

## COMMON MARKET LAW REVIEW

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## **Aims**

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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## BEST AND EVEN BETTER PRACTICES IN COMMITMENT PROCEDURES AFTER *ALROSA*: THE DANGERS OF ABANDONING THE “STRUGGLE FOR COMPETITION LAW”

FLORIAN WAGNER-VON PAPP\*

### 1. Introduction

Article 9 of Regulation (EC) No. 1/2003 empowers the Commission to accept commitments offered by the undertakings after a preliminary assessment, provided that these commitments meet the Commission’s concerns. If the Commission accepts the commitments, it makes them binding on the undertakings and concludes that there are “no longer grounds for action” (the “commitment procedure”, as opposed to the “infringement procedure” under Art. 7).<sup>1</sup> The commitment procedure was discussed controversially from the outset,<sup>2</sup> and the interest has not ebbed since.<sup>3</sup> In the *Alrosa* case, both the

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1. This commitment procedure is part of a wider trend that promotes what one could call “consensual competition law enforcement” or “settlement culture”, see Waelbroeck, “The Development of a new ‘settlement culture’ in competition cases”, in Gheur and Petit (Eds.), *Alternative Enforcement Techniques in EC Competition Law* (Bruylant, 2009), p. 221. For an assessment of this trend, cf. e.g. the other contributions in that book, and those in Ehlermann and Marquis (Eds.), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law* (Hart Publishing, 2010); Bueren, *Verständigungen – Settlements in Kartellbußverfahren* (Nomos 2011), pp. 963 et seq. Other emanations of this trend are informal commitments – which may still be part of the mix of remedies even after the introduction of the formal procedure –, settlements in cartel cases (Art. 10a of Regulation 773/2004), commitments in merger cases, and – if casting the net wide – the leniency procedure in cartel cases. These procedures raise some of the same issues as the Art. 9 commitment procedure, but there are also significant differences (cf. Bueren, pp. 51–54). In particular, the settlement and leniency procedures in cartel cases are much closer to the top-down infringement procedure, and the extent of the Commission’s discretion in varying the “regular” sanction is limited, so that many of the concerns raised against the commitment procedure are attenuated. Commitments in merger cases, however, hand similar discretion to the Commission, and the time constraint in merger cases may produce an even greater pressure on undertakings to accede to the Commission’s “invitations to offer” particular commitments.

2. See the several contributions in Hawk (Ed.), *2005 Annual Proceedings of the Fordham Corporate Law Institute* (Juris Publishing, 2006); Temple Lang, “Commitment decisions under Regulation 1/2003: Legal aspects of a new kind of competition decision”, 24 ECLR (2003),

General Court<sup>4</sup> and the Court of Justice (ECJ)<sup>5</sup> had the rare opportunity to adjudicate on the degree of protection to be afforded to the undertakings against disproportionate commitments. In contrast to the General Court, the ECJ in *Alrosa* largely dispensed with the need for an enquiry into the proportionality of commitments offered by undertakings.<sup>6</sup>

This article argues that certain features of the negotiations put into doubt whether the bargaining process, on which the ECJ relies in lieu of a proportionality review, can guarantee that commitments are adequate to address competition concerns and are not disproportionate.<sup>7</sup> The General Court's approach of requiring judicial review of the adequacy and proportionality of commitments made binding seems preferable.

The main criticism against the hands-off approach of the ECJ in *Alrosa* is that the severely limited judicial review of commitment decisions may result in a vicious circle: legal uncertainty about outcomes in the infringement

347; Whish, "Commitment decisions under Article 9 of the EC Modernisation Regulation: Some unanswered questions", in Johansson, Wahl and Bernitz (Eds.), *Liber Amicorum in Honour of Sven Norberg – A European For All Seasons* (Bruylant, 2006), p. 555; Cook, "Commitment decisions: The law and practice under Article 9", 29 *World Comp.* (2006), 209; Wils, "Settlements of EU antitrust investigations: Commitment decisions under Article 9 of Regulation 1/2003", 29 *World Comp.*(2006), 345.

3. Wils, "The use of settlements in public antitrust enforcement: Objectives and principles", 31 *World Comp.* (2008), 335; Georgiev, "Contagious efficiency: The growing reliance on US-style antitrust settlements in EU Law", (2007) *Utah L. Rev.*, 971; Rab, Monnoyeur and Sukhtankar, "Commitments in EU competition cases", 1 *Journal of European Competition Law & Practice* (2010), 171.

4. Case T-170/06, *Alrosa v. Commission*, [2007] ECR II-2601. For commentary following the GC's decision, see Temple Lang, "Commitment decisions under Regulation 1/2003", in Gheur and Petit, op. cit. *supra* note 1, p. 121; Schweitzer, "Commitment decisions under Article 9 of Regulation 1/2003: The developing EC practice and case law", in Ehlermann and Marquis, op. cit. *supra* note 1, p. 547; Körber, "Rechtliches Gehör, Verpflichtungszusagen nach Art. 9 VO 1/2003 und die *Alrosa*-Entscheidung" in Weiß (Ed.), *Die Rechtsstellung Betroffener im modernisierten EU-Kartellverfahren* (Nomos 2010), p. 73.

5. Case C-441/07 P, *Commission v. Alrosa*, judgment of 29 June 2010, nyr; see also the Opinion of A.G. Kokott. For contributions following the ECJ's judgment, see e.g. Cengiz, "Judicial review and the rule of law in the EU competition law regime after *Alrosa*", (2011) *Competition Law Journal*, 127; Kellerbauer, "Playground instead of playpen: The Court of Justice of the European Union's *Alrosa* judgment on Art. 9 of Regulation 1/2003", 32 *ECLR* (2011), 1; Kellerbauer, "Weitreichender Spielraum für einvernehmliche Lösungen nach Art. 9 Verordnung (EG) Nr. 1/2003", 21 *EuZW* (2010), 652; Immenga, "Zusagen, Auflagen und Bedingungen der EU-Kommission – Herausforderungen im Beihilferecht und nach Art. 9 VO 1/2003", in Bechtold, Jickeli and Rohe (Eds.), *Recht, Ordnung und Wettbewerb – Festschrift zum 70. Geburtstag von Wernhard Möschel* (Nomos 2011), p. 293; Schweitzer, "Verpflichtungszusagen im Gemeinschaftsrecht", in Bechtold et al., *ibid.*, p. 637; Mische and Visnar, "The European Court of Justice confirms approach in *De Beers* commitment decision", (2010) *Competition Policy Newsletter*, 17.

6. The decisions will be discussed in section 3 of this article.

7. See *infra* section 4.

procedure makes commitment decisions attractive for undertakings. The resulting decrease in the number of infringement decisions breeds further legal uncertainty about what the law demands. This results in an even greater demand for commitment decisions and accordingly fewer infringement decisions. Lacking authoritative statements of the law, undertakings look to previous commitment decisions and non-binding guidelines to estimate the threat points in the bargaining process. This reliance on “quasi case law” increases the Commission’s discretion in future negotiations. The Commission, in turn, accommodates the increased demand for commitment decisions so as to profit from the increased discretion it enjoys, for example in framing proactive remedies.<sup>8</sup> The incentives for the Commission to resort to the commitment procedure are especially strong in those cases in which the benefit of legal certainty provided by an infringement decision would be particularly strong, namely cases involving novel legal issues. There is a danger that the struggle for law is abandoned in favour of discretionary case-to-case negotiations.

There are two ways out of this vicious circle. One is to make infringement decisions more attractive for the Commission by increasing the Commission’s discretion in devising proactive remedies.<sup>9</sup> The other way is to impose more constraints on the Commission in the commitment procedure. Since the legislature and the Court have largely abandoned their role in constraining the Commission’s discretion in the commitment procedure, it now falls to the Commission to exercise self-restraint, not only in individual cases, but by issuing self-binding guidelines.<sup>10</sup> In its “Best Practices” document,<sup>11</sup> the Commission has unfortunately missed an opportunity to do this. The

8. In the infringement procedure, the case law of the Court restricts the Commission to imposing obligations that “restore compliance with the rules infringed”, see e.g. Joined Cases C-241 & 242/91 P, *RTE and ITP v. Commission*, [1995] ECR I-743, para 93; see also Temple Lang, *op. cit. supra* note 4, pp. 136–137.

9. Compare the “fencing in” relief in FTC orders, see Ducore, “Settlement of competition conduct violations at the United States antitrust agencies and at the European Commission – Some observations” in Hawk, *op. cit. supra* note 2, pp. 227, 229. For the concept and limits of “discretionary remedialism” see Lianos, “Competition law remedies: In search of a theory”, in Lianos and Sokol (Eds.), *The Global Limits of Competition Law* (Stanford University Press, forthcoming).

10. The current Hearing Officer of the European Commission, Wouter Wils, seems to support such a self-binding announcement of self-restraint, see Wils, *op. cit. supra* note 2, 352, favourably quoting the suggestion in Melamed, “Antitrust: The New Regulation”, 10 *Antitrust* (1995), 13, 14–15; see also Wils’s statements *infra* note 17, and the criticism in Rab, Monnoyeur and Sukhtankar, *op. cit. supra* note 3, 175, that the Commission’s “criteria and rationale to accept an Article 9 commitment or proceed with an Article 7 infringement decision . . . are not publicly known (or at least not in any great detail)”.

11. Commission Notice on Best Practices for the conduct of proceedings concerning Arts. 101 and 102 TFEU, O.J. 2011, C 308/6.

document contains a section on the commitment procedure,<sup>12</sup> but it largely confines itself to restating the statutory provisions in Article 9 Regulation 1/2003 and Recital 13 of this Regulation, a brief allusion to the limited proportionality test after *Alrosa*, and an overview of the sequence of procedural steps in the commitment procedure. The Commission has not even attempted to establish criteria for the selection of cases it considers suitable for resolution under the commitment procedure.<sup>13</sup> Nor does the Commission's recently adopted "Antitrust Manual of Procedures" fill the gap:<sup>14</sup> while it does outline some of the policy concerns addressed in this article, it is "purely internal guidance".<sup>15</sup> From a public choice perspective, it is perhaps not surprising that the Commission did not voluntarily reduce its "playground" to the size of a "playpen".<sup>16</sup> Nevertheless, it is regrettable that the Commission has not taken its recent documents as an opportunity to establish a more rigorous filter for cases that lend themselves to a resolution in consensual procedures.<sup>17</sup>

This article starts by outlining the hybrid nature of commitment decisions between the public and contract law paradigms (section 2). Section 3 describes the *Alrosa* case and analyses its consequences for the judicial review of commitment decisions. Section 4 provides an account why reliance on the negotiations between the Commission and the undertaking to provide the right outcome is misplaced. Section 5 explains why the ECJ's *Alrosa* decision removes practically all external constraints on the Commission's discretion to extract commitments that go beyond what is necessary. Section 6 outlines the countervailing benefits of the commitment procedure. Section 7 discusses the danger of abandoning the "struggle for law" by resorting to remedies negotiated on a case-by-case basis. Section 8 concludes.

