) BIS Working Paper No. 331 (No. 331), available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1717809, 5.
115 See also Shavell (supra n. 94).
116 Geradin and Petit (supra n. 60), 24-25.
117 Ibid., 32-36.
118 Ibid., 37-39.
119 Cf. Colomo (supra n. 113), discussing the role of the EU Courts.

Figure 14 Substantive Grounds



Our findings reveal that substantive grounds were the focus of most appeals in most jurisdictions, in comparison with the procedural, fines-related, and the EU/national grounds. Apart from Cyprus, substantive grounds were invoked in 56% or more of the appeals in front of all the examined jurisdictions, reaching over 95% in eight. This may suggest that despite the concerns voiced during the negotiations over Regulation 1/2003, fearing that national courts will not engage in substantive review of complex and technical competition law matters,[120] most national courts have contributed to the development of the competition rules.

The rates of successful acceptance of substantive grounds varied more significantly among the various countries, ranging from 10% or less in Austria, Croatia, and Cyprus to 50% or over in Ireland, Italy, and Sweden. The very limited consideration of substantive grounds in Cyprus and the low acceptance rates of those claims (38% of claims on substantive appeal grounds and 10% partially successful appeals) may be tied to the limited standard of review. As mentioned in section 1.4 above, the courts in Cyprus only exercise marginal review and do not have jurisdiction over issues of a technical nature, and matters pertaining to the

120 See Chapter 1, section 3.1.

substance of a decision or requiring specialised knowledge.[121] In Croatia, almost all of the fully or partially successful substantive grounds concerned anti-competitive agreements cases, whereas successful abuse appeals related primarily to matters of procedure.[122]

Highly specialist courts, such as the first instance Competition Appeal Tribunals in the UK and Denmark, demonstrated both relatively high rates for invocation of substantive grounds (81% and 100%, respectively) and acceptance rates of those grounds (48% and 41%).[123] This supports the hypothesis that specialist courts will pay less deference to the NCAs' analysis in comparison with non-specialist courts.[124]

5.2 Procedural Grounds

Ensuring procedural regularity by safeguarding fundamental rights, due process, and participation is another well-acknowledged function of judicial review.[125] This review function is particularly important in the case of (administrative) NCAs, where the authority acts both as an investigator and decision-maker.[126] In this context, judicial review can serve as an important accountability instrument to solve the democratic deficit of independent unelected competition authorities and to further good governance principles.[127]

Safeguarding fundamental rights and due process is also of particular importance given the quasi-criminal nature of competition law enforcement. The competition law prohibitions and severe sanctions imposed inherently interfere with individual freedoms such as ownership rights, business freedom, and the freedom to contract and of association, and their enforcement is often intrusive and involves powerful inspection tools.[128] As recognised by the ECtHR jurisprudence, the high level of fines potentially imposed makes procedural regularity and due rights even more important in the competition law enforcement context.[129]

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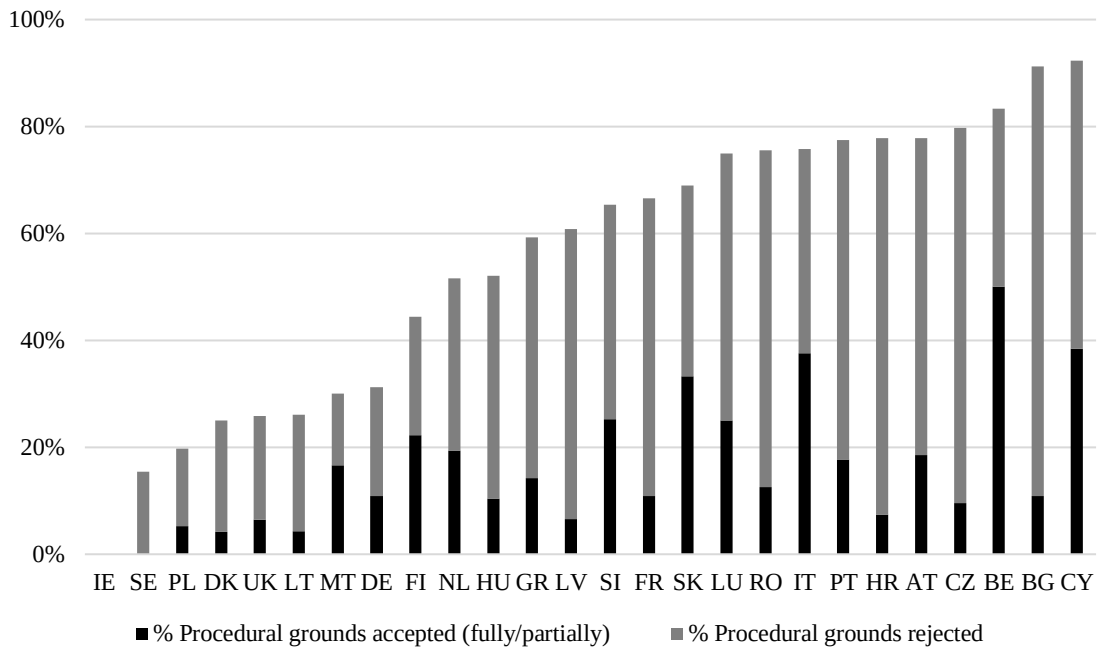
121 Cyprus report, Chapter 7.
122 Croatia report, Chapter 6.
123 Note that these percentages reflect the invocation and success rates in front of the first instance courts alone, and thus slightly differ from the ratios presented in Figure 14 above.
124 See section 1.3 above.
125 Geradin and Petit (supra n. 60), 26-28.
126 Cf. Colomo (supra n. 113), 144.
127 Geradin and Petit (supra n. 60), 29-30.
128 Ibid., 36.
129 See, e.g., ECHR 23 November 2006 Jussila v. Finland (Application no. 73053/01); ECHR 27 September 2011 Menarini Diagnostics v. Italy (Application no. 43509/08); Case C-272/09 KME Germany and Others v. Commission EU:C:2011:810; Case C-386/10 P Chalkor AE Epexergasias Metallon v. European Commission

Figure 15 presents the percentage of judgments in which procedural grounds were raised by the parties, differentiating between the percentage of judgments in which those grounds were accepted (black bars) and rejected (grey bars). Procedural grounds were defined in our study as arguments based on or related to the right to be heard, rights of the defence, due reasoning, competence, admissibility of evidence (excluding lack of sufficient evidence to support a fact), legality of obtaining evidence, limitation periods, and *ne bis in idem*. They do *not* include pleas directly related to the imposition or calculation of fines. The data is presented from the perspective of each NCA's decision or previous instance's judgment which has been appealed, entailing that multiple appeals submitted on a single decision or judgment will be aggregated.

Figure 15 Procedural Grounds



The figure reveals that in many CEE courts, procedural grounds were invoked in a very high proportion of review proceedings overall. This is evident, for example, in Bulgaria, Czech

EU:C:2011:815, para. 51. See Wouter P.J. Wils, 'The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker' (2014) 37 World Competition 5-25 DOI: 10.54648/cola2012036; R. Nazzini, 'Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective' (2012) 49 Common Market Law Review 971-1006 DOI: 10.54648/cola2012036; M. Bernatt, 'Between Menarini and Delta Pekarny – Strasbourg View on Intensity of Judicial Review in Competition Law', in Csongor Nagy (ed.) The Procedural Aspects of the Application of Competition Law: European Frameworks – Central European Perspectives (Europa Law Publishing 2016).

Republic, Croatia, and Romania (over 75% of the appeals), and to a lesser extent in Hungary, Latvia, Slovenia, and Slovakia (over 50% of the appeals). This may be explained by the relatively recent introduction of competition law in those jurisdictions. It is expected that in the early years of the establishment of particular competition law systems, courts will tend to focus closely on apparent deviations from procedural requirements established in the competition law or imposed by the jurisdiction's administrative procedure code.[130] Notably, the success rate of procedural grounds has varied considerably between those courts, meaning that high invocation rates of procedural grounds did not necessarily lead to their acceptance (e.g., relatively low acceptance rates in Croatia, Latvia, Bulgaria, Czech Republic, Romania, and Hungary). This finding is interesting when taken together with Figure 14, pointing to relatively low success rates of substantive grounds invoked in many of those jurisdictions.

