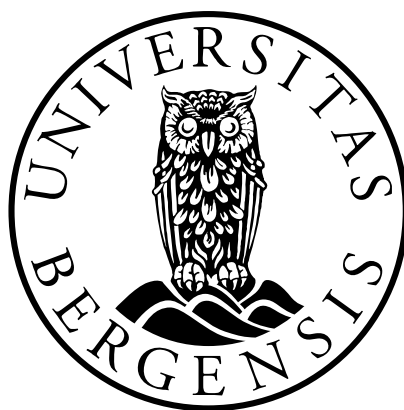


Commitment Decisions Under Article 9 of Council Regulation (EC) No 1/2003

*An analysis of the Commission's practice,
advantages, disadvantages and proposals for
changes*

Candidate Number: 128

Word Count: 14 978



JUS399 Master's Thesis
The Faculty of Law

UNIVERSITY OF BERGEN

10 May 2019

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1 Introduction

1.1 Research Question

The topic of this master's thesis is commitment decisions under Article 9 of Regulation 1/2003.¹ The research question is the Commission's practice, advantages and disadvantages of the commitment procedure and if there are any changes that can be made in order to improve the commitment procedure for the future.

In order to conclude on the research question I will make an assessment of different aspects of the commitment procedure. Firstly, I will give an account for the content and the historical background of the commitment procedure. Secondly, I will carry out an analysis of the Commission's practice on commitment decisions. Thirdly, I will discuss the advantages and disadvantages of the commitment procedure compared to the infringement procedure under Article 7.² Finally I will assess whether there are any changes that can be made in order to improve the commitment procedure for the future.

1.2 Topicality

The powers of the Commission to make commitment decisions is laid out in Article 9 in Chapter III. The implementation of Regulation 1/2003 provided the European Commission with a formal mechanism to resolve cases without finding an infringement based on remedial commitments offered by the undertakings under scrutiny.³ In the *Alrosa* judgement, the Court of Justice of the European Union (the ECJ) held that the principal objective of the commitment procedure is to provide a more rapid solution to the competition problems identified by the Commission.⁴ Thus, commitment decisions provide the Commission with a more flexible and rapid solution to the competition concerns than an infringement decision under Article 7.

When introducing Article 9, the commitment procedure was envisaged to be applied secondary to infringement decisions under Article 7. However, the Commission has since the

¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1/1) [hereinafter Regulation 1/2003].

² Ibid.

³ Dunne [2014] p. 399.

⁴ Case C-441/07 P - Commission v Alrosa para. 35.

implementation of Regulation 1/2003 and until this date adopted around 40 commitment decisions.⁵ In comparison the Commission has only adopted around 23 non-cartel infringement decisions since 2004.⁶

The high number of commitment decisions subsequent to the implementation of Regulation 1/2003 does therefore raise several interesting questions. One could question why the commitment procedure has been used so frequently, when it was envisaged to be used only in rare cases. Another interesting question is in what type of cases the Commission has been using commitment decisions. Moreover, it is also questionable whether the Commission's use of commitment decisions can be regarded as justified based on the advantages and disadvantages of the procedure. And if there are several disadvantages, one could question whether there are any changes that can be made in order to improve the commitment procedure for the future.

Although the topic commitment decisions are mentioned in legal literature and treated in several articles, they do not examine all of the above mentioned issues. The increasing number of commitment decisions does therefore entail the need for an analysis of the commitment procedure.

The aim of this master's thesis is to carry out an analysis of the commitment procedure under Article 9 based on the questions set out above.

1.3 Delimitation

The Norwegian Competition Authority has not made any commitment decisions pursuant to section 12 (3) of the Norwegian Competition Act.⁷ Furthermore, ESA has since 2008 only adopted one commitment decision in the case *Liechtensteinische Kraftwerke Anstalt and Telecom Liechtenstein AG*.⁸ To my knowledge, ESA has not adopted any commitment decisions prior to 2008. However, a numerous of commitment decisions has been adopted by the Commission since the entry into force of Regulation 1/2003. Due to the low number of

⁵ European Commission's homepage [2019] – the number is based on cases found with the case search tool under “commitments decisions” from 2004.

⁶ European Commission's homepage [2019] – the number is based on cases found with the case search tool under “Prohibition Decisions (Article 101...)” And “Prohibition Decision (Article 102...)” from 2004 excluding cartels.

⁷ The Norwegian Competition Authority's homepage “case search” and the Norwegian Competition Act (L05.03.2004 nr. 12).

⁸ ESA decision of 17 September [2008] in case 61291, *Liechtensteinische Kraftwerke Anstalt and Telecom Liechtenstein AG*.

commitment decisions under Norwegian competition law, the EEA Agreement and SCA, the thesis will be limited to the Commission's commitment decisions under Article 9 of Regulation 1/2003 with relevant legal sources.

Nonetheless, Norway is part of the European Economic Area (EEA). The EEA Agreement is an international agreement between the EU Member States and three of the EFTA states (Iceland, Lichtenstein and Norway). The EEA Agreement allows the three EFTA States to participate fully in the Single Market. It covers the four freedoms, competition and state aid rules, and horizontal areas related to the four freedoms. Moreover, it provides for the inclusion of EU legislation in all policy areas of the Single market.⁹

Part IV of the EEA Agreement regulates competition and other common rules. Articles 53 and 54 are identical to Articles 101 and 102 TFEU. Furthermore, the contracting states of the EEA Agreement have also ratified the Surveillance and Court Agreement.¹⁰ The SCA establishes an independent surveillance authority (ETFA Surveillance Authority).¹¹ Regulation 1/2003 is made part of the EEA Agreement. Protocol 4 of SCA regulates the functions and powers of the EFTA Surveillance Authority in the field of competition.¹² Protocol 4 of the SCA Articles 5 and 9 mirror the Commission's powers in Articles 5 and 9 of Regulation 1/2003. The SCA does therefore provide ESA with the powers to make commitment decisions.

A central principle of the EEA Agreement is homogeneity. The principle of homogeneity entails that the same rules and conditions of competition apply to all economic operators within the EEA. In order to maintaining the principle of homogeneity, the EEA Agreement is continuously updated and amended to ensure that the legislation of the EEA EFTA states is in line with the EU Single Market legislation. Thus the EEA Agreement and the principle of homogeneity requires a uniform and simultaneous application and interpretation of legislation within the EU and EEA states.¹³

⁹ Agreement on the European Economic Area of March 1993 (OJ No L 1, 3.1.1994) [hereinafter the EEA agreement].

¹⁰ Agreement between the ETFA States on the establishment of a Surveillance Authority and Court of Justice (OJ L 344, 31.1.1994, p. 3) [hereinafter SCA].

¹¹ ETFA Surveillance Authority [hereinafter ESA].

¹² PROTOCOL 4 ON THE FUNCTIONS AND POWERS OF THE EFTA SURVEILLANCE AUTHORITY IN THE FIELD OF COMPETITION [hereinafter Protocol 4].

¹³ EEA Agreement Article 102 and Article 105.

In Norway the competition rules of the EEA Agreement and SCA are incorporated in Norwegian law through the Norwegian EEA Act, the EEA Competition Act with regulations and the Norwegian Competition Act.¹⁴ In case of conflict between national law and the EEA agreement, the latter has precedence according to section 2 of the EEA Act.

Seeing that section 12 (3) in the Norwegian Competition Act and Article 9 of the EEA Agreement largely coincide with Article 9 of Regulation 1/2003, the analyses of the thesis are also relevant for the interpretation of Norwegian competition law and the EEA Agreement.

1.4 Methodology

1.4.1 Legal Sources

The topic of this thesis is based on EU law.

Primary law is the Treaties establishing EU and therefor the supreme source of law in the EU.¹⁵ The relevant primary law in this thesis is Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).¹⁶ Articles 101 and 102 TFEU will be used to examine the Commission's practice, the European courts' judgements and advantages and disadvantages of the commitment procedure.

Secondary law is regulated in Article 288 TFEU.¹⁷ According to Article 288 (2) TFEU a regulation shall have general application and is binding in its entirety and directly applicable in all Member States. The main legal source of this thesis is Article 9 of Regulation 1/2003. Additionally Article 7 and the infringement procedure will also be examined in order to compare the advantages and disadvantages of the Article 9 commitment procedure. Regulation 17 will also be of importance in order to give an account for the historical background of the commitment procedure.¹⁸

Furthermore, I will also use judgements from the European courts. Pursuant to Article 19 TEU the ECJ "shall ensure that in the interpretation and application of the Treaties the law is

¹⁴ The EEA Act section 1 (L27.11.1992 nr. 109), the EEA Competition Act (L05.03.2004 nr. 11) and the Norwegian Competition Act (L05.03.2004 nr. 12).

¹⁵ Sources of European Union Law, EUR-Lex.

¹⁶ Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326) [hereinafter TFEU].

¹⁷ Ibid.

¹⁸ EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty.

observed”. In accordance with Article 267 TFEU and Article 19 TEU¹⁹ the European courts have the jurisdiction to give preliminary rulings on the interpretation of the treaties, union law or the validity of acts adopted by the institutions. The aim of the ECJ is to ensure the uniform interpretation of EU law and that EU countries and institutions respect the law.²⁰ The judgements are thus of great importance in understanding EU law as they are binding on the EU institutions, national authorities and national courts.²¹

The Commission’s decisions, in particular commitment decisions and infringement decisions under Article 9 and Article 7 of Regulation 1/2003 will also be used as a source for this thesis. Pursuant to Article 288 (4) TFEU a decision which specifies to whom it is addressed shall be binding only on them. There are few cases before the EU courts on commitment decisions, and the EU courts are also reluctant in overturning the Commission’s decisions. Therefore, the Commission’s decisional practice on commitment decisions has more weight as a legal source compared to other areas subject to more intense judicial review.²²

In addition, I will also use soft law which has less legal weight than Commission decisions. This include white papers, guidelines, working papers and reports. Soft law constitute a part of the secondary law, but does not have any binding force, see Article 288 (5) TFEU.

Finally, I will use recitals in my analysis. Recitals do not have any binding force in EU law but they can nevertheless play an important role in the interpretation of the Treaties and the legal acts.²³

1.4.2 Methodological Traits

In this thesis I will carry out my analysis of Article 9 of Regulation 1/2003 based on the legal sources set out in section 1.4.1 in accordance with European Union law interpretation rules.