12. *Ibid.*, paras. 115–133.

13. The only clarification in this regard is the statement in para 116 that the limitation in Recital 13 Regulation 1/2003 merely excludes "secret cartels that fall under the Notice on immunity from fines and reduction of fines in cartel cases"; this rephrases the interpretation in MEMO/04/217 of 17 Sept. 2004 that the Recital "excludes commitment decisions in hardcore cartel cases."

14. Commission, *Antitrust Manual of Procedures* (March 2012); see Module 16, paras 5–18 (esp. paras 11, 12, 18); on proportionality, see para. 46.

15. *Ibid.* Notice.

16. Cf. the title of one of Kellerbauer's articles, *op. cit. supra* note 5.

17. The current Hearing Officer pointed out before the need for "strict and effective internal procedures and controls" to avoid the "risk as to the weakening of incentives for optimal case selection and prioritization" in the commitment procedure, see *Wils, op. cit. supra* note 3, 348.

## 2. The underlying problem: The hybrid character of commitment decisions

The underlying problem of the commitment procedure is its hybrid character between the “public-law paradigm” and the “contract-law paradigm”.<sup>18</sup>

### 2.1. *The public-law paradigm*

Competition law enforcement is usually a classic application of public law, epitomized by an authoritative, unilateral top-down hierarchical command by the “State”,<sup>19</sup> addressed to one of its subjects and constrained by the rule of law (the “public-law paradigm”). The commitment procedure departs from this public-law paradigm by substituting negotiations and agreement between the parties for the unilateral top-down command. This raises the questions whether the rule-of-law constraint continues to apply, and if so, to what extent.

### 2.2. *The contract-law paradigm*

The reliance on “offer” and “acceptance” in the commitment procedure has clear contractual overtones. Contract law envisages – at least as a Platonic ideal – negotiations between parties of similar bargaining power who are able to safeguard their own respective interests in the negotiations by relying on their power to walk away from the negotiation table. In the area of contract law, one largely avoids second-guessing the substantive “correctness” of the content of the contract agreed by the parties. Given the parallels of the commitment procedure and contracts, one may be tempted to apply the same reasoning to commitment decisions: the agreement of both the Commission and the undertakings appear to be a sufficient guarantee for safeguarding the interests on both sides.<sup>20</sup>

18. The commitment procedure shares the hybrid character with all procedures that allow the substitution of contractual solutions for a hierarchical authoritative top-down command. The resulting problems have been debated at least since the 19th century, when the German literature started to discuss controversially the question whether the administration should be allowed to enter into “administrative contracts”. The standard reference is to Mayer, “Zur Lehre vom öffentlichrechtlichen Verträge”, 3 AöR (1888), 3.

19. I have no intention of embarking on a discussion of the “State” status of the EU. Regardless of one’s view of the EU’s status, the powers in the area of competition law are emanations of State power, in whatever way it is delegated to the Union institutions.

20. In the *Alrosa* case, the AG’s Opinion reflects this approach most clearly; see Opinion of A.G. Kokott in *Alrosa*, cited *supra* note 5, para 55. For an in-depth discussion of the “shadow of trial model” see Bueren, op. cit. *supra* note 1, pp. 133 et seq. For reasons why the analogy between contractual and commitment negotiations is limited, see *infra* para 4 of this article, and Bueren, *ibid.*, pp. 137 et seq.

### 3. The Alrosa case

The *Alrosa* case has been discussed for several years now. The following section recalls the salient facts and outcomes, and analyses the consequences of the ECJ's judgment.<sup>21</sup>

#### 3.1. *The facts*

De Beers is a vertically integrated company covering the entire supply chain for diamonds, from exploration and mining down to jewellery shops; it is number one in the world market for the production and supply of rough diamonds. Alrosa is also a vertically integrated company, active in the same markets, and is number two in the world market for the production and supply of rough diamonds. Alrosa is mainly active in Russia and the Community of Independent States (CIS). It exported rough diamonds worth equal to, or less than, US\$ 800 million a year to areas outside the CIS. After the Commission found out about trade arrangements between De Beers and Alrosa in a merger investigation,<sup>22</sup> De Beers and Alrosa notified to the Commission in 2002 an agreement according to which Alrosa would sell and De Beers would buy rough diamonds to the value of US\$ 800 million per year for five years, with an option for Alrosa to reduce the amount to US\$700 million during the last two years of the agreement.<sup>23</sup> In 2003, the Commission sent two Statements of Objections (SO) under similar case numbers (COMP/E-3/38.381 and COMP/E-2/38.381). The former SO was addressed to both Alrosa and De Beers and raised concerns about collusion under Article 101 TFEU. The latter SO was addressed to De Beers only, raising concerns about an abuse of a dominant position under Article 102 TFEU. Alrosa and De Beers offered "Joint Commitments" in the Article 101 TFEU proceedings, gradually lowering the amount of rough diamonds sold by Alrosa to De Beers from US\$700 million to US\$275 million by 2010.<sup>24</sup> These Joint Commitments were

21. I will limit the description to the "proportionality issue", and will leave out the relatively case-specific issues concerning the status of Alrosa as an interested third party or as an undertaking concerned and the associated procedural rights. For a fuller account of the *Alrosa* decision, see Mische and Visnar, Kellerbauer, and Schweitzer (all op. cit. *supra* note 5).

22. See Commission Decision of 22 Feb. 2006, Case COMP/B-2/38.381 – *De Beers*, para 10 (notice in O.J. 2006, L 205/24).

23. The transaction was notified under the notification system of Regulation (EEC) no. 17/1962 that was then still in force, and sought either a negative clearance or an individual exemption.

24. Alrosa had initially offered individual commitments, *inter alia*, to stop selling to De Beers as of 2013, but later withdrew these commitments because they were not viable from a business perspective. While the Commission tried before the GC to rely on this argument to show that De Beer's commitment to terminate purchases from Alrosa was not disproportionate

market-tested by the Commission. When third parties expressed concerns, the Commission invited De Beers and Alrosa to offer revised commitments gradually phasing out the sales and stopping them entirely from 2009 onwards. De Beers complied with this request and submitted the “De Beers Individual Commitments”. Alrosa did not. The Commission rendered the Individual Commitments binding on De Beers in the Article 102 TFEU proceedings and brought these proceedings to an end.<sup>25</sup> In substance, the commitment by De Beers to stop purchases from 2009 onwards undeniably affected Alrosa directly: Alrosa found itself deprived of a purchaser, despite not having consented to the De Beers Individual Commitments. From a *formal* point of view, however, the Commission could content itself with accepting De Beers’ commitments in the Article 102 TFEU procedure, because Alrosa was not – at least not formally – an “undertaking concerned” in these proceedings at all. Alrosa brought an action for the annulment of the commitment decision.

### 3.2. *The judgment of the General Court*

The General Court emphasized the hierarchical public-law aspect of commitment decisions from the very first paragraph of its own findings on the substance of the case,<sup>26</sup> and played down the contractual aspect.<sup>27</sup> In consequence, it held that the principle of proportionality did not only apply to commitment procedures, but applied with nearly the same force as in infringement procedures. The only concession the Court was willing to make to commitment procedures was that the point of comparison for the

in relation to Alrosa, the GC rejected this argument (*Alrosa v. Commission*, cited *supra* note 4, para 143) and the withdrawn individual commitment did not play a role in the further proceedings.

25. Commission Decision of 22 Feb. 2006, cited *supra* note 22. The Art. 101 TFEU proceedings were closed, see *ibid.* in fn. 6.

26. *Alrosa v. Commission*, cited *supra* note 4, para 86: “Since offers made by undertakings are themselves without binding legal effect, it is the decision of the Commission taken under Article 9 of Regulation No 1/2003, and that decision alone, which has legal consequences for the undertakings.” Similarly, in para 87: The decision “cannot be considered as being a mere acceptance on the Commission’s part of a proposal that has been freely put forward by a negotiating partner, but constitutes a binding measure which puts an end to an infringement or a potential infringement . . .”.

27. *Ibid.*, para 105: “the voluntary nature of the commitments also does not relieve the Commission of the need to comply with the principle of proportionality, because it is the Commission’s decision which makes those commitments binding.”; para 143: “the fact that an undertaking has offered commitments at a particular time, for reasons of its own, does not mean that those commitments can be assumed to be proportionate and does not relieve the Commission of the obligation to verify their adequacy and their necessity as regards the aim which it is sought to achieve” (this later statement was made in the context of Alrosa’s individual commitments that had been withdrawn, see *supra* note 24).

proportionality test was the “preliminary assessment” of the infringement, rather than a finding of an actual infringement.<sup>28</sup> In deciding on the level of judicial review of the Commission’s assessment, the Court held that it could review the necessity and proportionality of the commitments in full, rather than limit its review to manifest errors, unless the commitment decision actually contains, in any particular case, a complex economic assessment.<sup>29</sup> In any case it concluded that the Commission’s assessment that the De Beers Individual Commitments were necessary – in particular the commitment to terminate all purchases from Alrosa indefinitely – was manifestly erroneous.<sup>30</sup> First, because a less onerous means would have been to prohibit De Beers from reserving to itself all or a material part of Alrosa’s diamonds sold outside the CIS; secondly, because the Commission failed to provide adequate reasoning why the less onerous “Joint Commitments” had been rejected as being inadequate to address the competitive concerns; and thirdly, because even if the Joint Commitments were indeed inadequate, the Commission should have accepted the Individual Commitments only *to the extent* that they were necessary.<sup>31</sup>

### 3.3. *The Opinion of Advocate General Kokott*

In contrast to the General Court, Advocate General Kokott emphasized the “voluntary” or contractual aspect of commitment decisions.<sup>32</sup> In consequence, she concluded that “necessity may be presumed as a matter of course in relation to the interests of the undertaking which has offered the commitments . . . ”.<sup>33</sup>

### 3.4. *The judgment of the ECJ*

The ECJ followed the Advocate General in distinguishing between the application of the principle of proportionality in the infringement procedure and in the commitment procedure, based on the “specific characteristics” of these procedures,<sup>34</sup> and their “different objectives”.<sup>35</sup> The Court is less explicit

28. *Ibid.*, paras. 99, 113.

29. *Ibid.*, paras. 108–110, 123–125.

30. *Ibid.*, paras. 126, 154–157.

31. *Ibid.*, respectively: paras. 127–128; paras. 129–136; paras. 137–153 (in particular para 139).

32. Cf. Opinion of AG Kokott in *Alrosa*, cited *supra* note 5, paras. 51, 55.

33. *Ibid.*, para 55 (distinguishing the assessment of the necessity in relation to third parties that had not agreed, so that “the voluntary nature of the commitments . . . cannot be any guarantee that their interests will be safeguarded”).