The limited discussion of procedural grounds in Poland (20% of the appeals, and fully or partially accepted only in 27% of those appeals where argued), especially in comparison with other CEE countries, could be explained by the development of the national jurisprudence on the possibility of reviewing the NCA's proceedings from a procedural perspective. National case law emphasised that courts should not control the correctness of administrative proceedings before the NCA, but rather assess the matter anew on the merits. In more recent years, however, the Supreme Court held that there was no reason to ignore *a priori* all procedural claims raised by appellants. Scholars have also suggested that the old approach might not have been in line with the procedural fairness principle and Article 6 of the European Convention on Human Rights (ECHR) requirements.[131]

Another interesting observation relates to the role of procedural grounds in jurisdictions following the judicial model of enforcement. As mentioned, since infringement decisions are adopted by a court or tribunal following the administrative authority's investigation, it may be expected that the procedural rights of the parties to the proceedings will be protected during the enforcement process.[132] Indeed, procedural grounds of appeal were rarely raised in Ireland and Sweden. However, in Austria, they were raised in 78% of the appeals and accepted in 24% of those cases where they were raised. In Finland they were raised in 44% of

130 Kovacic and López-Galdós (supra n. 86), 107.
131 Poland report, Chapter 23.
132 See section 1.1 above.

the appeals, and accepted in 50% of the cases where they were raised. The judicial model, therefore, did not necessarily lead to less frequent deliberation on procedural matters in appeals.

5.3 Fines-Related Grounds

Regulation 1/2003 provides that NCAs shall have the power to impose fines for the breach of Articles 101 and 102 TFEU according to the rules provided for in their national laws.[133] In practice, however, as elaborated in the relevant national reports, no administrative fines were imposed for the infringement of competition law in Estonia, Denmark, Ireland, and Malta during the period covered by this project.

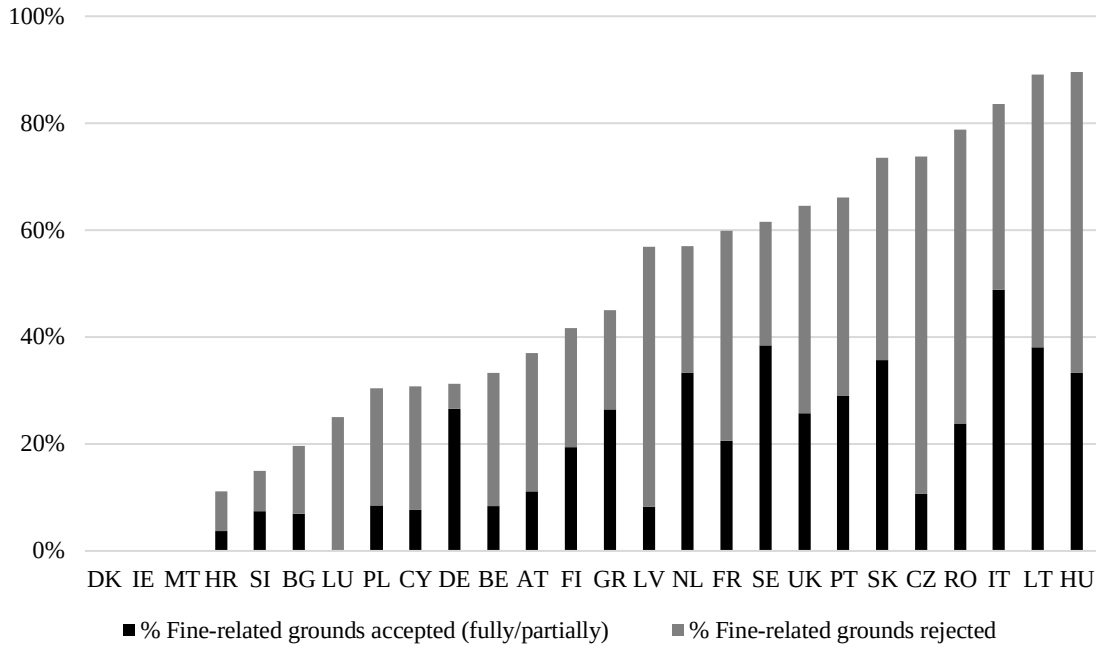
Regulation 1/2003 provides limited details on the way the Commission and NCAs should calculate the fines or what types of considerations should be taken into account in determining the appropriate level of a fine. Similarly, when it comes to judicial review, EU law provides only limited guidance on the review of the imposition of penalties. Some steps towards harmonisation of the legal regulation on the imposition of fines were introduced by the ECN+ Directive, stating, for example, that any fines imposed by NCAs for an infringement of the competition rules are expected to be effective, proportionate, and dissuasive.[134] It also provides that the maximum amount of the fine that is possible to be imposed for each infringement of Article 101 or 102 TFEU should be set at a level of not less than 10% of the total worldwide turnover of the undertaking concerned,[135] and details the parameters that should be taken into account to ensure that the fines reflect the economic significance of the infringement.[136] Given the cut-off date of this study, the effects of the ECN+ Directive are unlikely to be captured.

Figure 16 presents the percentage of judgments in which grounds related to the fines imposed were raised by the parties, differentiating between the percentage of judgments in which those grounds were accepted (black bars) and rejected (grey bars). Grounds related to fines were defined in this study as arguments against the amount of penalty imposed by the NCA. They do not include cases in which the fine was reduced as a direct result of accepting

133 Regulation 1/2003, Articles 5 and 35.
134 ECN+ Directive, Preamble 40 and Article 13.
135 Ibid, Preamble 49 and Article 15.
136 Ibid, Preamble 47 and Article 14.

the other three categories of grounds. The data is presented from the perspective of each NCA's decision or previous instance's judgment which has been appealed, entailing that multiple appeals submitted on a single decision or judgment will be aggregated.

Figure 16 Fines-Related Grounds



Considerable focus on fines-related grounds characterised many of the CEE countries. These grounds were raised in relation to 74% or more of the appealed NCAs' decisions and previous instance judgments in Hungary, Lithuania, Romania, Czech Republic, and Slovakia. The relatively high acceptance rates of fines-related grounds in Hungary (33%), Slovakia (36%), and Lithuania (38%) can be explained by the courts' inclination to reduce or even quash a fine rather than to overrule the substance of the decision or to find procedural errors affecting the substance of the case.[137] The very low proportions of appeals involving the consideration of fines in other CEE countries – such as Croatia (11%) Slovenia (15%), and to some extent also Bulgaria (20%) – correspond with the types of NCA decisions that were subject to an appeal in those countries (*see*

137 Hungary report, Chapter 15; Lithuania report, Chapter 19; Slovakia report, Chapter 26.

Figure 4 above). Since those NCAs have adopted only a limited number of infringement findings imposing a fine, these grounds were not relevant to many of the appeals. The high rates of discussion and acceptance of fines appeal grounds in Italy (84% and 49%, respectively) correspond with the Italian courts' similar outcomes in accepting procedural and substantive grounds, and therefore do not appear to point to a unique approach to the calculation of fines.

By comparison, an earlier empirical study found that the General Court (GC) had intervened quite frequently when reviewing fines imposed by the European Commission for infringements of Article 101 TFEU, reducing it in 45% of the judgments rendered between 2000 and 2010. The Commission enjoyed almost judicial immunity from fines imposed for infringements of Article 102 TFEU, which were reduced by the GC in only 18% of the cases where the fines were reviewed.[138]

5.4 Internal Market Grounds: Consistency and Uniformity of EU Law Application

In addition to the already complex task of judicial review of competition law decisions on substantive and procedural matters, national courts of the EU Member States must ensure that EU law is being applied in a consistent and uniform manner across the EU. As we outlined in Chapter 1, prior to the process of modernisation of EU competition law enforcement through Regulation 1/2003, some of the EU institutions were concerned that decentralised judicial review of EU competition law enforcement by national courts might be problematic in terms of ensuring consistency and uniformity.