Primary law, Article 9 and case law from the EU courts provide little guidance on in what cases the Commission uses the commitment procedure and when a remedy is sufficient to meet the Commission’s competition concerns.

¹⁹ Consolidated version of the Treaty on European Union (OJ C 326).

²⁰ Court of Justice of the European Union, homepage.

²¹ Sejersted [2011] p. 55.

²² Ibid, p. 57.

²³ Fredriksen, EØS-rett 2.utgave [2014] p. 228

However, pursuant to the EU interpretation rules every provision of Community law must be interpreted dynamically and in its context in light of the provisions of Community law as a whole.²⁴

Seeing that the above mentioned legal sources provide little guidance I will carry out a dynamic and contextual interpretation of Article 9 in light of non-binding legal acts such as the Commission's commitment decision practice, recitals and preparatory works.

The first part of the analysis will provide for a clarification of the law based on the regulations, the Commission's practice and the judgements of the European courts. The second part of the analysis will provide for an analysis of advantages and disadvantages of the commitment procedure. The final part of the thesis will provide a policy analysis of the commitment procedure and proposals for changes of the commitment procedure for the future. The proposed changes do not require changes in the primary law, but may trigger changes in the secondary law and the supplementary law.

²⁴ Case C-283/81 - *CILFIT v Ministero della Sanità* [1982] EU:C:1982:335 paras 18-20.

2 Commitment Decisions Under Article 9

2.1 Introduction to Article 9

Regulation 1/2003 was a landmark reform which comprehensively changed the procedures for the application of Articles 101 and 102 TFEU. The regulation introduced an enforcement system that is based on direct application of the EU competition rules in its entirety.²⁵

One of the new provisions adopted with Regulation 1/2003 was the possibility of the Commission to adopt decisions on the basis of legally binding commitments as to undertakings' future behaviour under Article 9.²⁶

Article 9 (1) reads as follows:

Article 9

Commitments

1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

Article 9 (1) provides that where the Commission intends to adopt an infringement decision, the undertakings concerned may offer commitments if they choose to do so. The Commission has the discretion to decide whether or not it accepts the proposed commitments. If those commitments meet the Commission's concerns, the Commission may by decision make those commitments binding on the undertakings. When adopting a commitment decision, the Commission refrains from stating whether there has been or still is an infringement. Such decision may be adopted for a specific period of time and shall conclude that there are no longer grounds for action by the Commission.²⁷ The commitments may be behavioural or structural.

The commitment procedure is more consensual compared to the infringement procedure under Article 7 and there are several qualitative differences between the procedures.

²⁵ The Commission Staff Working Document's SWD [2014] 230 p. 2.

²⁶ Whish, Richard and David Bailey [2018] p. 257.

²⁷ Schweitzer [2012] p. 2.

Article 7 (1) reads as follows:

Article 7

Finding and termination of infringement

1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

Article 7 provides that a structural remedy can only be imposed in case it is proportionate with the infringement. The proportionality assessment is one of the most significant differences between the infringement procedure and the commitment procedure. The differences between the procedures were expressed in the *Alrosa*²⁸ case, and subsequently confirmed in the *Morningstar*²⁹ case. The differences between the proportionality assessments will be explained in section 2.4.

2.2 Historical Background

Although, no formal settlement procedures existed prior to Regulation 1/2003, the Commission closed several cases with informal settlements.³⁰ Many of those settlements involved that the undertakings committed to certain behavioural or structural changes. Some of the most well-known cases are the GFU-case, IBM case and the IRI/Nielsen case.³¹

In relation to the preparation of Regulation no 1/2003 it was desirable to formalise the comprehensive use of settlements and render the use of commitments more effective. The White Paper on Modernisation of the competition rules describe the two main defects with the practice

²⁸ Case C-441/07 P - *Commission v Alrosa* [2010] EU:C:2010:377.

²⁹ Case T-76 *Morningstar InC v Commission* paras 39-40.

³⁰ Hjelmg [2011] p. 4 and the Fifth Report on Competition Policy [1976] p. 9.

³¹ IP/002/1084, 17. July 2002, Fourteenth Report on Competition Policy [1984] p. 77 and XXVIth Report on Competition Policy (1996) para 64.

of informal settlements under Regulation 17.³² Firstly, the Commission did not have any means to ensure that the undertaking respected the commitments, apart from reopening the case. Secondly, the practice of informal settlements lacked transparency towards directly interested third parties and others in the business and legal community. Informal settlement cases were usually described in the Commission's annual Report on Competition Policy, however it did not provide much detail in order to learn from the settlements.³³

The introduction of Article 9 in Regulation 1/2003 sought to accommodate those defects.

Article 23 (2) (c) in Regulation 1/2003 provides that in case an undertaking fails to comply with the commitment, the Commission has the powers to impose a fine that does not exceed 10 % of the total turnover in the precedent business year of the undertakings concerned.

Article 24 (1) (c) provides the Commission with the powers to impose a periodic penalty payment not exceeding 5 % of the average daily turnover in the preceding business year on the undertakings concerned for a failure to comply with a decision pursuant to Article 9.

Furthermore, Article 30 in Regulation 1/2003 requires all decisions provided for in Chapter III of the Regulation to be published.³⁴

2.3 Overview of the European Commission's Decisional Practice on Commitment Decisions

2.3.1 Objective of the Analysis

In order to analyse in what type of cases the Commission uses commitment decisions and advantages and disadvantages with the procedure, I will provide an overview of the Commission's decisional practice on commitment decisions. As already mentioned, the Commission has adopted around 40 commitment decisions since Regulation 1/2003 was implemented. A few remarks can be made on the general tendencies of the Commission's decisional practice.

³² White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty [1999] para. 90.

³³ Wouter P.J Wils [2006] p. 347.

³⁴ *Ibid*, p. 348.

The majority of the commitment decisions adopted involves competition concerns in relation to Article 102 TFEU, rather than Article 101 TFEU. Recital 13 states that “Commitment decisions are not appropriate in cases where the Commission intends to impose a fine”, thus commitment decisions are often excluded in the case of hard-core cartels.³⁵ Furthermore, it is stated in Best Practices that the Commission does not apply the Article 9 procedure to secret cartels that fall under the Notice on immunity from fines and reduction of fines in cartel cases.³⁶ This may be the reason why there are fewer commitment decisions in relation to Article 101. Several cartel decisions according to article 101 TFEU are adopted by the Commission each year under Article 7.

Furthermore, Article 102 cases tend to be more complex than cartels, and commitment decisions might provide for a more rapid and effective solution to the competition concerns without a formal finding of an infringement.³⁷ However, the exclusion of cartel cases does not fully explain the high number of commitment decisions in Article 102 cases.

Additionally, other than recital 13 and Best Practices, secondary law provides little guidance on how the Commission assesses whether the commitment procedure or the infringement procedure is appropriate in a specific case and the effectiveness of the commitments.

As seen in section 1.4.1 the Commission’s practice of commitment decisions can shed light on how the commitment procedure is to be understood as there are few cases before the EU courts. Therefore, I will in the following sections examine the Commission’s practice in order provide a better understanding of in what cases the Commission uses the commitment procedure and if the remedies imposed are structural or behavioural.

The European Commission’s practice on commitment decisions can roughly be divided into four categories. Firstly, decisions that mirror the former notification procedure under Regulation 17. Secondly, energy sector investigations targeted in support of market liberalization. Thirdly, technology cases. And lastly decisions within the financial sector.³⁸

³⁵ Whish, Richard and David Bailey [2018] p. 266.

³⁶ Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU Text with EEA relevance OJ C 308, 20.10.2011, p. 6–32 para 116.

³⁷ Whish, Richard and David Bailey [2018] p. 268.

³⁸ Dunne [2014] p. 406.

2.3.2 Category 1: Decisions Mirroring the Former Notification Procedure

The first category is the most diverse one. The use of commitment decisions in these cases replicates the functions performed by the Regulation 17 notification procedure. The notification procedure required a notification to the Commission of any agreement or other coordination that involved a prima facie violation of Article 101 (1) that could potentially be exempted due to efficiencies under Article 101 (3). The exemption decisions under Article 101 (3) could be issued for a specific period and with conditions and obligations attached. In case of negative clearance, there were no longer grounds under Article 101 (1) for actions by the Commission.³⁹ Decisions with conditions and obligations attached do therefore have similarities with commitment decisions. The notification procedure particularly granted the Commission a guiding role over distribution agreements.⁴⁰

Within this category of commitment decisions, many of the earlier cases were notified to the Commission under Regulation 17 and subsequently solved through commitment decisions after the implementation of Regulation 1/2003. This includes the *DFB* decision⁴¹ concerning joint selling of media rights to the German Bundesliga. The *de Beers* decision⁴² involved the purchase relationship between De Beers group of Companies and the second largest diamond producer Alrosa on the worldwide market for rough diamonds. Other commitment decisions previously notified under Regulation 17 include *FA Premier League*,⁴³ *REPSOL*⁴⁴ and the *The Cannes Extension Agreement*.⁴⁵ In 2016 the Commission adopted the commitment decision *Cross-border access to pay-TV*.⁴⁶ The case concerned exclusive territorial licencing agreements concluded between six major US film studios and pay-TV broadcasters. The commitments involved alterations of the agreements and removal of the clauses that resulted in absolute territorial exclusivity in relation to Paramount's content. Furthermore, Paramount committed to not enter into or extend pay-TV output licence agreements with the anti-competitive clauses. Similar commitments have been made legally binding in a commitment decision from 2019 in the same case concerning Disney, NBCUniversal, Sony Pictures, Warnes Bros and Sky UK.⁴⁷

³⁹ Regulation 17 Articles 8 (1) and 2.

⁴⁰ Dunne [2014] p. 406.

⁴¹ Commission Decision of 19 January 2005 in case COMP/C-2/37.214, DFB.

⁴² Commission Decision of 22 February 2006 in case COMP/B-2/38.381, de Beers.

⁴³ Commission Decision of 22 March 2006 in case COMP/38.173, FA Premier League.

⁴⁴ Commission Decision of 12 April 2006 in case COMP/B-1/38.348, REPSOL.

⁴⁵ Commission Decision of 4 October 2006 in case COMP/C2/38.681, The Cannes Extension Agreement.

⁴⁶ Commission Decision of 26 July 2016 in case AT.40023, Cross-border access to pay-TV.