34. *Alrosa*, cited *supra* note 5, para 38.

than the Advocate General that the “specific characteristic” of the commitment procedure lies in the voluntary agreement, but this seems nevertheless implicit in its reasoning.<sup>36</sup> While the Court conceded the – undisputed – point that the principle of proportionality applied as a general principle of Union law in the commitment procedure,<sup>37</sup> it held that the “extent and content” of this principle were modified in comparison to the infringement procedure.<sup>38</sup> More specifically, the ECJ held that the *only* content of the proportionality principle in the commitment procedure is that the Commission must ensure that the set of commitments it makes binding on the undertakings is not more onerous than any other set of commitments offered that still meet the concerns expressed by the Commission in the preliminary assessment.<sup>39</sup> It rejected the General Court’s reasoning that the Commission was required to assess whether it was sufficient to make the offered commitments *partially* binding. Moreover, the ECJ rejected the General Court’s assessment that the “manifest error” standard of judicial review did not apply.

### 3.5. *The consequences of the Alrosa decision I: An invitation to engage in salami tactics?*

The ECJ’s judgment in *Alrosa* is rightly interpreted as having completely emasculated the proportionality review of commitment decisions.<sup>40</sup>

From a purely theoretical point of view, this interpretation is not the inevitable result of the *Alrosa* judgment. The judgment requires the Commission to choose the least restrictive of the commitments that are actually offered by the undertakings, provided they are adequate to meet the concerns. The parties may therefore have the possibility of resorting to “salami tactics” by presenting the Commission with a selection of alternative incremental commitments. Instead of presenting the Commission with merely two sets of commitments – the choice between the Joint Commitments

35. *Ibid.*, para 46.

36. Cf. *ibid.*, para 48: “Undertakings which offer commitments . . . *consciously accept* that the concessions . . . may go beyond what the Commission could itself impose on them . . .” (emphasis added).

37. *Ibid.*, para 36.

38. *Ibid.*, para 38.

39. *Ibid.*, para 41; also cf. para 61. The Commission’s Antitrust Manual of Procedures (*supra* note 14) now adopts this test, Module 16 para 46.

40. Cf. Cengiz, *op. cit. supra* note 5, 150–152 and *passim*; in essence also Kellerbauer (2011), *op. cit. supra* note 5, 8; Kellerbauer, (2010), *op. cit. supra* note 5, 658. See also the assessment in Klees, “Das Instrument der Zusagenentscheidung der Kommission und der Fall ‘E.ON’ – Ein (weiterer) Sündenfall”, 59 WuW (2009), 374, 378–380, preceding the ECJ’s judgment.

offering a reduction of sales to US\$275m from 2010 onwards, or the De Beers Individual Commitments, offering the cessation of all sales from 2009 –, the parties could have presented numerous alternative commitments to the Commission with intermediate levels of sales. Even under the ECJ's judgment, the Commission has to choose a less restrictive alternative where it is offered to it – always provided it chooses the commitment procedure at all –, as long as these commitments still meet the Commission's concerns. If the commitments offered seamlessly cover the entire spectrum of adequate remedies, the salami tactic would force the Commission to engage in a proportionality analysis that is equivalent to that demanded by the General Court.

The salami tactic does seem contrived, and there are four reasons why it may not work, two of which are legal and two of which are practical. The first legal caveat is that its implementation presupposes that the addressee – who “voluntarily” offered the commitments – is able to appeal a commitment decision not only for procedural reasons, a proposition that is very controversial.<sup>41</sup> Secondly, even if one does allow the addressee to appeal, it is possible that the proportionality review would be even more hands-off than in the *Alrosa* case; after all, the addressee had *itself* offered the commitments, while in *Alrosa* the appellant had not consented to the commitments.<sup>42</sup> The Advocate General's Opinion seems to indicate implicitly that the undertaking offering the commitments could not complain at all if the Commission makes *any* of these commitments binding.<sup>43</sup> This would render the salami tactic not only futile but even dangerous, because offering an increased range of

41. Klees, *Europäisches Kartellverfahrensrecht* (Carl Heymanns Verlag, 2005), pp. 182–183 argues for the addressees' ability to appeal; Cook, *op. cit. supra* note 2, 221–223, and Temple Lang, *op. cit. infra* note 74, p. 296, argue against their ability to appeal (unless there were procedural errors). Von Rosenberg, “Unbundling through the back door . . . the case of network divestiture as a remedy in the energy sector”, 30 ECLR (2009), 237, 250–251, and Körber, *op. cit. supra* note 4, pp. 87, 89–90, sensibly took the GC's emphasis on the authoritative aspect of commitment decisions in *Alrosa* as a sign that an addressee would be able to appeal the decision and that the addressee could raise the disproportionality of a commitment despite the fact that it voluntarily agreed to it. After the ECJ's judgment, which emphasized the consensual aspect over the unilateral aspect, this line of reasoning is no longer available. Also cf. the discussion in Rab, Monnoyeur and Sukhtankar, *op. cit. supra* note 3, 180–181, 184.

42. The question whether different standards would apply was already raised after the GC's judgment by Temple Lang, *op. cit. supra* note 4, p. 134; see also von Rosenberg's interpretation of the GC's decision, *op. cit. supra* note 41.

43. Opinion in *Alrosa*, cited *supra* note 5, para 55: “Whilst necessity may be presumed as a matter of course in relation to the interests of the undertaking which has offered the commitments (in this case De Beers), . . . such a presumption cannot be made where the interests of third parties (in this case Alrosa) are affected. The commitments do not originate from them, which means that the voluntary nature of the commitments offered cannot be any guarantee that their interests will be safeguarded.” Under this approach, the remaining

alternative commitments would enlarge the Commission's decision space instead of restricting it. The ECJ's judgment, however, does not make the same distinction as the Advocate General.<sup>44</sup> Unless the ECJ's statements are not meant to apply as generally as they are stated, the salami tactic appears to be available to the parties.

The first practical caveat is that addressees are unlikely to challenge a commitment decision to which they agreed. A successful challenge would risk an infringement procedure, so that the reasons that made the addressees offer commitments in the first place argue against challenging the commitment decision as well.<sup>45</sup>

The second practical caveat is that the Commission, instead of making a choice between, for example, 275 million proposals of sales between Alrosa and De Beers in US\$1-increments, may decide that it would rather pursue the infringement procedure. Nevertheless, it seems that the ECJ's judgment is an invitation to undertakings to engage in "salami tactics", even though perhaps not as extreme as the one described here. It is doubtful that anything is to be gained by prompting the parties to engage in such tactics, instead of taking the view of the General Court that the Commission should assess, as less restrictive means, the possibility of making offered commitments "partially" binding.<sup>46</sup> Concededly, placing the burden of selecting the increments in which commitments are offered on the undertakings ensures that the Commission is at least presented with a pre-filtered selection of reasonable alternatives. On the other hand, placing the burden on the undertaking seems to be little more than a trap for the unwary, and does not allow third parties, who cannot propose commitments and therefore cannot employ the salami tactic, to ensure that the commitments are proportionate to the infringement.

applicability of a proportionality review initiated by the undertaking that had offered the commitments turns on the strength of the "presumption", on which the AG had no need to, and did not, elaborate.

44. In para 41 of its judgment in *Alrosa*, cited *supra* note 5, the ECJ merely states "Application of the principle of proportionality by the Commission in the context of Article 9 of Regulation No 1/2003 is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the Commission must, however, take into consideration the interests of third parties."

45. The only difference to the initial position would be that the appellant would have antagonized the Commission in the process. The low *de facto* probability of challenges by the addressee has been noted before, e.g., Whish, *op. cit. supra* note 2, p. 570; Körber, *op. cit. supra* note 4, p. 90.

46. See *Alrosa v. Commission*, cited *supra* note 4, para 139, and earlier de Bronett, *Kommentar zum europäischen Kartellverfahrensrecht* (Luchterhand, 2005) Art. 9 para 5. Even if one requires the Commission to consider making commitments only partially binding, one could still grant the Commission a wide margin of discretion in assessing the adequacy of the commitments offered.

This last point has a significance of its own. The proportionality review in *Alrosa* was reduced to choosing between the two commitments actually offered to the Commission. That there were two sets of commitments to begin with was due to the purely fortuitous fact that *Alrosa* had been an undertaking concerned in a separate proceeding. Usually, a third party will not have any opportunity to submit alternative commitments. Where the Commission is faced with only *one* offer of commitments, the residual proportionality review under the ECJ's *Alrosa* judgment is completely eliminated.<sup>47</sup> This is not compatible with the Advocate General's sensible concession that third parties have a right to separate protection, because "the voluntary nature of the commitments . . . cannot guarantee that their interests will be safeguarded" and that therefore "it is always necessary to examine . . . whether the commitments go beyond what is necessary in order to address the competition problems in question."<sup>48</sup>

### 3.6. *Consequences of Alrosa II: An increase in commitment decisions?*

The General Court's *Alrosa* judgment was predicted to make the commitment procedure substantially less attractive for the Commission in the future.<sup>49</sup> The Advocate General's Opinion, and the judgment of the ECJ, however, completely reversed the position (unless one accepts and adopts the salami-counterstrategy) and fully vindicated the Commission's previous practice. Accordingly, it could be expected that the prevalence of commitment decisions would remain at least at the pre-*Alrosa* level, and perhaps even increase because the pre-*Alrosa* uncertainty as to the standard of judicial review has now been eliminated. Empirically, it is impossible to verify whether the *Alrosa* saga had the effects on the prevalence theoretically conjectured. There is no clear trend that the Commission reduced the rate of commitment decisions in the time following the General Court's judgment, or that it increased the use after the Advocate General's Opinion or after the

47. Cf. *Alrosa*, cited *supra* note 5, para 41. While the Commission "must . . . take into consideration the interests of third parties", it only has to do so "[w]hen carrying out that assessment", i.e. the verification "that the commitments . . . address the concerns" and "that they [the undertakings concerned] have not offered less onerous commitments". Third parties can therefore challenge commitments on the basis that they do not address the concerns, even though such a challenge will usually fail given the wide margin of discretion in setting its priorities on the Commission's part; see Wils, "Discretion and prioritisation in public antitrust enforcement, in particular EU antitrust enforcement", 34 *World Comp.* (2011), 355, 359–361 and more specifically 363–364. Apparently, however, third parties are prevented from challenging the commitments as disproportionate, unless for some external reason there were several commitments before the Commission.