Previous empirical studies have already pointed out that decentralised judicial review has failed to maintain substantive uniformity in the interpretation of the competition rules, for example, with respect to the role of public policy and the scope of Article 101(3) TFEU;[139] in relation to the relationship between the EU competition law prohibitions to national laws on

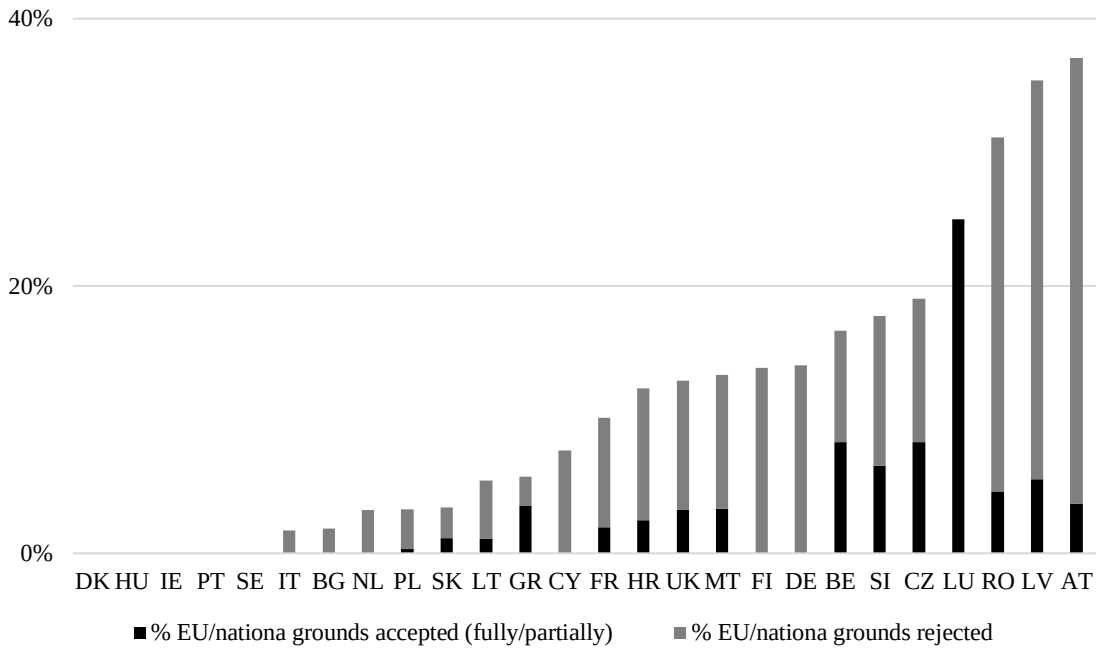
138 Geradin and Petit (supra n. 60), 62. See also Jose Luis da Cruz Vilaca, 'The Intensity of Judicial Review in Complex Economic Matters – Recent Competition Law Judgments of the EU' (2018) 6 Journal of Antitrust Enforcement 173-188.

139 Or Brook, 'Struggling with Article 101 (3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities' (2029) 56(1) Common Market Law Review 121; Brook (supra n. 108).

unfair trading practices and the regulation of digital markets;[140] or concerning the application of the effect on trade test.[141]

Figure 17 presents the percentage of judgments in which grounds related to the relationship between EU and national laws were raised by the parties, differentiating between the percentage of judgments in which those grounds were accepted (black bars) and rejected (grey bars). It shows that not only does such national divergence persist, but also that matters related to uniformity and consistency of the internal market or the tension between EU competition laws and national laws and policies have scarcely been raised before the national courts. The internal market grounds were defined in this study as arguments based on or related to the tension between EU and national competition laws. For example, they include matters related to the application of the effect on trade test, the interpretation of the obligations of Article 3 of Regulation 1/2003, and questions over the primacy of EU competition law or its uniform application. The data is presented from the perspective of each NCA's decision or previous instance's judgment which has been appealed, entailing that multiple appeals submitted on a single decision or judgments will be aggregated.

Figure 17 EU/National Grounds



The figure demonstrates that no grounds related to the relationship between EU and national

140 Or Brook and Magali Eben. 'Article 3 of Regulation 1/2003: A Historical and Empirical Account of an Unworkable Compromise.' (2024) 12(1) Journal of Antitrust Enforcement 45.

141 Botta et al. (supra n. 108).

laws were ever raised in Denmark, Hungary, Ireland, Portugal, and Sweden. Such grounds were examined in 5% of the cases or less in Italy, Bulgaria, the Netherlands, Poland, Slovakia, and Lithuania. Those grounds were more prominent only in a handful of jurisdictions (above 25% of the cases in Luxembourg, Romania, Latvia, and Austria).

The limited discussion of this type of appeal ground may be ascribed to soft convergence and relative alignment between EU and national competition laws in most of the Member States.[142] The relatively high percentage rate of appeals on EU/national grounds in Latvia, for example, was the result of classifying all anti-competitive agreements listed in the national provision equivalent to Article 101 TFEU as by-object restrictions, thereby diverging from the EU jurisprudence on the matter.[143] Similarly, the discussion of such grounds in Austria involved a series of cases raising questions on the interpretation of various EU competition law provisions.[144] Moreover, the limited appeals submitted regarding the relationship between EU and national laws might also be the result of the limited incentive for parties to the judicial dispute to contest the classification of their alleged infringement as based on EU or national competition laws.

The limited discussion over the relationship between EU and national laws is particularly striking when taken together with the findings on the highly limited application of EU competition law in some of the Member States, and particularly in most of the CEE countries (*see* discussion in section 4 above). In practice, this leads the national courts in those jurisdictions to have very limited opportunities to scrutinise the application of EU competition law by the NCAs and fulfil the important role envisioned for national courts by Regulation 1/2003.

6. Preliminary References

The limited attention paid to matters relating to the tension between EU competition law and national laws, as reported above, does not seem to be fulfilled by the preliminary reference

142 Katalin Cseres, 'Relationship Between EU Competition Law and National Competition Laws' in Lianos and Geradin (eds), Handbook on European Competition Law: Enforcement and Procedure (Edward Elgar 2013), 578-583; Bogdan M. Chiriţoiu, 'Convergence Within the European Competition Network: Legislative Harmonization and Enforcement Priorities' in Adriana Almășan and Peter Whelan (eds), The Consistent Application of EU Competition Law: Substantive and Procedural Challenges (2017 Springer), 3-22.

143 Latvia report, Chapter 18.

144 Austria report, Chapter 3.

procedure of Article 267 TFEU. This 'institutionalised mechanism of dialogue' between the ECJ and national courts,[145] aims to provide national courts with assistance on questions regarding the interpretation of EU law, to contribute towards ensuring the uniform application of EU law across the Union.[146] Notably, in the field of competition law, preliminary references are aimed at ensuring the uniform application of EU competition law not only in terms of substance but also in matters related to the procedures followed by NCAs and national courts and the sanctions imposed.[147] Preliminary references can thus determine the limits of the procedural autonomy principle.

According to Article 267 TFEU, the decision on whether to submit a preliminary reference rests with the national court concerned. However, if it is a court of last instance and a question of interpretation of EU law or the validity of an act of the EU institutions is necessary to decide a question before it, that court must submit a question. In the field of competition law, the ECJ has established a relatively broad jurisdiction, declaring it has the jurisdiction to give preliminary rulings about the interpretation of national competition laws, where such national rules have been modelled on EU law.[148] Hence, at times it has issued preliminary rulings on the interpretation of the national equivalent prohibitions even in purely national cases.[149]

Nevertheless, Figure 18 points to a limited number of preliminary rulings issued in connection with the judgments included in the database, amounting to only thirty-five rulings in the relevant period. Very few rulings originated from CEE Member States, perhaps given their limited application of the EU prohibitions,[150] with five Member States (Greece, France, Italy, Latvia and Lithuania) being responsible for over half of the rulings issued.