⁴⁷ Commission Decision of 7 March 2019 in case AT.40023, Cross-border access to pay-TV.

Other cases within category 1 are *Air France/KLM/Alitalia/Delta*⁴⁸, *BA/AA/IB*⁴⁹ and *Continental/United/Lufthansa/Air Canada*⁵⁰. In these cases the Commission adopted commitment decisions regarding joint venture agreements between airlines covering transatlantic air-routes, including the release of take-off and landing slots. In related cases the Commission made four decisions to bind *DaimlerChrysler*⁵¹, *Fiat*⁵², *Toyota*⁵³ and *Opel*⁵⁴ to give independent repairers access to technical information for car repairs, due to the risk of foreclosure as a result of the arrangements. The decision *Siemens/Areva*⁵⁵ concerned a non-compete and confidentiality obligation agreed between the parties within a broad field of products within the field of nuclear technology in the framework of their former joint venture.

In the decision *Ship classification*⁵⁶ the IACS committed to alter the membership rules of an association of classification services providers, participation in IACS's work and provide access of IACS' information to non-members, in order to avoid the disadvantages caused by the foreclosure practices. *Container Shipping*⁵⁷ involved a practice whereby 14 container liner shipping undertakings had been regularly announcing their intended future increases in prices through the media. The Commission's concern was that this practice may allow the parties to explore each other's pricing intentions and coordinate their behaviour in a way that might amount to a concerted practice in violation of Article 101. The Commission solved the case with a commitment decision that refrains from stating whether there has been or still is an infringement of the competition rules. Some would take the view that the Commission should have used the infringement procedure to clarify the law, given the uncertainty of the law in relation to price signalling as a concerted practice.⁵⁸

In 2012 the Commission adopted a decision under both Article 101 and 102 in *Rio Tinto Alcan*.⁵⁹ The decision concerned certain contractual practices relating to the licencing of reduction technology and the supply of pot tending assemblies (PTAs"). The Commission's

⁴⁸ Commission Decision of 12 May 2015 in case AT.39964, *Air France/KLM/Alitalia/Delta*.

⁴⁹ Commission Decision of 14 July 2010 in case COMP/39.596, *BA/AA/IB*.

⁵⁰ Commission Decision of 23 May 2013 in case AT.39595, *Continental/United/Lufthansa/Air Canada*.

⁵¹ Commission Decision of 13 September 2007 in case COMP/E-2/39.140, *DaimlerChrysler*.

⁵² Commission Decision of 13 September 2007 in case COMP/E-2/39.141, *Fiat*.

⁵³ Commission Decision of 13 September 2007 in case COMP/E-2/39.142, *Toyota*.

⁵⁴ Commission Decision of 13 September 2007 in case COMP/E-2/39.143, *Opel*.

⁵⁵ Commission Decision of 18 June 2012 in case COMP/39.736, *Siemens/Areva*.

⁵⁶ Commission Decision of 14 October 2009 in case COMP/39.416, *Ship classification*.

⁵⁷ Commission Decision of 7 July 2016 in case AT.39850, *Container Shipping*.

⁵⁸ Whish, Richard and David Bailey [2018] p. 583.

⁵⁹ Commission Decision of 20 December 2012 in case COMP/39.230, *Rio Tinto Alcan*.

competition concerns were that Rio Tinto Alcan's contractual practice might produce negative effects and result in anti-competitive foreclosure on the PTA market in contrary to Article 101 and 102. Finally, the *Coca-Cola*⁶⁰ decision concerned Coca-Cola's distribution agreements with retailers and thus, falls within category 1 although the decision was based on an alleged breach of Article 102. In order to meet the Commission's concerns regarding anticompetitive foreclosure resulting from the distribution agreements, Coca-Cola made commitments, inter alia, to remove any clauses that would lead to exclusivity, tying or loyalty rebates.⁶¹

2.3.3 Category 2: the Energy Sector

The second category involves commitment decisions in the energy sector based on alleged breaches of abuse of dominant position under Article 102. A significant number of commitment decisions fall within this category – fifteen in total.⁶² The European energy policy was set out in the Commission's communication to the 2006 Spring European Council. The policy is based on the view that well-functioning energy markets that ensure secure energy supplies at competitive prices are essential for achieving growth and consumer welfare in EU. The introduction of competition in EU's gas and electricity markets is thus an integral part of the European energy policy.⁶³ A high number of commitment decisions within the energy sector subsequent to the inquiry into the gas and electricity markets in 2005, is therefore not surprising.

These decisions include *Distrigaz*,⁶⁴ *German Electricity Wholesale Market*,⁶⁵ *German Electricity Balancing Market*,⁶⁶ *RWE Gas Foreclosure*,⁶⁷ *GDF*,⁶⁸ *Long Term Electricity Contracts in France*,⁶⁹ *Swedish Interconnectors*,⁷⁰ *E.ON Gas*,⁷¹ *ENI*,⁷² *Gazprom*,⁷³ *CEZ*,⁷⁴ *BEH*

⁶⁰ Commission Decision of 22 June 2005 in case COMP/A.39.116/B2, *Coca-Cola*.

⁶¹ Dunne [2014] p. 408.

⁶² European Commission's homepage [2019] – the number is based on cases found with the case search tool under "commitments decisions" from 2004 if the decisions *Deutsche Bahn I* and *Deutsche Bahn II* are included in this category.

⁶³ DG Competition Report on the Energy Sector Inquiry [2007] pp.4-5.

⁶⁴ Commission Decision of October 2007 in case COMP/B-1/37.966, *Distrigaz*.

⁶⁵ Commission Decision of 26 November 2008 in case COMP/39.388, *German Electricity Wholesale Market*.

⁶⁶ Commission Decision of 26 November 2008 in case COMP/39.389, *German Electricity Balancing Market*.

⁶⁷ Commission Decision of 18 March 2009 in case COMP/B-1/39.402, *RWE Gas Foreclosure*.

⁶⁸ Commission Decision of 3 December 2009 in case COMP/39.316, *GDF*.

⁶⁹ Commission Decision of 17 March 2010 in case COMP/39.386, *Long Term Electricity Contracts in France*.

⁷⁰ Commission Decision of 14 April 2010 in case COMP/39.351, *Swedish Interconnectors*.

⁷¹ Commission Decision of 4 May 2010 in case COMP/39.317, *E.ON Gas*.

⁷² Commission Decision of 29 September 2010 in case COMP/39.315, *ENI*.

⁷³ Commission Decision of 24 May 2018 in case AT.39816, *Gazprom*.

⁷⁴ Commission Decision of 10 April 2013 in case Case AT.39727, *CEZ*.

*Electricity*⁷⁵ and *DK/DE Interconnector*.⁷⁶ One might also include the decisions *Deutsche Bahn I*⁷⁷ and *Deutsche Bahn II*⁷⁸ in this category, although they primarily concerned the market for the supply of traction in Germany.

Commitment decisions within the energy sector can broadly be divided into two categories namely non-network-related cases and network-related cases. The non-network-related cases concerns long-term supply contracts, inflating balancing cost and discrimination against EU-based electricity traders. The competition concerns in these cases were foreclosure of the markets, higher prices and discrimination.

Furthermore, a majority of the cases within the energy sector has been network-related cases. These cases concern the transportation of network. The competition concerns in these cases were capacity hoarding, capacity degradation, margin squeeze, long term capacity bookings, strategic underinvestment, discrimination via congestion management, market segmentation, and withdrawal of generation capacity.⁷⁹

Most of the decisions within the energy sector involve structural or quasi-structural commitments, rather than, or in addition to behavioural commitments. The commitments accepted by *ENI*, to divide itself of its interests in three cross-border gas pipelines and thereby terminating the conflict on interest that arose from its vertical integration as both a supplier and transporter of gas, is an example of structural commitments.

The Commission has only imposed a structural remedy in one infringement decision under article 7. The use of structural remedies in the cases within the energy sector is thus very distinct from the use of structural remedies in infringement decisions, but does however, have some similarities with structural commitments required in some merger cases.⁸⁰

2.3.4 Category 3: the Technology Sector

The third category of commitment decisions are decisions within the technology sector. Technology markets are fast moving. The nature of these markets does therefore create

⁷⁵ Commission Decision of 10 December 2015 in case AT.39767, BEH Electricity.

⁷⁶ Commission Decision of 7 December 2018 in case AT.40461, DK/DE Interconnector.

⁷⁷ Commission Decision of 18 December 2013 in case AT.39678, Deutsche Bahn I.

⁷⁸ Commission Decision of 18 December 2013 in case AT.39731, Deutsche Bahn II.

⁷⁹ Hoffman [2014] pp. 134-135.

⁸⁰ Whish, Richard and David Bailey [2018] pp. 268-269.

challenges for antitrust authorities in terms of enforcement, especially since infringement decisions can span over several years. Illustrative are *Microsoft I*⁸¹ which took the Commission over ten years to administer remedies, and *Intel*⁸² which took the Commission 9 years to conclude. Commitment decisions on the other hand, may allow a faster reaction than infringement decisions.

In 2012 VP of the Commission Almunia stated in a speech on the Google antitrust investigation that:

I believe that these fast-moving markets would particularly benefit from a quick resolution of the competition issues identified. Restoring competition swiftly to the benefit of users at an early stage is always preferable to lengthy proceedings, although these sometimes become indispensable to competition enforcement.⁸³

Furthermore, it appears from the same speech that Alumina offered Google to solve the case pursuant to Article 9 instead of with an infringement decision and fines.

Against this background it could seem as if the Commission is of the opinion that cases within the technology sector are better solved with a commitment decision.

Technology markets differ from other markets due to the global scope of these markets. Therefore the undertakings concerned can face multiple investigations in respect of largely the same facts in different jurisdictions.⁸⁴ As an example the United States and the European Union have spent a considerable amount of time and resources the past decade pursuing antitrust cases against Microsoft.

The *Microsoft*⁸⁵ decision concerned Microsoft's potentially illegal tying of its web browser Internet Explorer to its dominant client PC operating system "Windows". Microsoft committed in particular to offer Windows' users an unbiased choice among different web browsers by means of a choice screen in different PC operating systems within the EEA. However, Microsoft subsequently failed to comply with the commitments and the Commission imposed a fine on EUR 561 million in 2013.⁸⁶

⁸¹ Commission decision of 24 May 2004 in case COMP/C-3/37.792, Microsoft I.