48. Opinion of AG Kokott in *Alrosa*, cited *supra* note 5, para 55.

49. Temple Lang, *op. cit. supra* note 4, pp. 138–139.

ECJ's judgment.<sup>50</sup> Nor can one find the conjectured trend by looking at the ratio between Article 7 (excluding hardcore cartel cases) and Article 9 decisions.<sup>51</sup> In any case, the overall number of commitment decisions issued is much too small to detect statistically significant effects, and variation of the rate of commitment decisions per year may be entirely due to chance fluctuations. Even if one had more data, one would have to account for time lags and the backlog of cases from the time before Regulation 1/2003.<sup>52</sup>

The *CISAC* case may be – but again need not be – an indication that the General Court's judgment in *Alrosa* shifted the relative attractiveness of commitment decisions and infringement decisions in favour of the latter. In the *CISAC* case, the Commission had market tested commitments shortly before the General Court's judgment in *Alrosa* was handed down. After the General Court handed down its judgment, and before the Advocate General's Opinion, the Commission issued an infringement decision in *CISAC*.<sup>53</sup> This timeline would be consistent with an explanation based on the reduced relative attractiveness of commitment decisions following the General Court's judgment; and the Commission's alternative explanation for the change of heart – that the market test had revealed doubts as to the effectiveness of the commitments offered – does not rule out that further negotiations could have

50. In the period between entry into force of Regulation 1/2003 and the GC's *Alrosa* decision, the Commission adopted about 2 commitment decisions p.a.; after the GC's decision, this rate increased to 4 p.a.; in the short period between the AG's Opinion and the ECJ's judgment, this further increased to 9 p.a.; but since the ECJ's judgment, the rate reverted to 3 p.a.. If one disregards the A.G.'s Opinion, the development is from 2 commitment decisions p.a. before the GC's judgment to about 6 decisions p.a. between the GC's and ECJ's judgments, and back to 3 decisions p.a. after the ECJ's judgment. For the decisions taken into account in the relevant periods, see *infra* notes 55–58.

51. Before the GC's decision, the ratio of Art. 9 to Art. 7 decisions was 3:4. This ratio increased sharply – and counterintuitively – to 12:5 in the period between the GC's and ECJ's judgments, and increased slightly after the ECJ judgment, viz. to 5:2, as would be expected. I am indebted to Wouter Wils for suggesting an enquiry into this aspect. There are several difficulties with this approach, however. First, the date of issuing an infringement decision is arguably more inert to turning points: if after a judgment commitment decisions become relatively more attractive, the Commission is still likely to issue an infringement decision in those cases in which it has already fully investigated all the relevant facts; and if after the turning point infringement decisions become more attractive, the Commission will need time to investigate all the facts. Second, the coding of the non-hardcore Art. 7 decisions may be controversial. I have included all Art. 102 TFEU decisions (COMP/37.990, 38.096, 38.113, 38.784, 39.525) and the following Art. 101 TFEU- or Arts. 101/102 TFEU-decisions: COMP/34.579, 36.632 (counted with 37.275 and 36.820 as one decision), 37.507, 37.860, 37.980, 38.606, 38.698, 38.662, and – possibly controversially, because of their proximity to cartels – 38.549 and 39.510.

52. Cf. Whish, *op. cit. supra* note 2, p. 564.

53. Commission Decision of 16 July 2008, Case COMP/C2/38.698 – *CISAC* (summary published in O.J. 2008, C 323/12; appeal pending, Case T-442/08, *CISAC v. Commission*).

led to amended offers of commitments.<sup>54</sup> But of course, the *post hoc, ergo propter hoc* argument for causation may be as fallacious here as in other contexts.

### 3.7. *Consequences of Alrosa III: The ups and downs of discussing proportionality*

One effect the General Court's judgment in *Alrosa* clearly did have on commitment decisions is that the Commission started to discuss the proportionality of the commitments. In commitment decisions preceding the General Court's judgment, the decisions outlined the practices raising concerns, described the commitments offered and the comments received during the market test – as well as, where applicable, what modifications to the commitments were agreed on following the market test –, and then stated that (rather than discussed why) the commitments were sufficient to meet the concerns. There was no discussion whether the commitments were necessary and proportionate.<sup>55</sup> Shortly after the General Court's judgment, commitment decisions started to include a section discussing the proportionality of the commitments.<sup>56</sup> After the Advocate General's Opinion<sup>57</sup> and the judgment of the ECJ,<sup>58</sup> the Commission continued with this practice. After the Advocate

54. Cf. *ibid.*, paras. 70–72; but see Memo/08/511, stating that the Commission had exhausted all possibilities for an amicable solution.

55. Cf. Commission Decisions of 19 Jan. 2005, Case COMP/C-2/37.214, *Joint selling of media rights to the German Bundesliga*; 22 June 2005, Case COMP/A.39.116/B2, *Coca Cola*; 22 Feb. 2006, Case COMP/B-2/38.381, *De Beers*; 22 Mar. 2006, Case COMP/C-2/38.173, *Joint selling of media rights to the FA Premier League*; Case COMP/B-1/38.348, *Repsol C.P.P.*; 4 Oct. 2006, Case COMP/C2/38.681, *The Cannes Extension Agreement*.

56. See Commission Decisions of 11 Oct. 2007, Case COMP/B-1/37966, *Distrigaz*, paras. 34–41; 26 Nov. 2008, Cases COMP/39.388, *German Electricity Wholesale Market* and COMP/39.389, *German Electricity Balancing Market*, paras. 77–89; 18 Mar. 2009, Case COMP/39.402, *RWE Gas Foreclosure*, paras. 46–53. But see Commission Decision of 13 Sept. 2007, Case COMP/E-2/39.140, *DaimlerChrysler*, which did not (yet) contain a proportionality section.

57. Commission Decisions of 14 Oct. 2009, Case 39416, *Ship Classification*, paras. 34–42; 3 Dec. 2009, Case COMP/39.316, *Gaz de France*, paras. 63–88; 9 Dec. 2009, Case COMP/38.636, *Rambus*, paras. 70–75; 16 Dec. 2009, Case COMP/C-3/39.530, *Microsoft (tying)*, paras. 96–112; 17 Mar. 2010, Case COMP/39.386, *Long-term contracts France*, paras. 67–102; 14 Apr. 2010, Case 39351, *Swedish Interconnectors*, paras. 76–97; 4 May 2010, Case COMP/39.317, *E.ON Gas*, paras. 61–72.

58. Commission Decisions of 29 Sept. 2010, Case COMP/39.315, *ENI*, paras. 85–114; 8 Dec. 2010, Case COMP/39.398, *Visa MIF*, paras. 54–69; 15 Nov. 2011, Case COMP/39.592, *Standard & Poor's (S&P)*, paras. 78–80; 13 Dec. 2011, Case COMP/C-3/39.692, *IBM Maintenance Services*, paras. 77–81. The decision of 14 July 2010, Case COMP/39.596, *BA/AA/IB*, adopted shortly after the ECJ's judgment, did not contain a section entitled "proportionality" of the commitments, but discussed these aspects in the general discussion of

General's Opinion, and even before the judgment of the ECJ was handed down, the Commission started to stress the voluntary nature of the commitments as a factor in assessing the proportionality.<sup>59</sup> After the ECJ's judgment, the Commission understandably started to include a paragraph explaining the limited extent and content of the proportionality principle in the commitment procedure.<sup>60</sup> While the three decisions immediately following the ECJ's judgment in 2010 still devoted a relatively substantial section on the proportionality analysis, the two commitment decisions rendered in 2011 confine themselves to outlining the applicable standard and laconically stating that this standard has been met. If this practice continues, the ECJ's *de facto* elimination of judicial review of the proportionality of commitments has had – even though with some delay – the predictable effect of reducing the diligence with which the Commission discusses, and arguably deliberates, this proportionality.

#### 4. The limits of the ECJ's contractual interpretation of commitment decisions

The ECJ in *Alosa* has opted whole-heartedly for the contractual interpretation of commitment decision. This section will analyse whether such reliance on the constraints of the negotiation process between the parties is warranted.

##### 4.1. The “unequal bargaining strength” argument refined

Various commentators have rejected the contractual interpretation of commitment decisions applied by the ECJ with the argument that the powerful Commission and the undertakings do not have “equal bargaining power”.<sup>61</sup> And yet, in the area of contract law, we usually do not accept “unequal bargaining power” as a defence to a contractual obligation. The following section will analyse in more detail what distinguishes contracts between private parties – even where one of them is more powerful than the other – from the commitment procedure.

the various commitments, and included the usual content of the proportionality section in the conclusion (paras. 228–238); see also the decision rejecting Virgin Atlantic's complaint in this case (Decision of 20 June 2011, C(2011) 4505 final, paras. 112 et seq.).

59. *Ship Classification*, para 34; *Gaz de France*, para 64; *Rambus*, para 70; *Microsoft (tying)*, para 96 (with footnote 48; see also para 108 with footnote 49); *Long-term contracts France*, para 68; *Swedish Interconnectors*, para 78; *E.ON Gas*, para 62 (all cited *supra* note 57).

60. *ENI*, para 86; *Visa MIF*, para 54; *BA/AA/IB*, para 228; *S&P*, para 78; *IBM Maintenance Services*, para 77 (all cited *supra* note 58).

61. See *infra* note 68.

It has often been noted that consensual competition law enforcement departs from the contract-law paradigm by substituting, for one of the parties of similar bargaining power, a body with the power to impose severe sanctions on the other party if the bargaining process should fail.<sup>62</sup> The standard argument is that the Commission's power to impose remedies of an uncertain magnitude, coupled with the risk aversion of the undertakings, allows the Commission to extract disproportionate commitments from the undertakings. This standard account without more is not entirely persuasive, but there are indeed special circumstances that distinguish commitment decisions from private contracting.

First, as always when facing "unequal bargaining power" arguments, one must avoid the temptation of equating power *in the abstract* with power *in the negotiations*. Of course the Commission has immense power, even compared to that of large undertakings. Yet, this is not relevant in itself. Walmart also has immense power when compared to the power of private shoppers, but we usually do not hesitate to enforce contracts between Walmart and these individuals. In the "negotiation" of contracts, both Walmart and the individual purchaser have the same power to walk away from the deal if the terms offered by one party are not acceptable to the other. And *mutatis mutandis*, the undertakings have power equal to that of the Commission in whether or not to offer commitments, even when prompted by the Commission to do so.

Of course, this over-simplistic argument – that abstract power of one party makes contracting with the weaker party inherently suspicious – is rarely made with regard to the commitment procedure, at least not explicitly. A more refined version is to point to the uncertainty on part of the undertakings as to what the sanctions in an infringement decision and the associated costs of a protracted investigation might be, and to argue that "risk averse" undertakings will therefore prefer to offer disproportionately far-reaching commitments.<sup>63</sup> The first premise of the argument can be easily accepted, namely that there is uncertainty as to the sanction in an infringement procedure because the Commission has substantial discretion in devising "brave punishments"<sup>64</sup> – including "any behavioural or structural remedy" and, when the requirements of Article 23 Regulation 1/2003 are met, fines.<sup>65</sup> The uncertainty is

62. See e.g. Waelbroeck, *op. cit.* note 1, p. 22; Körber, *op. cit. supra* note 4, pp. 81–82, 85, 86.

63. See e.g., Wils, *op. cit. supra* note 2, 352; Cengiz, *op. cit. supra* note 5, 136; Bruzzone and Boccaccio, "Taking Care of Modernisation After the Start-up: A View from a Member State", 31 *World Comp.*(2008) 89, 99; similarly, Schweitzer, *op. cit. supra* note 5, p. 646.