145 Rafał Mańko, 'Preliminary reference procedure' European Parliamentary Research Service PE 608.628 (2017), available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608628/EPRS_BRI(2017)608628_EN.pdf, 1.

146 Ibid. See also Paul Craig and Gráinne De Búrca, EU Law: Text, Cases, and Materials UK Version (Oxford University Press, USA, 2020), 496-497.

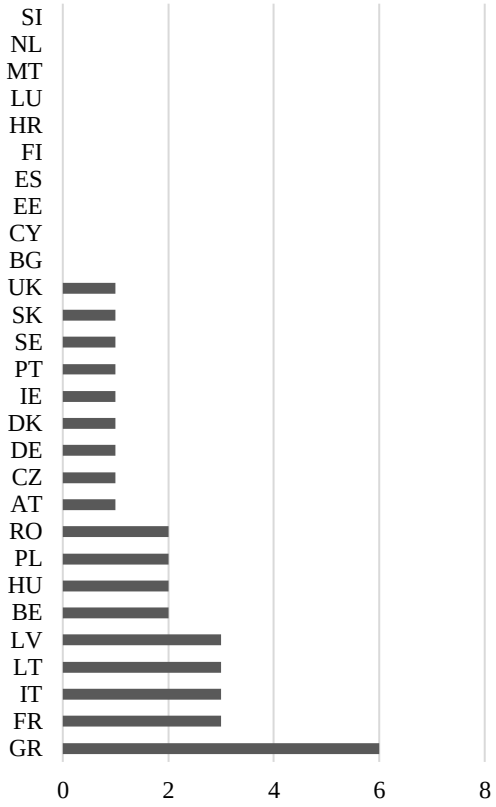
147 Jules Stuyck, 'The Role of Preliminary References in the Uniform Application of EU Competition Law' in Adriana Almăşan and Peter Whelan (eds) The Consistent Application of EU Competition Law: Substantive and Procedural Challenges (Springer 2017), 177-191, 187-188.

148 Joined Cases C-297/88 & 197/89, Dzodzi, EU:C:1990:360.

149 C-32/11 Allianz (2013), paras 20-23; C-413/13 FNV Kunsten Informatie en Media (2014), paras 17-20. Also see Stuyck (supra n. 147), 177-191.

150 See section 4 above.

Figure 18 Number of Preliminary Rulings



Notably, the figure only captured judgments that were issued after a preliminary ruling was issued. Given the length of the preliminary reference procedure and the re-initiation of national judicial procedures upon the delivery of such a ruling, it is possible that the figure does not capture preliminary rulings that were not issued or were not implemented by the national courts until the cut-off date of the study.

The limited use of the preliminary reference procedure in the decentralised public enforcement of EU competition law was already observed by earlier research.[151] When compared with the statistics on the total number of preliminary references across all fields of EU law,[152] there are surprisingly few references in the context of the public enforcement of the competition rules in the Member States, particularly in comparison with references by

151 Alec Stone Sweet and Thomas L. Brunell. 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95' (1998) 5(1) Journal of European Public Policy 66-97 DOI: 10.1080/13501768880000041; Barry Rodger 'Competition Law Preliminary Rulings: A Quantitative and Qualitative Overview Post Regulation 1/2003' (2014) Global Competition Litigation Review 125-139; Brook (supra n. 108), 140, 192, 228, 264.

152 https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-03/stats_cour_2022_en.pdf.

courts dealing with competition law disputes by private parties.[153] Studies also indicated that despite the introduction of that decentralised enforcement system in the EU there were fewer preliminary rulings in competition cases in recent years to 2016, noting the potential impact of the settlements and commitments procedures.[154]

7. Leniency and Settlements

Leniency[155] and settlements[156] (together 'negotiated penalty settlements') offer undertakings a full or partial waiver of fines in exchange for admitting to the facts involved or to a violation of the competition rules and cooperation with the competition authority. The Commission adopted its own leniency and settlements programmes,[157] and most (yet not all) of the NCAs examined in this study have similar national programmes.[158]

The fine reduction in those programmes is likely to impact upon the deterrent effect of the competition law prohibitions, yet is often justified by procedural economy benefits, as leniency and settlement processes are assumed to help authorities quickly conclude their investigations and render their decisions.[159] For the purpose of this study, it is noteworthy that the procedural economy benefits were attributed, among others, to the avoidance of litigation costs. It is assumed that while both leniency and settlements are subject to judicial

153 Rodger (supra n. 151).

154 See Jan Blockx, 'The Impact of the EU Antitrust Procedure on the Role of the EU Courts (1997-2016)' (2018) 9(2) Journal of European Competition Law & Practice 92-103 DOI: 10.1093/jeclap/lpy004.

155 According to the ECN+ Directive, Article 2(1)(16), a leniency programme is defined as 'a programme concerning the application of Article 101 TFEU or a corresponding provision under national competition law on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations regarding that participant's knowledge of, and role in, the cartel in return for which that participant receives, by decision or by a discontinuation of proceedings, immunity from, or a reduction of, fines for its involvement in the cartel'. In this project, we also included comparable national programmes that extend to all types of violations of Articles 101 and 102 TFEU and the national equivalent provisions, beyond secret cartels. It does not include criminal cartel immunity programmes.

156 According to the ECN+ Directive, Article 2(1)(18), settlement submission refer to voluntary presentations 'by, or on behalf of, an undertaking to a competition authority, describing the undertaking's acknowledgement of, or its renunciation to dispute, its participation in an infringement of Article 101 or 102 TFEU or national competition law and its responsibility for that infringement, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure'.

157 See, for example, Eur. Comm'n, Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2006 O.J. (C 298) 17, 3; Commission Regulation No. 622/2008 of June 30, 2008 Amending Regulation No. 773/2004, as regard the Conduct of Settlement Procedures in Cartel Cases, 2008 O.J. (L 171) 3, 1.

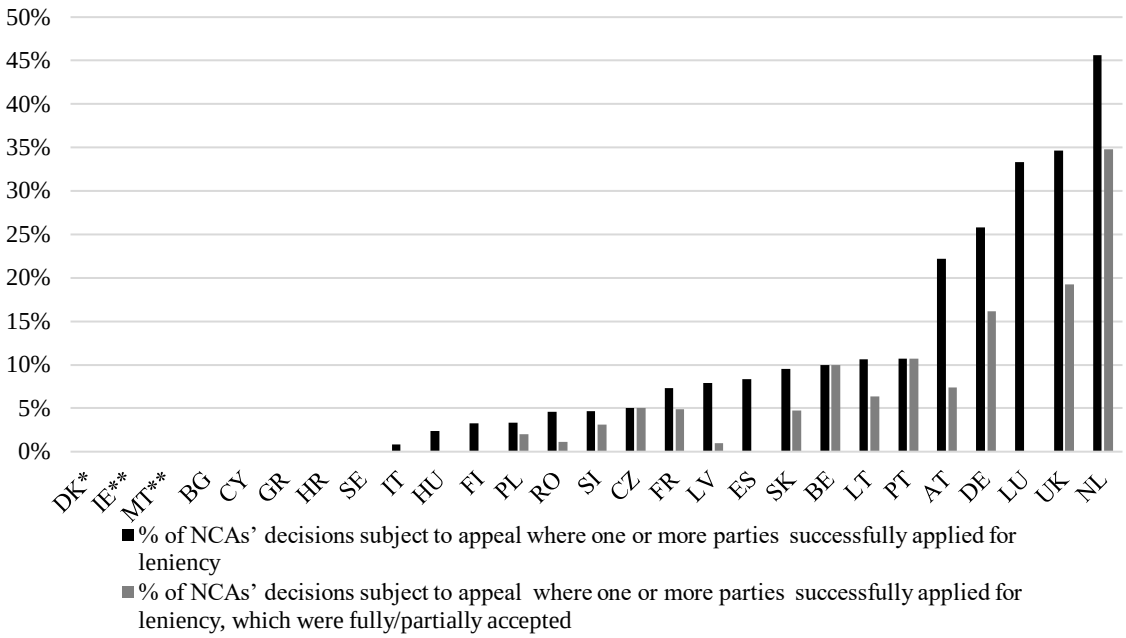
158 For a discussion of the diverging national programs see Eur. Comm'n Staff Working Paper, Impact Assessment accompanying the ECN+ Directive Proposal, SWD (2017) 114 final, 23-25 and Annex XII-XIII.