⁸² Commission decision of 13 May 2009 in case COMP/C-3/37.990, Intel.

⁸³ Almunia, « Statement of VP Almunia on the Google antitrust investigation » [2012].

⁸⁴ Dunne [2014] p. 409.

⁸⁵ Commission Decision of 16 December 2009 in case COMP/39.530, Microsoft (Tying).

⁸⁶ Commission Decision of 6 March 2013 in case COMP/39.530, Microsoft Tying.

Another decision within the technology markets was the decision *Rambus* from 2009.⁸⁷ The case concerned Rambus Inc and its claiming of potentially abusive royalties for the use of certain patents for “Dynamic Random Access Memory” (DRAM) chips subsequent to an allegedly deceptive conduct in the context of JEDEC standard-setting process. Such behaviour is known as “patent ambush”. The commission considered that the alleged “patent ambush” by Rambus undermined confidence in the standard-setting process, given that an effective standard-setting process is a precondition to technical development and development of the market in general benefit of consumers.

The *IBM*⁸⁸ case concerned IBM’s potential abuse of dominant position on the maintenance market for its mainframe hardware and operating system software products. The Commission adopted a commitment decision whereby IBM committed, for a period of five years, to make available critical spare parts and technical information necessary for maintenance of the IBM mainframe products under commercially reasonable and non-discriminatory terms, and allow third parties to enforce the commitments.

Furthermore, the Commission has adopted two commitment decisions concerning E-Books in the cases *E-Books* and *E-Books MFN’s and related matters*. The *E-Books*⁸⁹ decision involved Apple and five book publishers and it concerned a possible concerted practice between these undertakings in the form of an agency agreement, with the object of raising retail prices of E-Books in the EEA in contrary to Article 101. The publishers and Apple committed to terminate the agency agreements for the sale of E-books and permit retailers to offer price discounts or any other form of promotions. The *E-Books MFNS and related matters*⁹⁰ decision concerned Amazon’s use of several clauses in Amazon’s distribution agreements with e-book publishers in Europe, in particular “Parity Clauses”. Amazon committed to not enforce the relevant clauses, allow publishers to terminate e-book contracts containing the relevant clauses and to not include the clauses in any new e-book agreement with publishers.

⁸⁷ Commission Decision of 9 December 2009 in case COMP/38.636, *Rambus*.

⁸⁸ Commission Decision of 13 December 2011 in case COMP/39.692, *IBM*.

⁸⁹ Commission Decision of 12 December 2012 and 25 July 2013 in cases COMP/39.847 and COMP/39.847, *E-Books*.

⁹⁰ Commission Decision of 4 May 2017 in case AT.40153, *E-Books MFNS and related matters*.

2.3.5 Category 4: the Financial Services Sector

The last category of commitment decisions involves decisions within the financial sector. In these cases the Commission has used commitment decisions to regulate the price of financial products.⁹¹ On the Commission's homepage they state that the financial markets are "the lifeblood of the real economy, giving businesses and consumers access to financial products" and "the better and more competitively they function, the better the economy will perform".⁹² Against this background, it may not be surprising that the Commission has adopted several commitment decisions within this sector as the procedure provides them with the ability to tackle the competition concerns effectively and quickly.

The *Visa MIF*⁹³ decisions concerned the setting of multilaterally agreed interchange fees (MIFs) by Visa Europe Limited that applied to certain transactions with Visa credit cards and debit cards. The Commission's concern was that the objective and content of the MIFs was to maintain the segmentation of the national markets by limiting entry and price competition from cross-border acquirers. Visa made commitments to significantly cut its multilateral interchange fee for credit card and debit card payments and to reform its rules in order to facilitate cross-border competition.

The *Standard & Poor's*⁹⁴ decision concerned S&P's allegedly charging of excessive prices for the use of US International Securities Identification Numbers, causing financial service providers in Europe undue costs. The undertaking concerned made commitments to abolish licence fees for indirect bank users and reduce fees for direct users. Thomson Reuters is a global provider for financial information for professionals in the financial services. *Reuters Instrument Codes (RICs)*⁹⁵ concerned Reuters's alleged abuse of dominant position on the worldwide market for real-time data-feeds by imposing certain restrictions as regards to the use of Reuters Instrument Codes (RICs). The Commission's concern was that Thomson Reuters was prohibiting customers to use RICs for retrieving data from alternative data providers. Reuters committed to make available new licences allowing customers, for a monthly fee, to use RICs for data sourced from Thomson Reuters' competitors in order to meet the Commission's

⁹¹ Dunne [2014] p. 410.

⁹² European Commission's homepage, Competition, Financial services, overview.

⁹³ Commission Decisions of 8 December 2010 and 26 February 2014 in cases COMP/39.398 and AT.39398, Visa MIF.

⁹⁴ Commission decision of 15 November 2011 in case COMP/39.592, Standard & Poor's.

⁹⁵ Commission Decision of 20 December 2012 in case COMP/D2/39.654, Reuters Instrument Codes (RICs).

concerns. *CDS – Information market*⁹⁶ involved proceedings against the trade organisation International Swaps and Derivative Association Inc. (ISDA) and Markit, a global provider for financial information services. The Commission had competition concerns relating to the licencing of intellectual property necessary to offer trading services on the market for credit default swaps (CDS). ISDA and Markit committed to facilitate access to their intellectual property and data for exchange trading purposes.

As technology and digitalization are rapidly transforming the way in which the financial sector is operating, the same challenges may arise for antitrust enforcers as in the technology sector in section 2.3.4.⁹⁷ Commitment decisions do provide the Commission with a mechanism to tackle competition concerns effectively and quickly. This may be the reason why the Commission has chosen to use the commitment decision device in the above mentioned cases within the financial services sector.

2.4 Judgements of the European Courts

In order to analyse the commitment procedure, advantages and disadvantages and possible proposals for improvements, I will provide for an overview of the judgements of the European courts.

As previously mentioned, there have been few cases before the courts relating to commitment decisions under Regulation 1/2003. This may not come as a surprise as the undertakings concerned in general would rather settle a case with a commitment decision, than risking a large fine and expensive court litigation. To this date none of the undertakings subject to commitment decisions has appealed the Commission decision.⁹⁸ In four cases, however, a third party did appeal the decision before the General Court of the European Union. These include *Alrosa v Commission*⁹⁹, *Transportes Evaristo Molina v Commission*¹⁰⁰, *Morningstar v Commission*¹⁰¹ and *Groupe Canal + v Commission*¹⁰².

⁹⁶ Commission decision of 20 July 2016 in case AT.39745, CDS Information Market.

⁹⁷ OECD, *Financial Markets, Insurance and Private Pensions: Digitalisation and Finance* [2018] p. 3.

⁹⁸ Geraldin and Mattioli (2017) p. 8.

⁹⁹ Case T-170/06 *Alrosa v Commission* EU:T:2007:220.

¹⁰⁰ Case T-45/08 *Transportes Evaristo Molina v Commission* EU:T:2008:499.

¹⁰¹ Case T- 76/14 *Morningstar v Commission* EU:T:2016:481.

¹⁰² Case T-873/16 *Groupe Canal + v Commission* EU:T:2018:904.

In *Transporters Evaristo Molina v Commission* the Transporters Evaristo Molina brought action for annulment of the commitment decision made in REPSOL¹⁰³. However, the action was dismissed by the General Court on procedural grounds. ECJ upheld the judgement of the General Court.¹⁰⁴

In *Alrosa v Commission*¹⁰⁵ Alrosa brought an action for annulment of the commitment decision made in the *de Beers*¹⁰⁶ case with the claim that the commitments were disproportionate and thus too excessive. Alrosa's appeal was upheld by the General Court, overturning the Commission's decision and concluded that the Commission decision breached the principle of proportionality, although the commitments were offered voluntarily. The General Court also held that the Commission had failed to consider less onerous alternative solutions. The General Court's judgement was appealed by the Commission to the European Court of Justice. The ECJ annulled the General Court's judgement and reinstated the commitment decision made by the Commission.

The ECJ held that:

Those two provisions of Regulation No 1/2003, as noted in paragraph 38 above, pursue different objectives, one of them aiming to put an end to the infringement that has been found to exist and the other aiming to address the Commission's concerns following its preliminary assessment.

There is therefore no reason why the measure which could possibly be imposed in the context of Article 7 of Regulation No 1/2003 should have to serve as a reference for the purpose of assessing the extent of the commitments accepted under Article 9 of the regulation, or why anything going beyond that measure should automatically be regarded as disproportionate. Even though decisions adopted under each of those provisions are in either case subject to the principle of proportionality, the application of that principle none the less differs according to which of those provisions is concerned.

Undertakings which offer commitments on the basis of Article 9 of Regulation No 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination. On the other hand, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine.¹⁰⁷

¹⁰³ Commission Decision of 12 April 2006 in case COMP/B-1/38.348, REPSOL.

¹⁰⁴ Case C-36/09 P *Transportes Evaristo Molina v Commission* EU:C:2010:670.

¹⁰⁵ Case C-441/07 P - *Commission v Alrosa* [2010] EU:C:2010:377.

¹⁰⁶ Commission Decision of 22 February 2006 in case COMP/B-2/38.381, de Beers.

¹⁰⁷ Case C-441/07 P *Commission v Alrosa* EU:C:2010:377 paras 46-48.

The ECJ does therefore emphasize the difference between the proportionality assessment of the remedies imposed under the Article 7 and the Article 9 procedures. The commitment procedure allows the Commission to impose remedies that they may not have been able to impose with the infringement procedure. Furthermore, the court stated that the procedures pursue different objectives.

In the *Morningstar*¹⁰⁸ case, Morningstar, a competitor of Thomson Reuters sought an annulment of the commitment decision in *Reuters Instrument Codes (RICs)*¹⁰⁹. Morningstar argued that the commitments were insufficient to address the Commission's concerns. The General Court referred to the *Alrosa* judgement and stated that the Commission has a wide discretion with regard to accepting or rejecting commitments. Furthermore the General Court held that the Commission did not make an error in their assessment on whether the commitments were appropriate to address the Commission's concerns.¹¹⁰ The judgement reinforces the Commission's extensive powers in relation to Article 9 of Regulation 1/2003.

These judgements indicate that the Commission has a wide discretion when adopting a commitment decision. The wide discretion in terms of the proportionality of remedies could be one of the reasons why the Commission in some cases may favour the commitment procedure over the infringement procedure.