64. Shakespeare, *Much Ado about Nothing*, Act V, Scene IV.

65. While Recital 13 to Regulation 1/2003 states that the commitment procedure is not to be used where "*the Commission intends to impose a fine*", it is widely accepted that it is permissible for the Commission to impose fines in an infringement decision following the

particularly great in the negotiations in the commitment procedure, because these often take place at a preliminary stage. The second premise, namely that “the undertakings” are risk averse, may be slightly more controversial, because undertakings are usually modelled to be risk neutral; but the assumption may nevertheless be a reasonable one, because the undertakings are represented by agents that may well be risk-averse.<sup>66</sup>

Yet, even if we accept both premises, the conclusion that the Commission can extract disproportionate commitments does not follow. The risk-averse party may well pay “an extra price”. Does this “extra price” make the commitments disproportionate? The commitments offered are presumably at most equal in value to (1) the expected value of the remedies imposed in an infringement decision – if necessary, discounted to net present value –, plus (2) the avoided expected discounted costs associated with the further investigations (and possibly litigation), this sum being multiplied by (3) the risk aversion factor that reflects the actor’s preference for the certain outcome

breakdown of commitment negotiations, provided the elements of Art. 23 Regulation 1/2003 are present. See e.g. the ECJ’s judgment in *Alrosa*, cited *supra* note 5, para 48; Kellerbauer (2010), op. cit. *supra* note 5, 654, fn. 17. Gippini-Fournier, “The modernisation of European competition law: First experiences with Regulation 1/2003”, *Community Report to the FIDE Congress 2008*, available at <ssrn.com/abstract=1139776>, argues that “if a fine were completely excluded, there would be little incentive for the undertakings concerned to offer commitments” (an argument that understates the costs of remedies under Art. 7 Regulation 1/2003 as an incentive). Possibly the limitation in Recital 13 was meant to “prevent . . . the scenario in which an undertaking is led to propose commitments under the threat of a fine” (Bruzzone and Boccaccio, op. cit. *supra* note 63). If so, then the interpretation of Recital 13 that restricts its role to excluding secret cartel cases from the commitment procedure (*supra* note 13) eliminates the intended constraint for all other cases. Kellerbauer (2011), op. cit. *supra* note 5, 2, fn. 22, rightly points out that the Recital could have been given the meaning “that commitment decisions should not be adopted where the gravity of the infringement requires a fine”, in which case the constraint would have had much wider application. See Schweitzer, op. cit. *supra* note 5, pp. 637–638 (the commitment procedure has been used in many cases in which a high fine could have been imposed, pointing to the cases *RWE* and *E.ON*); also cf. the assessment by Von Rosenberg, op. cit. *supra* note 41, 238, that *RWE* and *E.ON* faced “fines which could have amounted to billions of Euros” before the commitments were agreed (but see *ibid.* 247, *negating* that fines would have been imposed in these cases; the relationship between these two statements is not clear to me).

66. The risk aversion of several agents may play a cumulative role here: managers may be risk averse because their human capital is not diversifiable. These managers may be advised by in-house counsel, who may be risk averse for the same reason. Independent lawyers may act like risk averse agents because clients may tend to attribute success to their own actions and the strength of their case, but to attribute failure to the lawyers’ efforts (such a tendency could be suggested by research on the so-called “self-serving bias”). For the lawyer who is looking for future business from the client this means that the payoff structure induces apparently risk-averse behaviour, where losses are weighted more heavily than gains. It is possible that “regret avoidance” also plays a role, cf. Guthrie, “Better settle than sorry: The regret aversion theory of litigation behavior”, (1999) *Univ. of Illinois L.Rev.*, 43.

in the commitment procedure as compared to the variance of sanctions possible in an infringement decision.

Those who argue that the Commission can therefore extract disproportionate commitments implicitly compare the “infringement sanctions” with the commitments including the risk aversion factor and the added investigation/litigation costs. But this assumes the wrong counterfactual: it assumes that as an alternative to the (more onerous) commitments the undertakings would have borne *only* the costs of the sanctions imposed in the infringement decision. In reality, the counterfactual is this: we assume that the Commission imposes sanctions in the infringement procedure (and that they – in themselves – would be proportionate). The undertakings would then *still* suffer the additional costs incurred in the course of further investigations (and possibly judicial review) and the costs reflected by the risk aversion factor because of the undertakings’ continued uncertainty of the eventual outcome. The only difference is that these costs would be *less visible* because in the infringement procedure they are dissipated as “friction” costs of the administrative and legal process, while in the commitment decision they become a visible part of the commitments. The overall burden on the undertakings does not change – to them it does not matter whether the costs are incurred as indirect friction costs (in the case of the infringement procedure), or as costs in the form of additional commitments. I can see no reason why a proportionality test should take into account the avoided costs of investigation/litigation and the concomitant uncertainty to the extent they are transformed into commitments – and thus, hopefully, contribute some social value –, but not to the extent they are dissipated as friction costs. In other words: if we worry about risk aversion and the costs of the investigation and litigation in the commitment procedure, then we would also have to take these factors into account when deciding on the proportionality of sanctions imposed in the infringement procedure. If we do not take them into account in the infringement procedure – and we do not –, then there is no reason to raise concerns about them in the commitment procedure.<sup>67</sup>

Nor can it be as such decisive that the Commission can impose a sanction against the undertakings in an infringement decision following the breakdown of negotiations.<sup>68</sup> Every contracting party, even in a simple private contract, is able to impose a “sanction” of some sort on the other party if the negotiations

67. For these reasons I consider the argument by Rab, Monnoyeur and Sukhtankar, *op. cit. supra* note 3, 182, that the voluntary nature of Art. 9 does not sufficiently constrain the Commission’s discretion because “the benefits of an Article 9 decision may well heavily influence the undertaking to agree to commitments”, without more, a non sequitur.

68. But see Waelbroeck, “Le développement en droit européen de la concurrence des solutions négociées (engagement, non-contestations des faits et transactions): que va-t-il rester aux juges?”, *GCLC Working Paper 1/08*, available at

fail. In the simplest case, this is the “sanction” of refusing to deal on the terms proposed by the other party; but in the case of settlement negotiations between private parties it may also be the enforcement of some external, possibly substantial, claim against the other party. The availability of a sanction as a threat to be realized in case of the breakdown of negotiations does not set the commitment procedure apart from purely private negotiations.

Another apparent difference is that in the private contracting context, the sanction is of a given – though perhaps *ex ante* uncertain – magnitude. Private parties are “bargaining in the shadow of the law”.<sup>69</sup> The property rights of these parties and the resulting threat points are fixed in that they are not contingent on the failure or success of the negotiations. In contrast, in the commitment procedure, there may be a danger – or at least a perception on the part of the undertakings – that the Commission uses its discretion such as to impose harsher sanctions where a party was given the chance to resolve the dispute in the commitment procedure and refused to offer commitments that were acceptable to the Commission. In other words, undertakings may offer commitments because they fear that the very fact that the negotiations with the Commission break down would induce the Commission to impose harsher remedies in a subsequent infringement decision than it would have imposed in an infringement decision imposed without prior negotiations.<sup>70</sup> There are incentives for the Commission to do this: after all, imposing harsher sanctions after the breakdown of negotiations may have valuable reputational effects for the Commission, because such a reputation increases the bargaining power in negotiations for commitments in future cases. To the extent the Commission has discretion as to the sanctions in the infringement procedure, it has the power to manipulate the other party’s threat point.

This power on part of the Commission over the other party’s threat point – even if it is not actually exercised – may lead the undertaking to expect a sanction in the top range of the distribution of proportionate sanctions, instead of the middle range of this distribution; the undertaking may accordingly offer higher commitments. This does not, however, explain why the undertaking should expect a *disproportionate* sanction in the infringement procedure (in which case it could seek judicial review, a possibility it would entirely or

<[www.coleurop.be/template.asp?pagename=gclcworkingpapers](http://www.coleurop.be/template.asp?pagename=gclcworkingpapers)>, 3; Waelbroeck, *op. cit. supra* note 1, p. 222; Körber, *op. cit. supra* note 4, pp. 81–82; Schweitzer, *op. cit. supra* note 4, p. 559.

69. To quote the oft-used phrase by Mnookin and Kornhauser, “Bargaining in the shadow of the law: the case of divorce”, 88 *Yale L.J.* (1979), 950.

70. Similarly Wils, *op. cit. supra* note 3, 350, in discussing the question when there is improper compulsion in settlements (though in the context of the cartel settlement procedure). Kellerbauer (2010), *op. cit. supra* note 5, 658, rejects the insinuation that the imposition of a fine could be contingent on the refusal to offer disproportionate commitments.

largely forgo when opting for the commitment procedure). Accordingly, this apparent difference cannot fully explain a tendency to offer disproportionate commitments, either.<sup>71</sup> The argument does have residual merit if one takes into account the uncertainty about the range of proportionate remedies, and the uncertainty about the extent of judicial deference or mistakes in this respect.<sup>72</sup>

If there is a problem with the Commission's bargaining power in the commitment procedure, it has to lie somewhere else. The Commission would have to be able to use leverage in the commitment procedure that would allow it to impose remedies that would be disproportionate if they were part of an infringement decision.

The first way in which the commitment procedure allows the inclusion of factors that could not be legitimately included in an imposed sanction is that the Commission has the power to vary "sanctions" *outside* the proceeding at hand. The suggestion that the Commission might treat undertakings in separate proceedings – such as future merger decisions – less favourably because they did not accede to requests by the Commission to offer certain commitments may seem contrived, if not paranoid. However, as the aphorism attributed to Henry Kissinger notes: "Just because you're paranoid does not mean they are not out to get you". More importantly, it suffices that the undertakings are "paranoid" in this respect, even if the Commission really is not "out to get" them: it is the undertakings' *subjective* probability that influences their calculation.

The second way in which the Commission can use sanctions it could not include in an infringement decision as leverage in the commitment procedure is to transform third parties' claims into additional concessions from the undertakings. One of the incentives for undertakings to offer commitments is the hope to avoid private litigation in the form of follow-on actions in the wake of an infringement decision.<sup>73</sup> To the extent that the substitution of a

71. Put more simply: in a settlement procedure between private parties, the negotiating parties *always* expect the other party to try to enforce their maximum claim should negotiations break down. The mere fact that a public authority has some discretion in choosing from a range of possible sanctions, and that in the circumstances described above the authority *may* choose the maximum (proportionate) sanctions should therefore not make a difference.