159 Brook (supra n. 84), 487-489.

review before the EU and some of the national courts, in theory, undertakings benefitting from either leniency or settlement will have more limited incentives to appeal. At the EU level, for example, a reduction of 20% in the number of the Commission's decisions subject to appeal has been explained as a consequence of the introduction of the Commission's settlements programme.[160]

Figure 19 summarises the percentage of NCAs' decisions subject to appeal in which one or more of the undertakings have successfully submitted a leniency application. It should be noted that Ireland did not have a leniency programme during the period covered by this study, and that Malta introduced a leniency programme soon after the end of the relevant period covered by this study, following the implementation of the ECN+ Directive. Furthermore, infringement decisions based on a leniency application cannot be appealed in Denmark.

Figure 19 Appeals on NCAs' Decisions Where a Leniency Application Was Submitted



Note: For Spain, the figure does not include data on the acceptance rate of NCA's decisions where one or more of the parties have successfully applied for leniency.

** Jurisdictions in which infringement decisions based on leniency applications cannot be appealed*

*** Jurisdictions having no leniency programme during the relevant period of the study (April 2021)*

160 Yannis Katsoulacos et al., 'Antitrust Enforcement in Europe in the Last 25 Years: Developments and Challenges' (2019) 55 Review of Industrial Organization 5-26, 19 DOI: 10.1007/s11151-019-09698-2.

Our findings question whether the assumption of the procedural economy benefits of leniency applications holds in all jurisdictions. The figures demonstrate that in nine jurisdictions, 10% or more of the NCA's decisions or previous instance's judgments subject to an appeal were adopted after one or more of the parties to the procedure have successfully applied for leniency (Slovakia, Belgium, Lithuania, Portugal), of which in five jurisdictions over 20% of the appealed decisions (Austria, Germany, Luxemburg, the UK and the Netherlands). This queries the extent to which the benefit resulting from those programmes can justify their detrimental impact upon deterrence.[161]

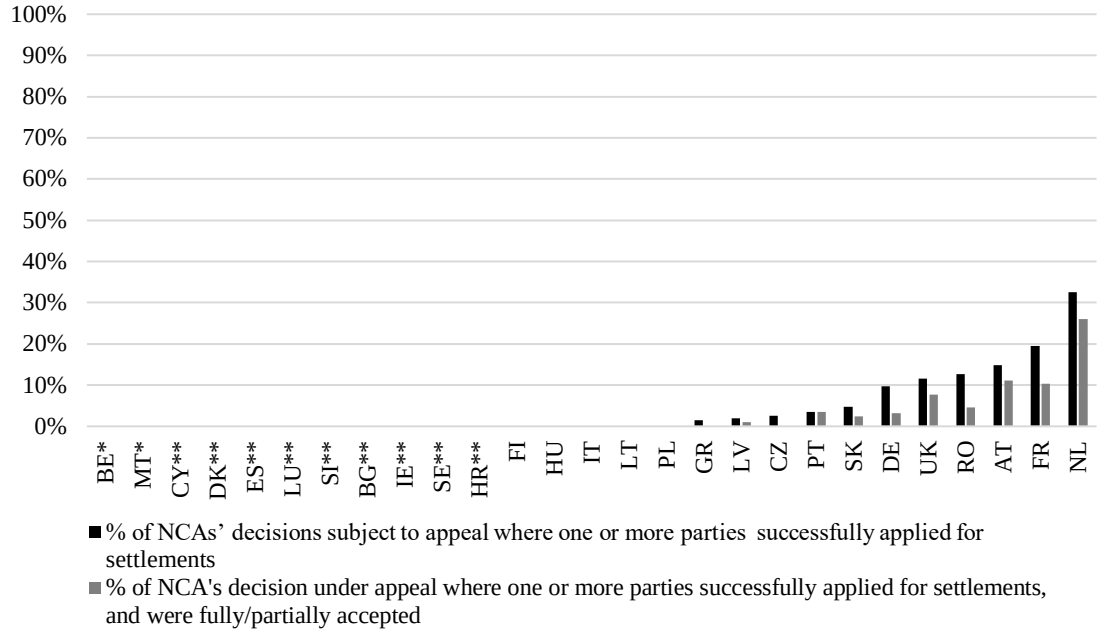
Almost half of the Dutch NCA's decisions and court judgments under appeal (46%) started with a leniency application, and 35% of such appeals were fully or partially successful. As elaborated in the national report, in some appeals, the effect of the leniency application itself was contested on appeal, such as the extent to which the application evidenced the role of an undertaking in the infringement. In a few cases, the leniency applicants themselves submitted an appeal, seeking a larger reduction in the fine.[162] In the UK, 35% of the decisions and judgments under appeal were adopted based on a leniency application. The appeals mostly contested the calculation of the fines and were fully or partially accepted in 19% of the cases.[163] In Austria, in which 22% of the appealed decisions were based on leniency applications, the appeal court often examined the application of the leniency instrument, and in some cases its compatibility with EU law.[164]

Similarly, Figure 20 depicts the percentage of NCA's decisions or previous instance's judgments subject to an appeal in which one or more of the undertakings had successfully negotiated a settlement with the NCA. Bulgaria, Cyprus, Denmark, Spain, Ireland, Luxemburg, Sweden and Slovenia[165] did not have a settlements programme during the period covered by the project, and in Croatia they were only introduced in April 2021. Infringement decisions based on a settlement cannot be appealed in Belgium. While such decisions can be appealed in Latvia, the grounds are limited to fraud, deceit, and duress.[166] In Malta, following the

161 For a discussion see Brook (supra n. 159), 487-489.
162 The Netherlands report, Chapter 22.
163 The UK report, Chapter 30.
164 Austria report, Chapter 3.
165 Settlements were introduced in Slovenia in 2022, following the cut-off date of this study (see Chapter 27).
166 Latvia report, Chapter 18.

adoption of the judicial model in 2019, settlement decisions are delivered by the Civil Court (Commercial Section), following proceedings instituted by the administrative NCA. While all decisions of the NCA in Malta are subject to an appeal, the law requires that undertakings must waive their right to appeal or challenge settlement procedures.[167]

Figure 20 Appeals on NCAs' Decisions Where a Settlement Application Was Submitted



*Note: * Jurisdictions in which infringement decisions based on settlement agreements cannot be appealed*

*** Jurisdictions having no settlements programme during the relevant period of the study (April 2021)*

The figure reveals that in comparison with leniency, fewer appeals were submitted on decisions and judgments where a settlement application was accepted. Relatively high appeal rates in such cases are apparent in Austria (15%, from which 11% were fully or partially successful) and the Netherlands (33%, from which 26% were fully or partially successful), both of which also experienced high appeal rates in cases of leniency applications, as well as France (20%, from which 10% were fully or partially successful). In Austria, the three appealed decisions involving settlements concerned procedural and relatively minor questions, such as publication and costs.[168] In France, such appeals were lodged by undertakings that did not

167 Malta report, Chapter 21.
168 Austria report, Chapter 3.

benefit from the settlement and by undertakings which had benefited from it but contested the method used to calculate the fine.[169]

8. Third Parties

Third parties' participation in competition law enforcement by NCAs and judicial review by national courts may support and complement judicial review. Granting participation rights to third parties provides them with the opportunity to contradict the decisions of the competition authorities, invoking errors, flaws, or mistakes that could ultimately lead to the illegality of the final decision.[170] Third-party participation may increase the effectiveness of enforcement by providing valuable information necessary for the accurate representation of the factual situation, thereby enabling the competition authorities and courts to reach a decision that accurately represents both law and facts. They facilitate the administrative procedure by allowing them to gain greater information and they help to concretise the public interest.[171] Hence, appeals brought by third parties may be an indicator of the success of judicial review in protecting the rights of stakeholders in the process.[172]

The rules governing third parties' participation are determined according to national laws and vary considerably from one jurisdiction to another.[173] Third parties may have a double role in judicial review, either launching an appeal against an NCA decision (in particular decisions concerning the rejection of a complaint and in some jurisdictions decisions to close a case on priority grounds) or joining an appeal as an interested third party (often referred to as intervening).