The last decision appealed by a third party is *Cross-border pay-TV*¹¹¹ in the case *Groupe Canal + v Commission*¹¹². The Commission's concerns in the *Cross-border pay-TV* decision were that absolute territorial restrictions could pose a threat to the single market. The General Court carried out a competition analysis of the contractual restrictions, and held that the Commission had not made an error in their assessment of the proposed commitments and that the commitments were appropriate to meet the Commission's concerns.¹¹³ The judgement by the General Court has been appealed and the case is pending before the ECJ.¹¹⁴

¹⁰⁸ Case T-76/14 *Morningstar v Commission* EU:T:2016:481.

¹⁰⁹ Commission Decisions of 20 December 2012 in case COMP/D2/39.654, *Reuters Instrument Codes (RICs)*.

¹¹⁰ *Ibid*, paras 40 and 72.

¹¹¹ Commission Decision of 26 July 2016 in case AT.40023, *Cross-border access to pay-TV*.

¹¹² Case T-873/16 *Groupe Canal + v Commission* EU:T:2018:904.

¹¹³ *Ibid*, paras 50 and 108.

¹¹⁴ Case C-132/19 P *Groupe Canal + v Commission*.

3 Advantages and Disadvantages of Commitment Decisions

3.1 Objective of the Analysis

Commitment decisions have frequently been used in many cases since the entry into force of Regulation 1/2003. As illustrated in section 2.3, commitment decisions have been used in cases within a wide range of sectors. The reason why the procedure has been so successful may be the several advantages of commitment decisions. However, there are also significant disadvantages.

In order to examine the different aspects of the commitment procedure and find proposals for improvement of the procedure, I have to provide an analysis of the advantages and the disadvantages of the procedure. In the following, I will examine the advantages of the commitment procedure from the perspective of the Commission and the undertakings under scrutiny. Furthermore, I will also examine the disadvantages from the same perspectives and in light of the EU legal system as such. Finally, I will discuss whether the Commission's use of the commitment procedure is justified.

3.2 Advantages

Commitment decisions under Article 9 involve many advantages both for the Commission and the undertakings concerned. Two of the immediate reasons why the commitment procedure has been so successful is the cure of the two defects in the former notification procedure under Regulation 17 as seen in section 2.2.¹¹⁵ As a result the commitment procedure has proven to be more effective as the Commission has only imposed one fine for the failure to comply with a commitment decision.¹¹⁶ As will be shown in the sections below, the commitment procedure represents other additional advantages both for the Commission and the undertakings concerned.

¹¹⁵ Bellis [2016] p. 4.

¹¹⁶ Commission decision of 6 March 2013 in case COMP/39.530, Microsoft (Tying).

3.2.1 No Finding of an Infringement and Avoidance of a Fine

From the perspective of the undertakings under scrutiny, an avoidance of a fine is one of the most important advantages. As previously mentioned it follows from recital 13 of Regulation 1/2003 that commitment decisions are not appropriate in cases where the Commission intends to impose a fine. A striking feature of the Commission's decisional practice the last twenty years is the increasing level of fines imposed on undertakings for infringement of the competition rules.¹¹⁷ Some of the examples are the €4.34 billion fine in the *Google Android*¹¹⁸ case, the fine on €2.42 billion in the *Google Search (Shopping)*¹¹⁹ case, €1.06 billion fine in the *Intel*¹²⁰ case and the €997 million fine in the *Qualcomm*¹²¹ case. All of these cases concerned abuse of dominant position in breach of Article 102. In light of the high level of fines, a commitment decision whereby fines are not imposed is highly attractive for the undertakings under scrutiny compared to an infringement decision with a possible fine. As mentioned in section 2.3 a majority of the commitment decisions adopted by the Commission concerns Article 102. This shows that there is a correlation between the success of the commitment procedure and the avoidance of a fine.

From the Commission's perspective, not imposing a fine does also represent an advantage. The fines imposed by the Commission for infringements of EU competition law are the result of a complex assessment where a variety of factors are taken into account.¹²² Thus, the avoidance of using the infringement procedure and imposing a fine do save the Commission from using resources on a complex assessment.

In addition to an avoidance of a fine, a commitment decision also involves no finding of an infringement of the competition rules. This is an advantage both for the undertakings under scrutiny and the Commission.

For the undertakings under scrutiny there are several advantages with not finding an infringement. Firstly, a commitment decision reduces the risks of private damages actions. Article 16 of Regulation 1/2003 requires a uniform application of Community competition law. This means that infringement decisions under Article 7 have a binding force before national

¹¹⁷ Ibid.

¹¹⁸ Commission decision of 18 July 2018 in case AT.40099, Google Android.

¹¹⁹ Commission decision of 27 June 2017 in case AT.39740, Google Search (Shopping).

¹²⁰ Commission decision of 13 May 2009 in case COMP/C-3/37.990, Intel.

¹²¹ Commission decision of 24 January 2018 in case AT.40220, Qualcomm.

¹²² Geradin, Damien and Sadrak Katarzyna [2017] p. 2.

courts and the private plaintiff needs only to establish causation and loss to recover.¹²³ Commitment decisions under Article 9 however, do not entail an infringement that aggrieved parties seeking damages can rely on before the national courts.

However, another interesting question is if and to what extent commitment decisions from the Commission is binding on national courts and NCA's. Furthermore, one could question whether finding an infringement in a case closed with a commitment decision by the Commission would be in contrary to the requirement of a uniform application on Community competition law pursuant to Article 16.

Recitals 13 and 22 of Regulation 1/2003 do state that commitment decisions adopted by the Commission do not affect the powers of the courts and the competition authorities to apply Articles 81 and 82. The recitals indicate that a commitment decision does not prevent NCA's from opening a case and subsequently finding an infringement, nor does it prevent private third parties to bring damages actions before the national courts. Nevertheless, one could question if the national courts and the NCA's in practice would find an infringement in a case that has already been investigated and concluded in by the Commission with a commitment decision.¹²⁴

The question on the extent of the binding nature of commitment decisions adopted by the Commission on national courts was raised in the *Gasorba et al. v Repsol case*.¹²⁵ The ECJ was asked by the Spanish Supreme Court to rule on whether national courts were precluded from declaring a restrictive agreement void subsequently to the Commission making a commitment decision with regard to the same agreement. The ECJ stated the importance of a uniform application of EU competition law in accordance with Regulation 1/2003. The ECJ did however hold that a commitment decision does not involve a finding of whether there has been or still is a breach of the competition rules. Thus, a commitment decision does not preclude national courts from examining and finding an infringement. Furthermore, the ECJ held that the national courts are required to take into account the Commission's preliminary assessment and regard it as an indication, if not prima facie evidence of an antitrust violation.¹²⁶ Following the ECJ's

¹²³ Dunne [2014] p. 405.

¹²⁴ Bellis [2016] p. 7.

¹²⁵ Case C- 547/16 *Gasorba et al. v Repsol* EU:C:2017:891.

¹²⁶ *Ibid*, paras 26 and 29.

ruling the Spanish Supreme Court did find an infringement of the competition rules and found the controversial agreement void.¹²⁷

The rulings in these cases illustrate that although an undertaking has accepted legally binding commitment decisions on an EU-level, a finding of an infringement on a national level is not precluded. Prior to these rulings the national courts and the NCA's had not found breaches of the competition rules in cases where the Commission had adopted commitment decisions.¹²⁸ Therefore, these rulings might have an impact on the future use of commitment decisions by making them less attractive for the undertakings concerned.

Secondly, a commitment decision might be more advantageous for an undertaking's reputation than an infringement decision, as a commitment decision normally comes with less stigma.

3.2.2 Speedier and Less Costly

As the ECJ held in *Alrosa*¹²⁹, commitment decisions are a mechanism with the aim to provide a more rapid solution to the competition problems identified by the Commission. Moreover, Article 9 is based on considerations of procedural economy. A commitment decision is generally considered to be speedier than an infringement decision since the latter requires a much more thorough analysis in order to prove an infringement of the competition rules. This is partially due to the fact that the Commission can communicate its competition concerns in a Preliminary Assessment that is normally around twenty pages, compared to the Statement of Objections in infringement cases that is very detailed and can run over several hundred pages.

In addition a commitment decision is also significantly shorter than an infringement decision, with regard to pages and substantive analysis.¹³⁰

Furthermore, commitment decisions are rarely appealed to the EU courts, which also makes the procedure speedier.

The speedy process, lack of appeals and quick results may also be important advantages in fast moving markets e.g. technology markets, which call for quick and targeted actions. Less use of

¹²⁷ Judgment of 7 Feb. 2018, Spanish Supreme Court, *Gasorba v. Repsol* ES:TS:2018:297. See also Van Bael and Bellis [2018] p. 12.

¹²⁸ Bellis [2016] p. 7.

¹²⁹ Case C-441/07 P *Commission v Alrosa* EU:C:2010:377 para 35.

¹³⁰ Geraldin and Mattioli [2017] p. 3.

resources and a speedier process make commitment decisions less costly, and enables the Commission to deal with more cases that again benefit competition. The use of commitment decision is therefore very beneficial for the Commission.

For the undertakings concerned a rapid solution is also beneficial as it will save the undertakings from litigation costs and lengthy investigations. This enables them to focus on activities that are more profitable for their business.

3.2.3 More Flexible Remedy

One of the most significant differences between the Article 7 infringement procedure and Article 9 commitment procedure is that the latter provides a more flexible solution to the competition concerns. While the objective of Article 7 is to punish previous abuses and make the infringement come to an end, Article 9 allows the Commission to remedy existing competition problems going forward. This was also stressed by the Commission as they consider that the “primary purpose of the commitment decision is to preserve effective competition for the future”.¹³¹ Furthermore, commitment decisions are more flexible in terms of proportionality as explained in section 2.4. Although the difference in terms of proportionality is an advantage of the commitment procedure, it is also a disadvantage. This will be further explained section 3.3.

The Commission has only imposed structural remedies in one infringement case, whereas it has made structural remedies binding in several commitment decisions, particularly within the energy sector. Commitment decisions therefore give the Commission the ability to impose remedies that go beyond those allowed in infringement decisions. The undertakings and the Commission can together craft remedies that are more likely to be a better solution to the competition concerns for the future, rather than to simply make previous infringements come to an end. Thus the flexibility of Article 9 brings an advantage to the Commission. Moreover, in circumstances where there is a reoccurrence of the prohibited conduct, commitment decisions are more easily enforced against the defaulting undertaking.¹³²

¹³¹ Commission Staff Working Paper SEC(2009) 574 final p. 31.