72. Similarly Bruzzone and Boccaccio, *op. cit. supra* note 63, 100.

73. Cf. Wils, *op. cit. supra* note 3, 344; Cook, *op. cit. supra* note 2, 210–211, 223; Rab, Monnoyeur and Sukhtankar, *op. cit. supra* note 3, 175. The fear of damages actions is undoubtedly a great motivation for settling in the US. In the EU, damages actions may currently be less of a concern; the few damages actions concentrate on cartel cases, in which the commitment procedure is unavailable (see *supra* note 13). However, one must not confuse a dearth of damages actions with a dearth of private enforcement (cf. Peyer, "Injunctive relief and private antitrust enforcement", (2011) *CCP Working Paper No. 11-7*, available at SSRN: <ssrn.com/abstract=1861861>): undertakings may well fear private actions seeking injunctive relief on the heels of a finding of an infringement.

commitment decision for the infringement decision makes private enforcement impossible or more difficult, the incentive for undertakings to offer commitments is increased.<sup>74</sup> The Commission is able to transform any deterrent effect of future *private* litigation into a bargaining chip for extracting further-reaching commitments in the *public* enforcement procedure.<sup>75</sup>

These two effects cast into doubt the assertion that the negotiations between the parties are a sufficient guarantee for the “correctness” of the negotiated solution.<sup>76</sup> This raises the question whether one should give up the reluctance to look behind the agreed-upon result of the negotiations, and if so, to what extent.

#### 4.2. *Third-party interests and the public interest in a competitive process*

While the previously discussed deviations of the commitment procedure from the contract-law paradigm go to the problem of whether negotiations ensure that the commitments are necessary, another deviation from the contract-law paradigm calls into doubt that the commitments are *adequate* to address competition law concerns. Contract law is concerned with the rights and obligations of the *contracting parties*. Competition law, in contrast, inherently deals with externalities imposed on third parties and on the public interest.<sup>77</sup> The voluntariness of an offer of commitments does not guarantee in any way

74. Schweitzer, op. cit. *supra* note 5, p. 657; Temple Lang, “Commitment decisions and settlements with antitrust authorities and private parties under European antitrust law”, in Hawk (Ed.), op. cit. *supra* note 2, pp. 265, 272.

75. This gives a curious twist to the Commission’s efforts to strengthen private enforcement, which ostensibly has the sole purpose of ensuring “compensation”, and not the purpose to deter. Once private enforcement is strengthened, the Commission can transform the (strengthened) claims of parties seeking compensation into an additional bargaining chip to extract commitments – which furthers mostly the goal of deterrence, and will at best have an indirect compensatory effect (unless the commitment procedure is used to compensate victims, see suggestions by Bourgeois and Strievi, “EU competition remedies in consumer cases: Thinking out of the shopping bag”, 33 *World Comp.* (2010), 241, 245–248).

76. Prior to the AG’s Opinion and the ECJ’s judgment in *Alrosa*, the propositions that the undertakings’ consent was not sufficient to eliminate the need for an external constraint and that commitments should not go beyond the remedies that could be imposed in an infringement decision were nearly universally accepted. See e.g. Wils, op. cit. *supra* note 2, 352, 356; Bruzzone and Boccaccio, op. cit. *supra* note 63, 100 (but cf. Cook, op. cit. *supra* note 2, 212–213). The ECJ’s judgment broke with this near-consensus by stating (*Alrosa*, cited *supra* note 5, para 47): “There is . . . no reason why the measure which could possibly be imposed in the context of Article 7 of Regulation No 1/2003 should have to serve as a reference for the purpose of assessing the extent of the commitments accepted under Article 9 . . . or why anything going beyond that measure should automatically be regarded as disproportionate”.

77. While I do not consider there to be a public interest separate from the constitutive private parties’ interests, it may make sense to distinguish between identifiable third parties, and the dispersed public interest in the process of competition.

that third-party interests or the public interest in the process of competition are well served.<sup>78</sup> Concededly, in the commitment procedure – in contrast to anticompetitive agreements between private parties – these third-party interests and the public interest are to some degree represented by the Commission, aided by third-party comments in the Article 27(4) market test procedure.<sup>79</sup> Nevertheless, for the following reasons the Commission may be a less reliable agent for the public interest in the commitment procedure than it usually is in the infringement procedure.

First, and perhaps most importantly, the Commission does not have the benefit of a full investigation into the facts.<sup>80</sup> While this disadvantage is attenuated by the possibility of reopening the proceedings where the decision was based on incomplete, incorrect or misleading information provided by the parties,<sup>81</sup> the question is whether anybody is ever actively looking for the facts that were missed the first time around.<sup>82</sup>

Secondly, without a full investigation into the facts, the adequacy and the proportionality of the remedies can be assessed only tentatively. In the extreme case, there may be a danger of unwittingly imposing remedies that are themselves anticompetitive.<sup>83</sup>

Thirdly, comments by third parties in the market test procedure need not reflect the full extent of the public interest at stake, especially if the negative externalities from any remaining competitive restraints are dispersed among many stakeholders with a low degree of coordination.

Fourthly, and more subtly, another distinguishing feature between the infringement procedure and the commitment procedure is the difference in the dynamic interaction that develops in an adversarial setting on the one hand and a consensual setting on the other hand. Top-down competition law enforcement by authoritative command in the infringement procedure ensures a clear separation of interests in the struggle between the opponents: one side is represented by the competition authority, the other side is represented by the undertakings suspected of infringing competition law. In this adversarial setting, the competition authority ideally makes up for the defect that

78. Schweitzer, *op. cit. supra* note 5, p. 647; Schweitzer, *op. cit. supra* note 4, p. 577.

79. See Art. 27(4) of Regulation 1/2003.

80. Schweitzer, *op. cit. supra* note 5, p. 647.

81. Art. 9(2)(c) Regulation 1/2003.

82. But see, Wils, *op. cit. supra* note 3, 346, who largely discounts the problem, relying on the possibility of reopening proceedings and on enforcement by NCAs and private plaintiffs; I am more sceptical as to the *de facto* effectiveness of both these attenuating factors. A reopening or enforcement by other actors may be possible where the anticompetitive effects are felt by well-coordinated interest groups that can lobby the Commission into reopening the proceedings (or, less likely, even litigate the case themselves). Where these effects are dispersed, both checks on the commitment decision likely fail.

83. Temple Lang, *op. cit. supra* note 4, pp. 134–135.

“competition has no lobby”;<sup>84</sup> the authority is, again ideally, an advocate that takes a stand for the public interest in upholding the competitive process, an interest which is usually so dispersed among the market participants that private incentives to take remedial action are sufficiently low as to make apathy rational. Of course, even in the best of circumstances, the literature on public choice teaches us that the competition authority, or more precisely its officials, will be subject to various conflicting incentives which could lead to enforcement that is either overzealous or under-ambitious. The introduction of negotiations between the opponents brings with it the spectre of transforming the adversarial procedure, which on balance safeguards both the public interest and the private interests of the parties concerned, into a common quest for a mutually acceptable solution, in which the interests of the authority and the undertakings concerned become more and more aligned. This gradual identification of a common purpose may be to the detriment of third-party interests and the public interest, if only because of confirmation bias – where a consensual resolution seems within reach, the Commission officials may be tempted to view the available evidence in a light more favourable to the undertakings concerned than if they were pursuing an infringement procedure.<sup>85</sup>

For all these reasons, it is possible that the Commission is a less reliable agent for third-party interests and the public interest in the commitment procedure than it is in the infringement procedure.

The degree to which third-party interests and the public interest are really endangered by these potential failures of the commitment procedure depends, *inter alia*, on the availability of complementary enforcement mechanisms. To the extent third parties have the right to take action against remaining competitive restraints *and* this is not only a theoretical possibility *de iure* but also a realistic option *de facto*, we need not worry too much about the third-party interest aspect. To the extent that National Competition Authorities (NCAs) may, and realistically will, take action against remaining competitive

84. This adage (“Der Wettbewerb hat keine Lobby”) is attributed to Franz Böhm, cf. Möschel, “Die Wettbewerbsordnung als Grundelement der Sozialen Marktwirtschaft” in Ascheri et al. (Eds.), “*Ins Wasser geworfen und Ozeane überquert*” : *Festschrift für Knut Wolfgang Nörr* (Böhlau, 2003), pp. 609, 612.

85. Cf. the district court’s description in *In re Relafen Antitrust Litigation*, 231 F.R.D. 52, 87 (D. Mass. 2005): “This development [i.e. the agreement on a settlement in principle] transformed the dynamics of litigation virtually overnight. . . . [t]he parties wanted settlement, not trial, and all attention turned to effectuating it. Nor could the Court any longer trust in the adversary system. At once, ‘the law’ – so carefully scrutinized in determining the summary judgment motion seemed to take a back seat to more practical needs in the minds of everyone but the Court.” This case concerned a private class action, in which the danger of the plaintiff’s “capture” is no doubt much greater than in the case of the Commission; but the institutional potential for such a dynamic to develop still seems plausible to me.

restraints against which no private actions are brought, we need not worry about the public interest aspect.

The problem is that the extent to which private third parties and NCAs may enforce competition law with regard to infringements that have been the subject of commitment decisions is not even uncontroversial *de iure*; in fact, this matter has been called one of “tremendous murkiness”.<sup>86</sup> And quite apart from the doctrinal controversy, it seems extremely unlikely *de facto* that an NCA would take action.

*De iure*, Recital 13 of Regulation 1/2003 appears to leave third-party private actions and actions by NCAs completely unaffected: “Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding [i.e. of an infringement] and decide upon the case”; and this is reconfirmed in Recital 22: “Commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles [101 and 102] of the Treaty.” A first indication that Recitals 13 and 22 are not as absolute as they look was the memorandum on commitment decisions, which stated that the companies “may still face enforcement action before Member States’ authorities and courts, *provided that the uniform application of the competition rules throughout the EU is not jeopardized*.”<sup>87</sup> Article 16 Regulation 1/2003 presumably excludes *at least* the possibility of qualifying as an infringement conduct that is positively required in the operative part of the commitment decision, and of ordering an undertaking to do something that is prohibited in the operative part of the commitments.<sup>88</sup> In addition, and despite the statements in Recitals 13 and 22, it is controversial in how far NCAs and national courts can find an infringement of competition law conduct subsequent to the adoption of the commitment decision. Some argue that such a finding would infringe Article 16 Regulation 1/2003, the prohibition of rendering decisions “running counter” prior Commission decisions.<sup>89</sup> The answer to this question is to some extent influenced, though

86. See Marquis, “Introduction: Cartel settlements and commitment decisions”, in Ehlermann and Marquis, op. cit. *supra* note 1, pp. xxix, lxiii, taking up Forrester’s remark in Panel V, in *ibid.*, p. 540.

87. MEMO/04/217 of 17 Sep. 2004 (emphasis added).

88. See Gippini-Fournier, op. cit. *supra* note 65, 32–33; Marquis, op. cit. *supra* note 86, pp. lxiv–lxv; Cook, op. cit. *supra* note 2, p. 226, and Temple Lang, op. cit. *supra* note 74, p. 287 (both extending the conduct exempt from further scrutiny to conduct that is clearly implied by commitments); Wils, op. cit. *supra* note 2, 362 (injunctive relief remains possible “unless the injunction would make it impossible for the undertaking concerned to comply (also) with the commitments made binding”); Rab, Monnoyeur and Sukhtankar, op. cit. *supra* note 3, 184.