The different involvement of third parties in lodging appeals is already illustrated in Figure 11. The figure revealed that in around a third of the examined jurisdictions, third parties played no role in launching first-instance appeals (Austria, Ireland, Sweden, Czech Republic) or a very limited role (3% or less in Italy, Romania, Hungary, Germany, Portugal, Slovenia, and Slovakia). By comparison, 27% of the first-instance appeals in Spain,[174] 49% of the first-instance appeals in Bulgaria, 50% of the first-instance appeals in Luxemburg, and 57% of the

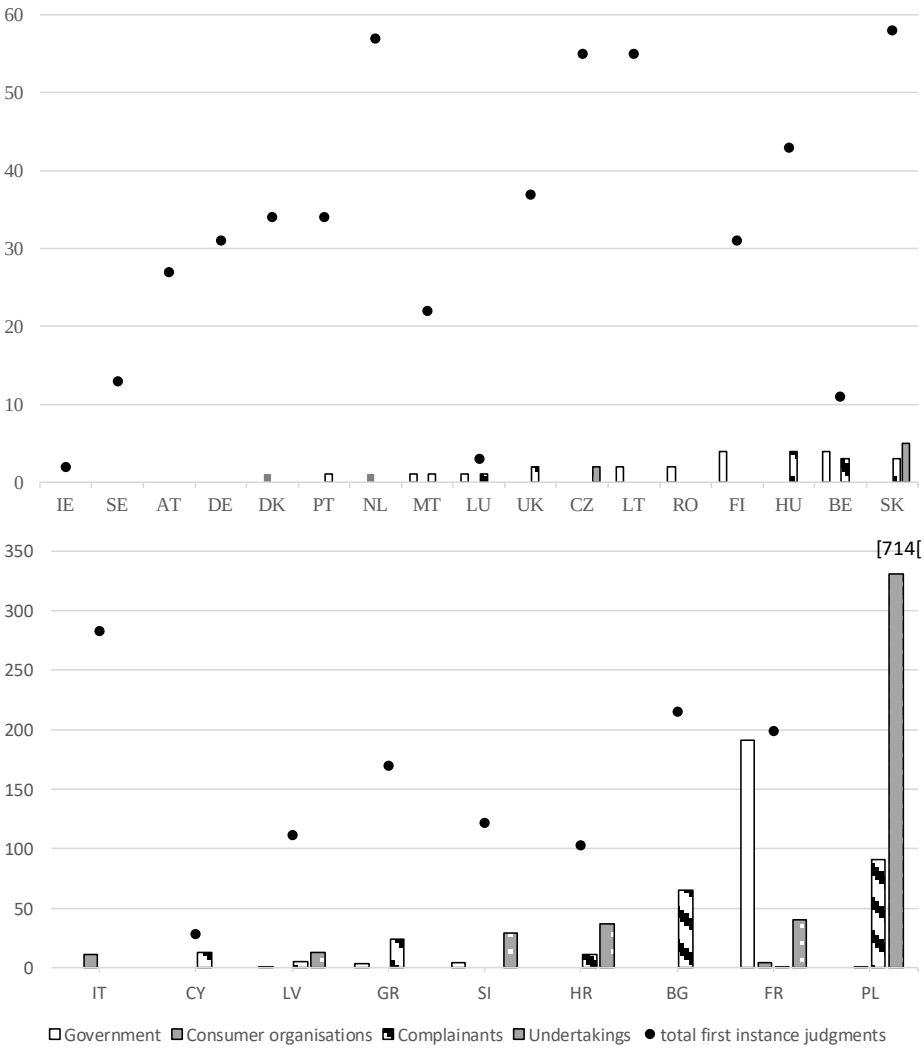
169 France report, Chapter 12.
170 Joana Mendes, Participation Rights (Oxford University Press 2011), 32.
171 Ibid.
172 Geradin and Petit (supra n. 60), 58.
173 For an empirical mapping on such rules, see Brook and Cseres (supra n. 69), 35-40.
174 This figure is based on a previous study by the Spanish rapporteur, which calculated this percentage from the perspective of each NCA's decision subject to an appeal (see Spain report, Chapter 28).

first-instance appeals in Malta and Croatia were initiated by third parties. The figure also reveals that in some countries, third parties were active in submitting second and third-instance appeals. All second-instance appeals in Belgium and Luxemburg were launched by third parties, as well as 41% of the second-instance appeals in Bulgaria, and 29% of the second-instance appeals and 33% of the third-instance appeals in Malta. The second-instance appeal in Croatia was initiated by the State Attorney Office and the third-instance appeals in Slovenia were initiated by the Higher State Attorney. By comparison, in relation to the EU Commission's decisions, third parties submitted 16% of the Article 101 TFEU annulment applications and 49% of the Article 102 TFEU annulment applications leading to judgments issued between 2000 and 2010.[175]

A similar trend is observed when it comes to the role of third parties in joining judicial proceedings as interested parties. As illustrated by Figure 21, the various judicial systems differ both in terms of the number of judgments where third parties have joined as third parties in the first-instance appeal, and in the characteristics of those third parties. The figure indicates where third parties to appeals were a national government agency or the government itself; a consumer organisation; the complainant in the NCA's decision subject to an appeal; undertakings and/or individuals that were part of the NCA's decision subject to an appeal but were not the applicants or the respondents in the appeal procedure; or other third parties not falling into any of the above categories. In relation to some judgments, more than one type of third party had joined the proceedings. The number of third parties joining first-instance appeals (bars) is compared to the total number of first-instance judgments (dots).[176]

175 Geradin and Petit (supra n. 60), 58.
176 No data is available with respect to Spain.

Figure 21 Third Parties Joining First-Instance Appeals



The available empirical findings suggest that in many countries, third parties have never (Ireland, Sweden, Austria, Germany) or rarely (Denmark, Portugal, the Netherlands, the UK, Czech Republic, Lithuania, Romania, Finland, Hungary, and Malta) intervened in competition law appeals.