¹³² Dunne [2014] p. 405.

A flexible remedy may also be beneficial for the undertakings, as they may use the commitment decision to leverage their way out of a procedure which could otherwise end with an infringement decision and possibly a high fine.¹³³

3.2.4 Few Cases Appealed to the GC and the ECJ

As set out in section 2.4, few commitment decisions have been appealed to the GC and the ECJ. No commitment decision has ever been appealed by the undertakings concerned. Additionally, in all the four appeals by third parties before the courts, the courts have given the Commission a wide discretion in deciding the appropriateness and the proportionality of the commitments. The few cases before the EU courts and the Commission's wide discretion in terms of the commitments represent advantages for the Commission. This might be some of the reasons why the Commission has chosen to adopt more commitment decisions than infringement decisions since the entry into force of regulation 1/2003.

For the undertakings concerned it is also a benefit as none of the appeals by third parties has been successful. The EU courts are therefore setting the bar high for third parties challenging EU commitment decisions. The lack of appeals and the high threshold makes it less likely for third parties to bring actions for annulment or damages. Moreover, it reduces the risk of an infringement decision and possibly a fine for the undertakings concerned. The reduced risk of an infringement decision could also reduce the risk of damages actions.

As much as the few cases before the EU courts represent an advantage for the undertakings, it does also represent several disadvantages for the EU legal system. Those disadvantages will be discussed in the following sections.

3.3 Disadvantages

3.3.1 The Commission's Wide Discretion and Bargaining Power

One of the most concerning aspects with commitment decisions is the wide discretion given to the Commission in their practice of the Article 9 procedure. As mentioned in section 2.4, the European courts have given the Commission a wide discretion particularly in relation to the

¹³³ Bellis [2016] p. 7.

proportionality of the commitments. Furthermore, as most commitment decisions are not appealed to the EU courts, the majority of commitment decisions are not subject to judicial review.

Considering the Commission's wide discretion, there is a potential risk of the Commission using the commitment procedure to deal with complex cases where the law is unclear and shape its own competition policy outside the control of the European courts.¹³⁴ As previously mentioned, a majority of the commitment decisions adopted by the Commission do in fact concern Article 102 cases, which are often complex. Furthermore, the Commission has used its wide discretion to impose structural remedies in many of those cases, particularly within the energy sector, that they might not have been able to impose with an Article 7 infringement decision.

Another disadvantage with the commitment procedure is that it does not involve a formal finding of an infringement of the competition rules. The lack of finding of an infringement and judicial review entail that the commitment procedure fails to sufficiently clarify the law in novel and complex competition cases.¹³⁵

Furthermore, it enables the Commission to simply express its concerns, rather than to articulate a theory of harm that could withstand the scrutiny of the ECJ.¹³⁶ This could be especially problematic in light of the wide discretion of the Commission and their practice of imposing structural remedies in commitment decisions. The potential risk is that undertakings may accept far-reaching remedies in cases where the competition concerns are weakly founded in Article 101 and/or in Article 102. One example may be the *ENI*¹³⁷ decision where ENI committed to divest its current shareholdings in companies related to international gas transmission pipelines to a suitable purchaser. The Commission argued that strategic underinvestment in pipelines was a refusal to supply strategy that could potentially be an abuse of dominant position under Article 102. The Commission's practice in this case and subsequent cases within the energy sector is questionable. It could be questioned whether strategically underinvestment in pipelines would constitute an abuse of dominance in the form of a refusal to supply under Article 7. The *ENI*¹³⁸ case led to the ownership unbundling of the pipelines concerned, which the Commission

¹³⁴ Schweitzer [2008] p. 10.

¹³⁵ Wathélet [2015] p. 554.

¹³⁶ Bellis [2016] ppt. p. 9.

¹³⁷ Commission Decision of 29 September 2010 in case COMP/39.315, ENI.

¹³⁸ *Ibid.*

previously had failed to achieve through a legislative measure. As seen from the case it might seem that the Commission uses the commitment procedure to seek regulatory objectives e.g. in accordance with the energy liberalisation policy. Furthermore, it is worrying that the Commission imposes structural remedies which are the most far-reaching remedy, in cases weakly founded in Article 102.¹³⁹

As seen in section 2.4 the ECJ held in *Alrosa* that the principle of proportionality differs under the commitment procedure and the prohibition procedure.¹⁴⁰ One of the reasons was that the commitments are offered by the undertakings voluntarily. The commitment procedure is seemingly a negotiated remedy where both parties have to compromise and find a solution that is mutually beneficial. As seen in section 3.2 commitment decisions do bring advantages for both parties.

However, one could question whether there is a balance between the negotiating parties that ensures a fair and balanced outcome. Although the undertakings in question have to offer appropriate commitments and are able to influence the commitment decision to a certain extent, the Commission's bargaining power is strong. The risk of an infringement decision with a possibly high fine, together with a threat of lengthy and costly litigations for the undertakings concerned, leads to unequal bargaining power between the negotiating parties. This might put a huge pressure on the undertakings to propose far-reaching remedies in order to ensure that the Commission will accept the commitments.

The willingness of the undertakings to offer far-reaching remedies is also not surprising given the lack of judicial control and the Commission's wide discretion in commitment decisions shown in the cases before the European courts. The inequality of bargaining power is especially evident in fast-moving markets e.g. technology markets, which calls for quick and decisive actions. In these cases the undertakings are not only exposed to pressure from the Commission, the defendant, and third parties, they are also under pressure from the evolving market itself. The undertakings would likely rather use their resources to focus on keeping up with or staying ahead of competition than to be distracted by litigation about past conduct.¹⁴¹

¹³⁹ Merlino, Pietro and Faella, Gianluca [2013] pp. 21-22.

¹⁴⁰ Case C-441/07 P *Commission v Alrosa* EU:C:2010:377 paras 46-50.

¹⁴¹ Marsden [2013] p. 4.

The Commission's wide discretion and bargaining power in relation to the commitment procedure under Article 9 do therefore represent disadvantages that call for a critical view on the increasing use of the commitment procedure.

3.3.2 Lack of Judicial Review and Legal Certainty

A commitment decision is a settlement mechanism where the Commission refrains from stating whether there has been or still is an infringement and it cannot result in a fine. As a result the commitment procedure lacks guidance in terms of how the law is to be understood. The lack of finding an infringement and few commitment decisions before the EU courts lead to loss of important advantages such as legal certainty.

It could be questioned whether the commitment procedure largely liberates the Commission from judicial control.¹⁴² Although both the undertakings concerned and third parties are able to appeal a commitment decision before the EU courts, there is a lack of incentive to do so. For the undertakings concerned a commitment decision is more favourable for them as they avoid a finding of an infringement, possibly a high fine and damages actions. This may also be the reason why there has not been any commitment decision appealed to the EU courts by the undertakings concerned. For third parties, the few cases before the EU courts concerning commitment decisions have not been successful and there are therefore little incentives for them to appeal.

Furthermore, unlikelihood of judicial review also reduces the Commission's incentives to build a robust case that would withstand the scrutiny of the European courts. The lack of incentives and judicial review do constitute a disadvantage in relation to commitment decisions, namely their implications on legal certainty and clarification of the law. Commitment decisions do not involve a finding of an infringement. Therefore the competition concerns expressed by the Commission in several cases may not amount to an actual infringement of Articles 102 or 101.

In some cases an infringement decision under Article 7 would be more appropriate than a commitment decision in order to provide for legal certainty, clarification of the law and deterrence. As previously mentioned it is questionable whether strategic underinvestment in infrastructure would actually amount to an infringement of Article 102, as the *ENI*¹⁴³ case was

¹⁴² Schweitzer [2008] p. 10.

¹⁴³ Commission Decision of 29 September 2010 in case COMP/39.315, ENI.

solved with a commitment decision and has never been tried before the European courts. This case might have been better solved with the prohibition procedure in order to clarify the law and enhance legal certainty.

Another case that could have been better solved with an Article 7 decision, is the *Container Shipping*¹⁴⁴ case. The *Container Shipping* case concerned “price signalling” as a concerted practice in contrary to Article 101. Price signalling is a term used for a unilateral, public disclosure of information to third parties that may lead to coordination between competitors.¹⁴⁵ The phenomenon is a controversial topic within EU competition law and in the Commission’s *Guidelines on Horizontal Cooperation Agreements* it is held that price signalling may lead to a concerted practice if it reduces “strategic uncertainty”.¹⁴⁶ However, there has not been any decision adopted by NCA’s or the Commission that has found price signalling to be an infringement of competition law that has been confirmed on appeal.

In the *Container Shipping* case the topic came up and the Commission stated that price signalling could constitute a concerted practice that had as its object to restrict competition, but the case was solved with a commitment decision. Given the uncertainty of the law in terms of price signalling, one could argue that solving the case with a commitment decision was unfortunate.¹⁴⁷ The *Container Shipping* case did bring an opportunity for both the Commission and potentially the European courts to clarify the law and enhance legal certainty on whether and in which situations price signalling constitutes a concerted practice contrary to Article 101 TFEU. The use of commitment decisions in cases that might be better solved with an infringement decision does therefore represent a disadvantage in terms of commitment decisions.

Moreover, a majority of the commitment decisions adopted by the Commission are complex Article 102 cases that would benefit from a more thorough infringement decision that would more likely be tried before the EU courts on appeals. The extensive use of commitment decisions in complex cases does therefore represent a disadvantage due to the lack of clarification of the law and legal certainty.

¹⁴⁴ Commission Decision of 7 July 2016 in case AT.39850, *Container Shipping*.

¹⁴⁵ Whish & Bailey [2018] p. 582.

¹⁴⁶ OJ [2011] C 11/1 para 63.

¹⁴⁷ Whish & Bailey [2018] pp. 582-583.

Furthermore, under Regulation 17 it was the Commission that decided whether an agreement or other coordination between undertakings was in accordance with Article 101. The implementation of Regulation 1/2003 involved a change from the notification procedure under Regulation 17, as the undertakings now must self-assess compliance with Article 101 TFEU. One could therefore argue that legal certainty and clarification of the law have become even more important for the undertakings after the abolishment of the notification procedure.