89. E.g. de Bronett, op. cit. *supra* note 46, Art. 9 para 8. Waelbroeck, op. cit. *supra* note 1, pp. 230–233, and Wiedemann, “Zur Bindungswirkung von Entscheidungen der Kommission über Verpflichtungszusagen nach Art. 9 VO Nr. 1/2003 gegenüber nationalen Kartellbehörden

not predetermined, by one's stance on yet another controversial question: whether the commitments must *completely* remove all the concerns raised in the preliminary assessment, or whether the commitments only need to reduce the competitive concerns to such an extent that it is permissible for the Commission to conclude that the remaining concerns are no longer an enforcement priority.<sup>90</sup> At least if one takes the latter view, any remaining infringements may still be prioritized by NCAs or taken up by private parties without "running counter" to the Commission decision.<sup>91</sup> If one otherwise considered the commitment decision to immunize against actions seeking relief for infringements subsequent to the adoption of the commitment decision, however, this would require a determination *to what extent* the commitment decision completely removed the competitive concerns and to what extent the infringements remain.<sup>92</sup>

Even to the extent that private enforcement and/or enforcement by NCAs remains possible *de iure*, it seems unlikely that these enforcement mechanisms would *de facto* satisfactorily fill any gap left by under-enforcement on part of the Commission.<sup>93</sup> In cases in which the Commission does not (yet) have sufficient facts to pursue an infringement decision, it seems unlikely that private litigants have better information; if they had, they would presumably use the market test stage to make their information available to the Commission. Nor is it likely that private litigants can easily gain access to this information; with the limited disclosure requirements in the national laws of the Member States, it seems unlikely that

und Kartellgerichten" in Reese et al., *Festschrift für Ulf Doepfner zum 65. Geburtstag* (C.H. Beck, 2008), pp. 89, 92–97, want to rely on the wording of the commitment decision. For the (preferable) view that "[n]either the finding by a national court that there has been no infringement nor a finding that there has been an infringement" would run counter to the commitment decision, see e.g. Wils op. cit. *supra* note 2, 360, 361–362; Whish, op. cit. *supra* note 2, p. 569; Gippini-Fournier, op. cit. *supra* note 65, 30–33 (also discussing, and correctly rejecting, *ne bis in idem* concerns); Schwarze and Weitbrecht, *Europäisches Kartellverfahrensrecht* (Nomos, 2004), § 6 para 95. Schweitzer, op. cit. *supra* note 5, p. 655, would allow the finding of an infringement and the imposition of sanctions at least where the NCA or national court have made additional factual or legal findings. Also cf. the lively Panel V discussion in Ehlermann and Marquis, op. cit. *supra* note 1, pp. 525, 534–545; Rab, Monnoyeur and Sukhtankar, op. cit. *supra* note 3, 184–185; Georgiev, op. cit. *supra* note 3, 1030; Körber, op. cit. *supra* note 4, p. 80.

90. Cf., for the latter proposition, Whish, op. cit. *supra* note 2, p. 569; Wils, op. cit. *supra* note 2, 357–358; von Rosenberg, op. cit. *supra* note 41, 246–247. For the former view, see Schweitzer, op. cit. *supra* note 5, p. 646; Schweitzer, op. cit. *supra* note 4, pp. 561–562, 576. For an extensive discussion, see Temple Lang, op. cit. *supra* note 74, pp. 287–290.

91. Wils, op. cit. *supra* note 2, 362.

92. Impracticable as such a determination may seem, this is indeed suggested by Waelbroeck, op. cit. *supra* note 1, pp. 231–232 (distinguishing on the basis of the wording of the commitment decision).

93. Schweitzer, op. cit. *supra* note 4, pp. 575–576.

information can be uncovered that was unavailable to the Commission.<sup>94</sup> Nor will NCAs be queuing up to jump into the breach: from an *ex ante* perspective, it is hardly the best use of scarce enforcement resources to look into a case which was already looked into and discarded by another enforcer; and additionally, the NCAs could have voiced any concerns in the Commission's commitment procedure.<sup>95</sup> Additionally, the *de facto* probability of action by NCAs and national courts is negatively affected by the uncertainty about the *de iure* position described above. A last indication that the enforcement by NCAs and national courts in commitment cases is *de facto* negligible is that otherwise commitment decisions would be of very limited value to undertakings, and this contrasts with the high demand for commitment decisions.

If this assessment that commitment decisions largely shield the undertakings against action by NCAs and private plaintiffs is correct – and this may be an explanation for the unexpected increase of the attractiveness of the commitment procedure following the abolition of the notification system –,<sup>96</sup> then there is a danger that a premature commitment decision may in some cases be *worse* than a simple closing of the file. Accordingly, the *a maiore ad minus* argument that the Commission's discretion to adopt a commitment decision must be as wide as the discretion to close the case informally is not an inference that is compelled by logic.<sup>97</sup>

#### 4.3. *The public-law consequences of the "contract"*

Furthermore, the public-law nature of commitments rears its head when it comes to breaches of the "contract": if a fine of up to 10 percent of the annual worldwide turnover were imposed as a contractual penalty for conduct that – absent the binding commitments – might well have been legal, courts would likely hesitate before enforcing the clause.<sup>98</sup>

94. Georgiev, *op. cit. supra* note 3, 1005. However, depending on the procedural regime, the commitment decision could suffice to overcome the preliminary threshold for obtaining disclosure, see Dekeyser, Becker and Calisti, "Impact of public enforcement on antitrust damages actions" in Ehlermann and Marquis (Eds.), *op. cit. supra* note 1, pp. 677, 683.

95. Cf. Whish, *op. cit. supra* note 2, pp. 567–568; Cook, *op. cit. supra* note 2, 227; Wils, *op. cit. supra* note 2, 363.

96. Cf. Temple Lang, *op. cit. supra* note 4, p. 122.

97. For such an inference based on logic cf. Wils, *op. cit. supra* note 2, 347. Wils takes Recitals 13 and 22 largely at face value (see *supra* note 89), so that his argument is logically consistent if one confines oneself to the *de iure* position. On the wide margin of discretion under current case law, see Wils, *op. cit. supra* note 47, 363.

98. Of course, the fine would have to take into account the gravity and duration of the infringement; but the infringement in this case would be the breach of the *commitments*, and so it is at best unclear in how far the legality of the *conduct* (irrespective of the commitments)

This aspect may become particularly problematic when combined with the concern that the Commission may seek remedies that are in themselves anticompetitive. If the commitments prohibit conduct that would otherwise be permissible under competition law, then the commitments restrict the range of options available to the undertakings bound by these commitments – and the restriction of otherwise legitimate business conduct may in itself amount to a restriction of competition.<sup>99</sup> The harsh penalty for any deviation from the binding commitments renders the promise of adhering to the commitments credible. Thus, the commitment decision may perversely act as a credible signal of the undertakings to their competitors that the undertakings will refrain from competing on certain parameters. Of course, this argument assumes that the Commission is duped into acting unwittingly as an accessory to restrictive conduct. This would ordinarily not be a likely scenario; however, it does not seem out of the question given the preliminary nature of the investigation into the facts in commitment procedures.<sup>100</sup>

#### 4.4. *A preliminary summary*

While the “voluntary” nature of commitments has contractual overtones, various features should caution against taking the analogy too far.

- In contrast to the situation of private parties settling their disputes, the Commission may be able to extract commitments that go beyond the remedies available in an infringement decision – not only in terms of “what” can be imposed, but also in terms of “how much”. The self-interest of the parties in negotiations, on which contract law relies as a nearly exclusive guarantor for

would influence the assessment of the fine for breaches of commitments. Cf. Schwarze and Weitbrecht, op. cit. *supra* note 89, § 6 para 85.

99. Schweitzer, op. cit. *supra* note 5, p. 657; Temple Lang, op. cit. *supra* note 4, pp. 134–135. Where national competition authorities impose commitment decisions that have anticompetitive effects, this could potentially be challenged as an infringement of the *effet utile* principle.

100. Assume, for example, that the Commission investigates an undertaking (U) in Member States A, B and C, and finds that the undertaking is dominant in these Member States and employs fidelity rebates. U offers commitments not to use fidelity rebates or bundled discounts in Member States A-F, and the Commission makes these commitments binding, even though it has not investigated the competitive situation in Member States D-F. Assume further that U is *not* dominant in Member States D-F, and that competitor V actually dominates these markets. U is prevented from engaging in legitimate competitive conduct to the detriment of the consumers that could have profited from rebates and discounts by a non-dominant undertaking, and to the detriment of the process of competition that could have undermined V’s market power. Even worse, U can use the commitments as a credible signal to V that it will not seek to enter these other markets, and that it will concentrate all its power on Member States A-C. One might reject as unrealistic the notion that the Commission could extend the commitments beyond the geographical market investigated; but see the *Coca Cola* case, cited *supra* note 54.

the correctness of the outcome, is still a constraint on the commitments that can be extracted from the undertakings. However, for the reasons explained above,<sup>101</sup> it is doubtful whether the “voluntary nature” of commitments is a perfect substitute for the proportionality test applicable to infringement decisions.

- While contract law is concerned with rights and obligations of the contractual parties, competition law is mostly about the externalities on third-parties and the public interest. The Commission is usually the agent for these latter interests. In the infringement procedure, the Commission has both the incentive and the means to be an effective agent. In the commitment procedure, both the incentive and the means for being a vigorous enforcer of the principals’ interests are attenuated. Nor do complementary enforcement mechanisms likely constitute a sufficient protection for third-party interests and the public interest: even to the extent they are available *de iure*, private enforcement and enforcement by the NCAs are particularly unlikely in cases in which the Commission has resolved the case by a commitment decision.

- In the extreme case, undertakings may offer commitments that are in themselves anticompetitive. The severe sanctions against breaching commitments ensure that the “promise” to other market participants to refrain from (or engage in) certain market behaviour is a credible one.

Overall, these differences between commitments and private contracts should lead to the conclusion that the voluntary nature of commitments is not a sufficient guarantee for the “correctness” of the negotiated outcome. In addition to the partial constraint that the requirement of consent undoubtedly exercises, the control of the substantive correctness of commitment decisions requires additional, external constraints.

## 5. The lost benefits of the infringement procedure

The effect of the ECJ’s judgment in *Alrosa* of reducing the strict demands of the rule of law in favour of a presumption for the substantive correctness of quasi-contractual solutions,<sup>102</sup> is that the Commission is subjected to markedly fewer constraints in the commitment procedure than in the infringement procedure.