In other countries, third parties have been more active in joining appeals. For example, a high number of complainants joined the appeals in Bulgaria, Croatia, Cyprus, Greece, Luxemburg, and Latvia (prior to 2016). In those countries, unlike many others, a decision to reject a complaint or a finding of no grounds for action is subject to an appeal that may be lodged by a complainant (*see* section 1.5 above). In Poland, the very high involvement of complainants and undertakings that were not party to the NCA's decisions subject to appeal reflect the old legal rules, in force until 2007. In that period, undertakings with legal interest,

local government authorities, state audit offices, consumer advocates, and consumer organisations had the right to call on the NCA to initiate infringement proceedings, and once proceedings were initiated, they would become a party to those proceedings and had the right to file and join an appeal. The 2007 reform stated that all NCA proceedings shall be initiated ex officio, solely at the discretion of the NCA. Although third parties are formally allowed to submit statements to the NCA during the proceedings, such submissions have a limited value, and third parties no longer have access to the case files. Moreover, only the addressees of the NCA's decision can submit an appeal.[177]

Figure 21 also illustrates that in some legal systems, branches of the government are involved in competition law appeals. This was most notable in France, where the Minister of the Economy has a right not only to lodge competition law appeals but also to intervene in the procedure by submitting oral and written observations.[178] The Minister of Economic Affairs also has the right to bring appeals in Belgium, yet made a more limited use of this power in practice in comparison with France.[179] In Greece, the government intervened only in a limited number of proceedings through public authorities, all concerning actions for annulment against the NCA's findings in the poultry farming cartel.[180] In Slovenia, the State Attorney's Office as the representative of the public interest has participated in four cases.[181] In Finland, governmental regulators acted as a third party in four appeals and included stakeholders such as the Finnish National Aviation Organisation, the National Telecommunications Regulator, and the National Post Office.[182]

Allowing branches of the government to intervene in competition law appeals may indirectly limit NCA independence, by allowing the government to make representations concerning the public interest and policy beyond competition law. Notably, while the ECN+ Directive prohibits the NCAs from seeking or taking instructions from the government or any other public or private entities when carrying out their duties and exercising their powers in

177 Poland report, Chapter 23.
178 France report, Chapter 12.
179 Belgium report, Chapter 4.
180 Greece report, Chapter 14.
181 Slovenia report, Chapter 27.
182 Finland report, Chapter 11.

the application of Articles 101 and 102 TFEU,[183] the Directive does not preclude Member States from making representations during judicial review.

9. A Plea for Greater Transparency: The (Lack of) Publication of Judgments

Publication of judgments is essential for both the public scrutiny of judges and courts and for public knowledge and awareness of the development of law.[184] A complete database of judgments is essential for the promotion of both a better understanding and critical analysis of competition law enforcement.[185] It is of particular value in the context of the enforcement regime of Regulation 1/2003, where undertakings must self-assess if and how they comply with the open-ended provisions of EU competition law.

At the EU level, competition law judgments by the ECJ and GC are published in accordance with the Rules of Procedure of the Court of Justice and the General Court.[186] Moreover, the EU Courts have acknowledged that publication of the Commission's competition law decisions may contribute to ensuring the observance of EU competition law. Their publication serves the public interest of providing greater transparency and awareness of the reasons behind the Commission's action while acknowledging the interests of economic operators in knowing the sort of behaviour that is likely to be punished. It supports the interests of anyone harmed by the infringement so that they can assert their rights, and it is also essential to the rights of the infringing undertaking to seek judicial review.[187] Publication of a Commission decision is the rule, and non-disclosure is the exception.[188]

183 ECN+ Directive, Article 4(2)(b).

184 Marc van Opijnen et al., 'On-line publication of court decisions in the EU: report of the policy group of the project "Building on the European Case Law Identifier"' Available at SSRN 3088495 (2017), 7. Also see Zachary D. Clopton and Aziz Z. Huq, 'The Necessary and Proper Stewardship of Judicial Data' (2024) 76 Stan. L. Rev. (forthcoming).

185 Cf, Richard A. Posner, 'A Statistical Study of Antitrust Enforcement' (1970) 13(2) The Journal of Law and Economics 365, 417-418 DOI: 10.1086/466698; William E. Kovacic, 'Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities' (2005) 31 Journal of Corporate Law 503, 541.

186 Their publication is subject to confidentiality with respect to business secrets, see Charlotte Emin, 'Luxembourg Confidential: Keeping (Business) Secrets Before the General Court of the European Union' (2023) 14(1) Journal of European Competition Law and Practice 4 DOI: 10.1093/jeclap/lpac048.

187 C-189/02P, Dansk Rørindustri and Others v. Commission ECLI:EU:C:2005:408, 170; T-193/03 Piro v. Commission ECLI:EU:T:2005:164, 57, 69, 78; 41-69, 104; T-345/12 Akzo Nobel and Others v. Commission ECLI:EU:T:2015:50, 60.

188 Also see P. Iannuccelli and J. Nuijten, 'Article 30 Publication of Decisions: Commentary' in Luca Prete et al. (eds) Regulation 1/2003 and EU Antitrust Enforcement (Wolters Kluwer 2023), 665-666.

Nonetheless, in relation to NCAs and national courts, there is no EU law requirement to publish decisions and judgments.[189] The diversity in the scope and nature of publication in different national legal systems was aptly demonstrated by a comparative study of the EU Member States conducted by van *Opijnen et al.*[190] They show that publication requirements in some Member States apply only to certain courts, often those of higher instances,[191] and that even those Member States that have adopted legal or policy frameworks that require full or partial publication have not always complied with such rules.[192]

Rapporteurs for the various jurisdictions in our project faced vastly different degrees of difficulty in locating all of the relevant cases for the purpose of the case-law database. As the national reports have illustrated, during all or part of the relevant period, there was no obligation to publish all judgments concerning the public enforcement of competition law in the Czech Republic,[193] Germany, Estonia, Greece, Hungary, Latvia, the Netherlands, Poland, Romania, and Slovenia. In France, there has only been an obligation to publish online all courts and administrative authorities' decisions since 2016. Previously, French constitutional rules, Article 6(1) ECHR and various domestic rules only required that such decisions be 'public', meaning that they had to be accessible to anyone who requested them but not necessarily published online.[194]

At times, even the judgments that were published were considerably redacted or anonymised in a manner that hinders the opportunity to follow the 'trail' of appeals against a single NCA decision or to understand its outcome.[195] Accordingly, in Hungary, while judgments are freely available on the courts' website, they are anonymised and it is not possible to search for court cases on the basis of the case number of the administrative procedure and to link the anonymised judgments to the decision reviewed. In Poland, the NCA's website is relatively comprehensive, even if not complete, in terms of publication of appeal judgments on its decisions. However, the difficulty remains in evaluating appeal

189 van Opijnen et al. (supra n. 184), 7.
190 Ibid., 11-14.
191 Ibid., 19.
192 Ibid., 11-14.
193 While in the Czech Republic, only the judgments of 'top' courts are systematically published, the NCA publishes all judgments reviewing its final decisions (see Chapter 8).
194 France report, Chapter 12.
195 See, for example, Hungary report, Chapter 15 and Romania report, Chapter 25.

courts' analysis, as the website includes only the conclusion part of any judgment, and the court's reasoning is not always published.[196]

Although the Portuguese NCA is obliged to publish all court judgments in appeals on fines imposed by it, this obligation is not always respected, and there is often a significant delay in publication. As detailed in the national report, this has even resulted in litigation by a consumer association.[197]

In Germany, national law does not require administrative authorities or courts to publish their decisions and judgments and there is no public register indicating which cases have been decided. Publication decisions primarily lie in the hands of the judges, and even if published, may take time and may be heavily redacted.[198] Similar issues arise in Greece, where the judgments of Greek administrative courts are not consistently published online in a manner accessible to the public. While the courts publish online some of their judgments, their databases are not reliably searchable due to the ineffectiveness of the available filtering criteria. Even private databases of Greek case law suffer from similar shortcomings in terms of the comprehensive nature of search results.[199] In Latvia, while judgments of administrative courts are published, there is no reliable search tool which can assist in identifying all relevant competition law judgments. Moreover, it is not always possible to link the appealed NCA decision to those judgments dealing with its appeal.[200]

The lack of publication hinders not only the public and academic assessment of the effectiveness of competition law judicial review but also the ability of the Commission and EU institutions to capture the functioning of Regulation 1/2003. As was elaborated in Chapter 1, the Regulation's process for transmission of national judgments to the Commission[201] was not respected in practice, meaning that even the Commission has only limited information on the scope and nature of the national judicial review of EU competition law enforcement.

We believe that the lack of access to judgments considerably restricts the ability to assess the effectiveness of judicial review of EU and national competition law.

196 Poland report, Chapter 23.
197 Portugal report, Chapter 24.
198 Germany report, Chapter 13.
199 Greece report, Chapter 14.
200 Latvia report, Chapter 18.
201 Regulation 1/2003, Article 15(2).