Lastly, another disadvantage with commitment decision is the lack of deterrent effect. The Fine Guidelines in EU divide deterrence into two categories, namely specific deterrence and general deterrence. The Guidelines state that:

Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence).¹⁴⁸

Seeing that commitment decisions are not appropriate in cases where the Commission intends to impose a fine, the procedure does seemingly not provide for specific deterrence or general deterrence. Additionally, as commitment decisions are less likely to be challenged before the EU courts than infringement decisions, the undertakings also avoid significant litigation costs and the risk of follow-on damages is significantly reduced.

3.3.3 Negative Impact on Private Enforcement

The absence of a finding of an infringement in commitment decisions does also has a negative impact on private enforcement. A private action can be brought before a court without prior decision by a competition authority in a so called stand-alone action. However, antitrust damages actions are most frequently brought once a competition authority has found an infringement of EU competition rules in follow-on actions.¹⁴⁹ As previously mentioned, aggrieved parties cannot use a commitment decision as a legal ground directly in a follow-on action, because there is not a binding infringement decision to rely on. Therefore the parties seeking damages need to initiate stand-alone actions before the national courts. Contrary to

¹⁴⁸ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/2.

¹⁴⁹ Commission, Impact Assessment Report, SWD[2013] 204 final p. 5.

follow-on actions, the parties bringing stand-alone actions need to prove the existence of an infringement of the competition rules in addition to causation and harm suffered.

The CJEU has established that any citizen or business has a right to full compensation for harm caused by infringement of the EU competition rules. In practice however, most victims rarely obtain compensation, as it is governed by national rules that often make it costly and difficult to bring antitrust damages actions. The Damages Directive entered into force in 2014 to provide for a few common rules, remove the main obstacle to effective compensation, and to guarantee minimum protection for citizens and businesses, everywhere in the EU.¹⁵⁰

However, the Damages Directive only applies in cases where someone has suffered harm caused by an infringement of competition law.¹⁵¹ This means that the Damages Directive does only apply in follow-on actions and not in stand-alone actions. The Damages Directive does therefore seemingly not increase the incentives for stand-alone actions for damages before the national courts.

Nevertheless, a commitment decision adopted by the Commission does not preclude national courts from finding an infringement of the competition rules. As seen in section 3.2.1 the Spanish Supreme Court has found an infringement of EU competition rules in a case closed with a commitment decision by the Commission.¹⁵²

3.4 Is the European Commission's Use of Commitment Decisions Justified?

Although commitment decisions undeniably bring many advantages, there are also disadvantages with the procedure. Therefore one should assess whether or not the Commission's use of commitment decisions is justified.

One of the concerns in terms of commitment decisions is the absence of deterrent effect for infringing the competition rules. As a commitment decision does not entail a finding of an infringement and cannot be used in cases where the Commission intends to impose a fine, the

¹⁵⁰ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L349/1) [hereinafter Damages Directive].

¹⁵¹ Ibid, Article 1 (1).

¹⁵² Judgment of 7 Feb. 2018, Spanish Supreme Court, *Gasorba v. Repsol* ES:TS:2018:297. See also Van Bael and Bellis [2018] p. 12.

procedure is seemingly less capable of ensuring deterrence compared to an infringement decision. In addition, commitment decisions are attractive for the undertakings as it reduces the risks for damages actions because the aggrieved parties cannot rely on a commitment decision before the national courts. Against that background, one could question whether the commitment procedure does not sufficiently ensure deterrence compared to the infringement procedure.

However, one could challenge the validity of this point of view and ask whether the use of commitment decisions really does harm the deterrent effect of competition law. Firstly, commitment decisions are not used in cartel cases. Cartels are “hard core” horizontal agreements between independent undertakings to fix prices, divide markets, or to limit production. Cartels are the opposite of rivalry between firms and are therefore regarded as the most obvious anti-competitive practice known to competition law that are a prime target for competition authorities.¹⁵³ The use of infringement decisions in cartel cases does ensure deterrent effect in the most severe type of cases of distortion of competition, and is therefore not affected by the increasing use of commitment decisions. Secondly, although commitment decisions do not entail a finding of an infringement, one could argue that they nonetheless have a deterrent effect because non-compliance is sanctioned according to Article 23 (2) (c) and Article 24 (1) (c) of Regulation 1/2003 as explained in section 2.2.

As previously mentioned the commitment procedure does provide the Commission with the powers to impose far-reaching remedies they might not have imposed with an infringement decision. Additionally, the Commission is not under an obligation to accept the commitments offered by the undertakings under scrutiny. This might put huge pressure on the undertakings to offer far-reaching remedies to ensure that they are accepted by the Commission and considered to meet the Commission’s concerns. One could therefore argue that the Commission’s practice on imposing far-reaching remedies to some extent may deter other undertakings from engaging in or continuing behaviour contrary to Articles 101 and 102 TFEU.

Furthermore, the non-binding nature of commitment decisions on national courts and NCA’s might also to a certain extent make commitment decisions less attractive for undertakings. As mentioned in section 3.2.1 the ECJ held in *Gasorba*¹⁵⁴ that as a commitment decision does not

¹⁵³ Whish and Bailey [2018] p. 520.

¹⁵⁴ Case C- 547/16 *Gasorba et al. v Repsol* EU:C:2017:891 para 26.

involve a finding of whether there has been or still is a breach the competition rules, it does not preclude NCA's and national courts from finding an infringement. National courts are required to take into account the Commission's preliminary assessment and regard it as an indication, if not prima facie evidence of an antitrust violation. The finding of an infringement by the Spanish Supreme Court in *Gasorba v Repsol*¹⁵⁵ following the ruling of the ECJ might make commitment decisions less attractive for undertakings in the future. These rulings could potentially have a deterrent effect and reduce the risk of undertakings engaging in anti-competitive conduct.

The arguments set out above do therefore indicate that the commitment procedure is not attractive enough in order to increase the risk of undertakings engaging in anti-competitive behaviour. This could therefore indicate that the Commission's use of commitment decisions is justified.

However, one should also take into consideration other important aspects and consequences of the increasing use of commitment decisions. In order to draw a conclusion one has to balance the advantages with the disadvantages and assess whether one outweighs the other.

As the ECJ held in *Alrosa*¹⁵⁶, commitment decisions is a mechanism with the aim to provide a more rapid solution to the competition concerns identified by the Commission and is based on considerations of procedural economy. Commitment decisions are to a certain extent speedier and less costly both for the undertakings concerned and for the Commission as they do not entail a finding of an infringement and are rarely appealed.

Furthermore, the procedure does seemingly enable the undertakings concerned and the Commission to impose tailor-made remedies that are better suited to address the competition concerns identified by the Commission. The procedure is therefore regarded as more flexible and appropriate to dictate how the undertakings can comply with the competition rules for the future. At first sight the commitment procedure does seemingly create a win-win situation for both the Commission and the undertakings.

However, these advantages do not come without sacrifices and one could therefore question whether they are worth their cost. While the aim of the commitment procedure is to provide a less costly and more rapid solution to the competition concerns, one could question whether the

¹⁵⁵ Judgment of 7 Feb. 2018, Spanish Supreme Court, *Gasorba* ES:TS:2018:297.

¹⁵⁶ Case C-441/07 P *Commission v Alrosa* EU:C:2010:377 para 35.

commitment procedure does in fact provide a better solution in the long term. One of the advantages of using commitment decisions is that they are considered speedier than infringement decisions. This is particularly important in cases concerning fast-moving market that calls for quick and decisive actions. However, some are of the opinion that commitment decisions do not guarantee a speedier process than an Article 7 infringement decision. An example is the *Google Search*¹⁵⁷ case where the Commission spent seven years on the investigation. Google did initially offer commitments, however the case resulted with an infringement decision in the end. Other examples are the commitment decisions in the cases *IBM*¹⁵⁸, *Microsoft*¹⁵⁹ and *Rambus*¹⁶⁰ which took the Commission, respectively 17, 24 and 28 months to conclude.¹⁶¹

In addition, although a rapid remedial intervention might seem optimal in technology-markets due to their dynamic nature, one could also question whether the commitment procedure is in fact more favourable than infringement decisions. It has been argued that high-tech markets involving novel theories of harm are actually better solved with infringement decisions due to the importance of the Commission to prove its case with adequate evidence and well-reasoned full decisions. In these markets the need for commercial and legal certainty is critical, thus the commitment procedure has the potential to stifle industry and the development of law.¹⁶² The use of commitment decisions in high-tech markets may therefore create an obstacle for innovation and ultimately affect consumers. This may therefore be a consequence in contrary to the objectives of competition law.

Furthermore, another advantage with commitment decisions is that it enables the Commission to impose flexible remedies that are, seemingly, more appropriate to address the Commission's concerns and that they could not have imposed unilaterally under Article 7. However, this advantage is not unproblematic as the Commission enjoys a very wide discretion in terms of the commitment decisions and their proportionality. In that context one could question whether the commitment procedure has become a tool to regulate the market, rather than address anti-competitive practices. It has been argued that in some cases the purpose of intervention is to alter the competitive process in order to achieve a particular market structure so as to conform

¹⁵⁷ Commission Decision of 27 June 2017 in case AT.39740, *Google Search (Shopping)*.

¹⁵⁸ Commission Decision of 13 December 2011 in case COMP/39.692, *IBM*.

¹⁵⁹ Commission Decision of 16 December 2009 in case COMP/39.530, *Microsoft (Tying)*.

¹⁶⁰ Commission Decision of 9 December 2009 in case COMP/38.636, *Rambus*.

¹⁶¹ *Costesec* [2018].

¹⁶² *Marsden* [2013] p. 5.

to a pre-conceived vision.¹⁶³ This might be right for the striking number of cases within the energy sector. As previously mentioned the Commission has adopted commitment decisions in numerous energy cases where the theories of harm are questionable and the use of far-reaching commitments is striking. This might indicate the Commission has gone beyond the mere protection of a competitive market, and has rather used the commitment procedure as a tool to regulate the energy market in accordance with the European energy policy.¹⁶⁴

When looking at the Commission's practice and the judgements of the European courts, it is clear that the lack of appeals of commitment decisions and judicial control do constitute some important disadvantages.