10. Conclusions: The Current National Judicial Review System Fails to Match the Integration Aims of EU Law

This project has created a new, open-access dataset of all judicial reviews of the public enforcement actions of Articles 101 and 102 TFEU and the national equivalent provisions, rendered by the national courts of the EU's twenty-seven Member States and the UK. The dataset covers a seventeen-year period from the decentralisation of the enforcement of EU competition law in May 2004 and ending in April 2021 covering all aspects of the judicial review of enforcement of the competition law prohibitions in line with the coding book, as outlined in Chapters 1 and 2 of Part I of this book.

Based on our findings, we submit that the current system of judicial review of EU and national competition law enforcement by national courts does not duly comply with the integration aims of EU law in general, and Regulation 1/2003 in particular. The evidence suggests that the existing EU and national rules on judicial review of the NCAs' enforcement do not ensure an effective, consistent, and uniform application of the competition rules by national courts in all Member States. In addition to the detailed findings presented in this chapter, we believe this conclusion is supported by two overarching outcomes emerging from the study: a conceptual and an empirical observation.

First, is the *lack of a shared, conceptual framework* to guide judicial review of competition law across the EU. There are no concrete EU law provisions that inform the operation of national courts, no harmonised terms and benchmarks with respect to fundamental matters such as the institutions and procedure, the standard of review and the degree of specialisation of the courts (section 1), the powers and remedies of courts upon accepting appeals (section 2.4), or the definition and focus of the grounds of appeal (Section 5). Moreover, there has been almost no attention afforded by policymakers and academics to foundational challenges associated with judicial review in a decentralised system, both at the EU and most of the national levels. In particular, very few systematic-empirical or EU-wide comparative studies have attempted, to date, to examine these questions (Chapter 1).

The lack of a conceptual framework not only hinders the study and review of the effectiveness and impact of judicial review but also complicates the gathering of empirical data. Judicial review, as we learn from this project, involves considerably divergent processes among the various Member States. One clear example arises in Member States following the

judicial model, namely where a national court is the entity formally adopting infringement decisions in public enforcement proceedings (section 1.1). In that setting, according to Regulation 1/2003, such courts' decisions are considered part of the action of the NCAs rather than review by a court. Other differences relate to the type of decisions that can be appealed in each Member State (e.g., whether decisions to close an investigation or reject a complaint are subject to review, as well as commitment decisions and NCAs' decisions that were based on leniency and/or settlement applications, *see* sections 1.5 and 7), the number of instances of appeals and the different types of review (e.g., internal, judicial, or constitutional, *see* section 1.2), and the types of appellants and the role of third parties (sections 3 and 8). The considerably different national settings in which judicial review of EU competition law takes place, therefore, renders its comparative study and governance particularly complicated.

The second general finding of the project is an empirical one. It confirms that the above conceptual challenges were matched by *great diversity in terms of the practical experience of judicial review*. The empirical findings point to considerable disparity, for example, in relation to the number of judgments on competition law appeals issued in the relevant period. While over 1,300 judgments were rendered in Spain (with respect to approx. 300 NCA's decisions), over 1,190 in Poland (with respect to approx. 500 NCA's decisions), only approx. 40 judgments were rendered in the UK (with respect to approx. 25 NCA decisions) and 2 in Ireland (with respect to 2 NCA's decisions) (section 2.1). A similar high level of heterogeneity concerns the ratio of appeals, with most CEE countries being at the higher end of the range (section 2.2). Moreover, although the ratio of successful appeals has its limitations as a performance assessment indicator and interpreting the meaning behind success rates is not a straightforward task, our findings suggest for instance that they do not point to a clear correlation between success and either the administrative and judicial model of enforcement (section 2.2).

The findings also point to remarkable differences in the nature and type of NCAs' decisions subject to judicial review (section 4). In many jurisdictions, the overwhelming majority of appeals concerned hard-core restrictions, corresponding with the enforcement strategies adopted by the NCAs. Moreover, the infringement of national competition laws alone has been the focus of judicial review actions in various CEE Member States in particular.

The appeal success rates varied significantly among the countries, both in aggregated terms and when examined based on the grounds invoked (sections 2.3 and 5). Highly specialist

courts, such as the first instance courts in Denmark and the UK, had high rates of both substantive grounds appeals and their success, supporting the hypothesis that specialist courts are less likely to be deferential to the NCAs' analysis. As such, there is some evidence that those national courts have contributed to the substantive development of the EU competition rules. By comparison, in many CEE courts, procedural grounds were invoked in a very high proportion of appeals. The study also found that, contrary to initial expectations, the judicial model did not always lead to less frequent appeal deliberation on procedural matters. Similarly, there was considerable focus on appeal grounds related to fines in many of the CEE countries, and the empirical findings suggest that many of the national courts (especially first instance appeals) are considerably more likely to intervene in the calculation of fines in comparison with the EU Courts.

Our findings also question whether the procedural economy benefits of leniency and settlements applications hold in all jurisdictions, given the high proportions of appeals submitted on decisions that were based on leniency, and to a lower extent on settlements applications, and the relatively high success rates of such appeals in some jurisdictions (section 7).

Finally, our empirical findings question the degree to which many of the national courts have fulfilled the important role envisioned for them by Regulation 1/2003, namely to ensure the effective, uniform and consistent application of EU competition law across the single market. In addition to the considerable divergence across substantive, procedural, and institutional aspects of judicial review, our project points to the limited deliberation over the relationship between EU and national laws before most of the national courts (section 5.4), the scant application of EU competition law in some of the NCAs and national courts (section 4), and the scarce resort to the preliminary reference procedure in most of the Member States (section 6). The reported diversity, found across the range of variables examined by the empirical study, does not appear to be associated with objective characteristics of the national markets. Therefore, it raises serious concerns as to the level playing field across the EU and the extent to which judicial review of EU competition law enforcement can be considered 'effective'.

The conceptual and empirical conclusions suggest that the few provisions of Regulation 1/2003, aimed at ensuring the substantive accuracy of the competition rules and their uniform and coherent applications by national courts, have failed at achieving their aims (*see*

Chapter 1): Article 3 of the Regulation obliges the national courts (and NCAs) to apply Articles 101 and/or 102 TFEU when they apply their national competition law rules and establishes the primacy of the EU competition provisions. Yet, national courts have almost never questioned the classification of a case as purely national and the parties to an appeal seldom have the incentive to raise such questions on their own motion. Moreover, the cooperation mechanisms of Articles 15-16 of Regulation 1/2003, aiming at ensuring that the Commission and NCAs remain sufficiently well informed of proceedings before national courts, are mostly voluntary in nature and have only partially been respected in practice (Chapter 1).

As a result, there is no external monitoring of the overall operation of the national judicial review system nor scope for external challenges to the compatibility of national courts' appellate judgments with EU law.

Based on the insights gathered by this book on all aspects of the work of the national courts both individually and collectively on a comparative basis, we call for the procedural autonomy principle that has guided the EU decentralised enforcement system to be revised and recalibrated in favour of greater effectiveness, uniformity and transparency. First, we point to the value of enhancing access to competition law enforcement by ensuring full and timely publication of all NCAs' decisions and national courts' judgments applying the EU and the national equivalent competition law prohibitions, as was envisioned by Article 15 of Regulation 1/2003 (section 9). This, we believe, is imperative for greater accountability and oversight by the EU and national policymakers, stakeholders, and academic scholarship and would inform evidence-based policy reforms. Second, we advocate for the EU legislator, especially as part of the review of Regulation 1/2003, to consider ways to provide a more consistent and coherent framework for the judicial review of the NCAs' enforcement actions across the EU internal market, in terms of the substantive competition law rules, institutions, and procedures. While the ECN+ Directive is a first step in the right direction, our empirical study has proven that further institutional, procedural, and substantive harmonisation and/or soft law coordination mechanisms are essential.