Firstly, as mentioned previously the Commission's wide discretion and the lack of judicial review could tempt the Commission to use commitment decisions to solve cases quickly and impose far-reaching remedies that they could not have imposed under Article 7. This is very worrying in light of the inequality of bargaining power between the Commission and the undertakings under scrutiny. An increasing use of commitment decisions could therefore lead to the Commission abusing its powers, especially in complex cases where the law is unclear.

Secondly, a widespread use of commitment decisions compared to infringement decisions does also have a negative impact in terms of legal certainty and clarification of the law. As a commitment decision is a settlement mechanism, it does not provide any legal guidance outside the context of the undertakings concerned.

Furthermore, commitment decisions are often scares and stripped of details. Therefore they do not provide guidance on the interpretation of the law. Favouring commitment decisions over infringement decisions entails loss of important benefits for competition. An obvious example is the Commission's use of a commitment decision in the *Container Shipping*¹⁶⁵ case concerning price signalling. Given the uncertainty of the law in relation to price signalling, an infringement decision would be more appropriate to clarify the law and provide legal certainty.

Finally, commitment decisions also have an unfortunate impact on private enforcement as they reduce the likelihood for damages actions.

¹⁶³ Colomo [2014] section B.

¹⁶⁴ Hoffmann [2014] p. 140.

¹⁶⁵ Commission Decision of 7 July 2016 in case AT.39850, Container Shipping.

Overall the commitment procedure does entail many advantages and provides a quick solution for the Commission's competition concerns. However, the advantages do not outweigh the disadvantages of the procedure. The Commission's use of commitment decisions could potentially have an adverse effect on competition law in the long run. Therefore the Commission's use of commitment decisions to this date could be considered to be unjustified.

4 Proposals for Changes of the Commitment Procedure

In my view the Commission's wide discretion, amongst others due to the unrestrictive proportionality-test, lack of judicial review and private enforcement are some of the most important disadvantages of the commitment procedure. In order to redress those disadvantages I will put forward several proposals for improvement in the following sections.

An important disadvantage of the commitment procedure in light of the Commission's extensive use of the procedure is the Commission's discretion in terms of the choice of procedure and remedies imposed. In order to improve those challenges it could be beneficial if the EU provided more guidance that the Commission should follow in commitment decisions. The objective of the guidance should be to limit the Commission's wide discretion and impose stricter requirements as to the proportionality and appropriateness of the commitments. Furthermore, seeing that the Commission could be tempted to choose the commitment procedure over the infringement procedure due to their wide discretion in terms of commitments, another objective of the guidance should also be to limit the Commission's discretion to choose the commitment procedure or the infringement procedure.

Setting guidelines for the Commission's discretion could make the commitment procedure less speedy and more costly, and thus important advantages of the procedure might be lost. However, the guidelines could potentially result in improvement of important aspects of the legal system such as clarification of the law and legal certainty.

The first part of the proposals in the following section relates to guidelines on how the Commission should assess whether the commitment procedure or the infringement procedure is appropriate.

Firstly, the proposed guidelines could set out some factors the Commission should follow in their assessment of whether the commitment procedure or the infringement procedure is appropriate in a given case.

The proposed guidelines could be inspired by Dutch administrative law on commitment decisions. Pursuant to Dutch administrative law, the Authority of Consumers and Markets (ACM) is required to carry out a test prior to issuing a commitment decision. The main test

ACM uses for commitment decisions is “whether the benefits in terms of an earlier end to a violation and increased consumer welfare, can be balanced against the benefits of imposing a fine or order subject to periodic penalty payments. Such benefits may relate to facilitation of follow-on actions for compensation”.¹⁶⁶ If the European Commission was required to establish a similar test prior to adopting a commitment decision, the commitment procedure would only be used in cases where the benefits outweigh the disadvantages. The test would also reduce the negative effects on private enforcement as the Commission would have to assess the effect on private enforcement in each case.

Furthermore, the guidelines could also state that cases that are complex or with a novel theory of harm should be concluded with an infringement decision. This measure would redress the defects of the lack of legal certainty and clarification of the law.

Additional factors that the guidelines could provide for could be inspired by the practice of the Australian Competition and Consumer Commission (ACCC), those are as follows:

- the nature of the alleged breach (the seriousness of the conduct at issue and its impact on third parties and the community at large);
- whether the alleged offender’s record suggests that an administrative settlement will be sufficient to deter it from future anti-competitive conduct;
- the ability of an undertaking to offer redress to affected parties;
- prospects for rapid resolution of the matter;
- whether there needs to be a clarification of the law by the courts.¹⁶⁷

By providing the above mentioned factors in the guidelines, the Commission would have to reason their choice of procedure and their discretion would be restricted.

The second part of the proposals will examine improvements in order to redress the disadvantages of the Commission’s discretion in relation to the proportionality and the appropriateness of the commitments.

A clear statement of concerns is the foundation for either finding an infringement or a commitments offer. The more clearly the competition concerns are set out, the easier it would

¹⁶⁶ OECD, *Commitment Decisions in Antitrust Cases – Note by Netherlands* [2016] DAF/COMP/WD(2016)29 p. 6.

¹⁶⁷ OECD, *Commitment Decisions in Antitrust Cases – Note by Australia* [2016] DAF/COMP/WD(2016)4, p. 3.

be to assess the appropriateness of the commitments.¹⁶⁸ The competition concerns in a Preliminary Assessment are normally not set out as fully as in a Statement of Objections. Therefore it could be beneficial with measures that could improve the assessment of whether the commitments are sufficient in order to meet the competition concerns expressed by the Commission in a Preliminary Assessment.

Pursuant to Article 27 (4) of Regulation 1/2003 interested third parties may participate in “market testing” by submitting their observations of the commitments offered. This may give the Commission an indication of the appropriateness of the commitments offered.

However, it could be beneficial with additional measures to improve the assessment of the commitments offered. The commitments offered could go through some form of “quality assurance” that should be detailed enough to prove that the commitments offered are sufficient to meet the competition concerns.¹⁶⁹

As a part of the “quality assurance” the guidelines could require the Commission to carry out a second assessment of the competition concerns in cases where the commitments offered entail a structural remedy. This measures could strengthen the link between the alleged infringement and remedy. Moreover, the second assessment could also restrict the Commission’s discretion in imposing far-reaching remedies.

Another part of the “quality assurance” could be inspired by the Consent Decree. The commitment procedure is inspired by and similar to the Consent Decree, the antitrust settlement procedure in the United States.¹⁷⁰ Under the Consent Decree neither the U.S. Department of Justice nor the Federal Trade Commission conduct a formal “market test”. However, a thorough assessment of the likely effectiveness of any proposed remedy is conducted by the agencies. As a part of the assessment, the agencies conduct interviews with industry players, including customers and competitors about the substance of the proposed remedy.¹⁷¹ A similar assessment in EU would require the Commission to be more pro-active when gathering information instead of simply inviting interested third parties to submit their observations pursuant to Article 27

¹⁶⁸ Marsden [2015] pp. 76-77.

¹⁶⁹ Ibid.

¹⁷⁰ Hjelmeng, [2011] p. 6.

¹⁷¹ OECD, *Commitment Decisions in Antitrust Cases – Note by the United States* [2016] DAF/COMP/WD(2016)23 p. 5.

(4). As a result the assessment of the effectiveness of the commitments could become more thorough.

The above mentioned measures could potentially improve the commitment procedure by limiting the Commission's discretion in terms of the appropriateness and proportionality of the commitments.

Other important disadvantages of the commitment procedure are the lack of judicial review and the few appeals before the EU courts. If the above mentioned measures were taken, it would enable the EU courts to review the Commission's discretion in relation to the choice of procedure and the proportionality of the commitments. This could be beneficial in several ways.

Firstly, the EU courts could be less reluctant to review the Commission's discretion, and their judgements would create precedence and legal certainty.

Secondly, if the EU courts played a more active role in the review of commitment decisions, it would create incentives for third parties to appeal.

Thirdly, increased judicial review would also create incentives for the Commission to be more thorough in its assessments and analyses in relation to the competition concerns as they have to withstand the scrutiny of the EU courts. Moreover, it could cause the Commission to be more critical in its assessment of the appropriateness of the remedies imposed, and impede the Commission from seeking regulatory objectives.

As stated earlier, commitment decisions do have a negative impact on private enforcement.

However, the ECJ held in *Gasorba*¹⁷² that:

Nonetheless, national courts cannot overlook that type of decision. Such acts are, in any event, in the nature of a decision. In addition, both the principle of sincere cooperation laid down in Article 4(3) TEU and the objective of applying EU competition law effectively and uniformly require the national court to take into account the preliminary assessment carried out by the Commission and regard it as an indication, if not *prima facie* evidence, of the anticompetitive nature of the agreement at issue in the light of Article 101(1) TFEU.

¹⁷² Case C- 547/16 *Gasorba et al. v Repsol* EU:C:2017:891 para 29.

Pursuant to the judgement it is clear that a commitment decision by the Commission does not preclude national competition authorities and national courts from finding an infringement of competition rules in the same case.

According to the Damages Directive Article 9 (1):

Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purpose of an action for damages brought before their national courts under Article 101 or 102 or under national competition law.¹⁷³

The binding effect of a final decision by NCA's or national courts pursuant to the Damages Directive will relieve the plaintiffs from the burden to prove an infringement of competition law in a follow-on action. Therefore the *Gasorba* case and the Damages Directive could potentially, in the future, redress the negative effect commitment decisions have on private enforcement.

¹⁷³ Directive 2014/104/EU (OJ L349/1).

5 Final Remarks

Prior to the entry into force of Regulation 1/2003, Article 9 commitment decisions were envisioned to be used in rare cases and considered to be secondary to infringement decisions under Article 7. However, since the implementation of Regulation 1/2003 the commitment procedure has become the most prevalent enforcement mechanism used by the European Commission to address infringements of Articles 101 and 102 TFEU excluding cartel cases. The commitment procedure has proven to be highly attractive for the Commission and the undertakings under scrutiny due to the lack of finding an infringement and avoidance of a possibly high fine. However, the analysis does also indicate that there are important disadvantages of the commitment procedure. The increased use of the procedure could potentially be worrying and have an adverse effect on EU competition law in the long run. EU legislation and case law provide little guidance on the relationship between the Article 7 infringement procedure, and the Article 9 commitment procedure. Therefore, there is a need for clarification in terms of when and how the respective procedures should be used. Whether this clarification will be provided for by EU, remains to be seen.

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