Infringement decisions under Article 7 Regulation 1/2003 and the sanctions imposed under this Article and/or Articles 23, 24 of this regulation are subject to the constraints of the rule of law, and as a consequence have various

101. See *supra* text accompanying notes 69–76.

102. See *supra* section 3.4.

beneficial effects:<sup>103</sup> (1) the infringement must be proven to the “requisite legal standard”;<sup>104</sup> (2) the remedies imposed must be the ones mandated or at least permitted by the legal provisions on which the Commission relies;<sup>105</sup> and (3) they must be necessary and proportionate means to end the infringement; both (4) the finding of an infringement and (5) the proportionality of the remedies imposed are subject to judicial review. As a consequence of this judicial review, the Commission has an *ex ante* incentive (6) to make a full enquiry into the facts before rendering an infringement decision, and (7) to scrutinize the proportionality of the remedies in detail. (8) In the infringement procedure, the Commission is not only legally bound to make sure that the remedies “bring the infringement effectively to an end”, but it also has an incentive to do this, because the incentives of the Commission in the infringement process are primarily antagonistic to those of the undertaking. (9) The final decision – either the decision of the competition authority or that of the courts on judicial review – will be a pronouncement of what the law is. The decision will therefore help to shed light on what was previously the “penumbra” of the scope of the legal provisions in question, and the decision will thus provide legal certainty for future cases. (10) The infringement decision will also assert the legal principle, and (11) contain a – more or less pronounced – statement of opprobrium of the infringement. The resulting “bad publicity” may contribute to the deterrent effect of any fines imposed, and additionally result in the benefits of what is sometimes called “positive general deterrence”. (12) Apart from being an end in itself, the finding of an infringement may serve as a basis for fines under Article 23 Regulation 1/2003, and (13) for private enforcement in the form of follow-on actions.

Some of these benefits are inevitably lost or reduced in the commitment procedure as established in Regulation 1/2003; others may be lost, depending on the choice of how to implement the commitment procedure. Recital 13 states that “[c]ommitment decisions should find that there are no longer grounds for action by the Commission *without concluding whether or not there has been or still is an infringement*” (my emphasis).<sup>106</sup> This

103. Partly based on Wils, op. cit. *supra* note 2, 349, and Wils, op. cit. *supra* note 3, 342; see also Cengiz, op. cit. *supra* note 5, 135–138; Klees, op. cit. *supra* note 40, 376–377.

104. Whatever this “requisite standard” may be: see Gippini-Fournier, “The elusive standard of proof in EU competition cases”, 33 *World Comp.* (2010), 187.

105. In the case of Art. 7 Regulation 1/2003, the legal constraints in this regard are admittedly negligible, because this provision empowers the Commission to impose any behavioural or structural remedy. The legal constraints are entirely shifted to the proportionality test.

106. A clause in US settlements to the same effect has recently been criticized by a US American court, see *SEC v. Citigroup Global Markets*, Slip Op. 2011 WL 5903733 at 5 (S.D.N.Y. 2011); see also the Public Comments by AARP in *United States v. Morgan Stanley*, Civil action no. 11-civ-6875 WHP (S.D.N.Y.) available at

automatically rules out that the infringement must be proven to the requisite legal standard (1) and that judicial review could enquire into the existence of an infringement (4); this absence of judicial review as to the existence of an infringement also diminishes the *de facto* incentive for the Commission to make a full enquiry into the facts (6).<sup>107</sup> The lack of a finding of an infringement eliminates the possibility of fines (12), and the possibility for private plaintiffs to rely on a prejudicial effect (13).<sup>108</sup> In addition, because the preliminary assessment is not as detailed as the factual findings in an infringement procedure, private plaintiffs will have to find other sources to prove the infringement. By definition, the commitment decision does not contribute to the clarification of the legal boundaries (9) and it does not assert the legal principle applied (10) or carry a statement of opprobrium (11). The intrinsic incentive to ensure the effectiveness of the remedy (8) may be weakened by the desire to finalize the negotiations.<sup>109</sup>

This leaves the constraints (2), (3), (5) and (7). Constraint (2) is negligible even in the infringement procedure,<sup>110</sup> and can therefore not be expected to be an effective constraint in the commitment procedure. Constraints (3), (5) and (7) all concern facets of the proportionality principle: the legal obligation to impose only proportionate remedies (3), the judicial review of compliance with the principle (5), and the resulting *de facto* incentive for the Commission to comply (7). Accordingly, the degree to which the content of commitment decisions is constrained by the rule of law depends nearly exclusively on the extent to which they are subjected to a proportionality test.

## 6. Potential benefits of the commitment procedure

The mere fact that certain sacrifices need to be made when substituting a commitment decision for an infringement decision is, of course, not decisive. Whether these sacrifices are worth their cost depends on the concomitant

<[www.justice.gov/atr/cases/morgan.html](http://www.justice.gov/atr/cases/morgan.html)> (but see section IV.B. of the Response of the United States of 6 Mar. 2012, *ibid.*). – The point here is not that Art. 9 commitment decisions should have to include admissions of liability (as seems to be the argument in the aforementioned decision in *Citigroup* and AARP's public comment in *Morgan Stanley*), only that the non-admission of liability makes it impossible for a commitment decision to fulfill certain objectives an infringement decision could fulfil.

107. The question whether the Commission is legally obliged to make a full enquiry into the facts, or at least live up to a certain minimum standard (see Wils, *op. cit. supra* note 3, 346), is a separate one; but the *de facto* incentive is certainly diminished.

108. *De facto*, commitment decisions may still have some probative value, but *de iure* there is neither an admission of liability nor a finding of liability on which the plaintiffs could build.

109. See *supra* text accompanying note 85.

110. See *supra* note 105.

benefits.<sup>111</sup> The benefits of commitment decisions as a form of consensual dispute resolution are well known from the literature in favour of alternative dispute resolution (ADR). Consensual decisions are *speedier* and *less costly*.<sup>112</sup> Commitment decisions are speedier because, first, the Commission need not engage in the time-consuming task of finding facts and evidence that would hold up in court,<sup>113</sup> and secondly, the negotiated remedies are by design more *acceptable* to the parties of the negotiations, thus avoiding protracted litigation.<sup>114</sup> This will often be an advantage for all actors:<sup>115</sup> for the competition authority, because it can concentrate its scarce resources on other infringements; for the undertakings, because the quick resolution saves litigation costs and the undertakings can turn their attention to activities which are more profitable; and for the public interest, especially where a lengthy investigation and contentious court battle would have rendered any remedy meaningless because competition would have been choked off in the meantime, perhaps irrevocably.<sup>116</sup>

The commitment procedure may also allow more “flexible” remedies than could be imposed in an infringement decision. In contrast to the time- and cost-effectiveness, however, the “flexible remedy” argument is a double-edged sword. On the one hand, the less constrained the parties are in what they can bring to the negotiation table, the more the range of available options for trade and therefore the potential bargaining surplus is increased – as the cliché goes, the pie to be divided becomes larger. If one of the parties is particularly keen on a remedy that would not be available in adjudication, this

111. More elaborate discussions of the advantages and disadvantages for undertakings and the Commission respectively can be found, e.g., in Cook, *op. cit. supra* note 2, 210–213; Rab, Monnoyeur and Sukhtankar, *op. cit. supra* note 3, 175–176; Wils, *op. cit. supra* note 2, 349–352.

112. Cengiz, *op. cit. supra* note 5, 130; Cook, *op. cit. supra* note 2, 210; Rab, Monnoyeur and Sukhtankar, *op. cit. supra* note 3, 175; Wils, *op. cit. supra* note 3, 343–344; Kellerbauer (2011), *op. cit. supra* note 5, 3; Bruzzzone and Boccaccio, *op. cit. supra* note 63, 99.

113. But note the trade-off: if one requires the Commission to be far advanced in their fact-finding so as to avoid missing crucial facts (Wils, *op. cit. supra* note 3, 346, with good reason), one cannot at the same time advance the time-saving aspect with regard to the fact-finding stage. If, on the other hand, one promotes the time-saving aspect with regard to the fact-finding stage as an advantage, one has to concede the possible negative effects on the adequacy of the commitments. Also, one has to be careful not to compare isolated, extremely long-lasting cases in infringement investigations with particularly speedy commitment procedures. In the one case in which a direct comparison is possible (the *CISAC* case, see text surrounding note 53 *supra*), it took the Commission less than a year to issue an infringement decision after negotiations broke down. The main advantage would seem to be the time saved by avoiding judicial review.

114. Kellerbauer (2011), *op. cit. supra* note 5, 3 with fn. 24, notes that no addressee has ever challenged a commitment decision; the few challenges that do exist were always initiated by third parties.

115. Wils, *op. cit. supra* note 3, 343–344.

116. Cf. Temple Lang, *op. cit. supra* note 4, p. 142.

party may agree to substantial concessions elsewhere.<sup>117</sup> To resort to yet another cliché from the sales talk of ADR proponents: using settlements instead of adjudication may create a win-win situation.<sup>118</sup>

This option to include “extra-legal” remedies is sometimes hailed as a benefit of negotiated solutions in competition cases as well.<sup>119</sup> As Article 7 of Regulation 1/2003 does not constrain the Commission’s power as to the nature of the remedy, the “flexible” remedy actually is a euphemism that stands for a remedy that would not have been proportionate and necessary if imposed in an infringement decision.<sup>120</sup> The obvious examples from past Commission practice are again the structural commitments in the energy sector. While structural remedies could in theory also be imposed top-down based on Article 7 Regulation 1/2003, the Commission has yet to make use of this option, and the statutory preference for behavioural remedies over structural remedies would make a successful appeal not unlikely.<sup>121</sup> The parties’ voluntary submission to structural commitments in the energy cases was almost certainly not based on an expectation that the Court of Justice would uphold an order for structural remedies if the Commission had adopted it in an Article 7 infringement decision. Instead, the parties presumably recognized that the Commission was very keen on obtaining structural remedies, and saw their chance for extracting more favourable concessions elsewhere in return.<sup>122</sup>

117. An example may be the keenness of the Commission to obtain structural remedies in the energy sector. Or, to give an illustration from a different area: in medical negligence cases, patients apparently often have a desire to get an apology from the doctor, cf. O’Reilly, “‘I’m Sorry’: Why is that so hard for doctors to say?”, *American Medical News*, 8 Feb. 2010, available at <[www.ama-assn.org/amednews/2010/02/01/prsa0201.htm](http://www.ama-assn.org/amednews/2010/02/01/prsa0201.htm)>. The law usually does not allow a judge to impose an apology as a remedy, and at any rate it seems impossible to get a meaningful apology if it is not voluntary. In a settlement, offering an apology imposes few costs on the offeror and (apparently) provides real value to the offeree.

118. And who would want to spoil their fun by pointing out that virtually every contract creates a win-win situation anyway?

119. cf. Georgiev, op. cit. *supra* note 3, 1012 (“Consent decrees also allow [the agencies] to craft innovative remedies which might not have an express legal basis”); Cook, op. cit. *supra* note 2, 212–213.

120. Klees, op. cit. *supra* note 40, 377.

121. Cf. the wording of the third sentence of Art. 7(1) and Recital 12 of Regulation 1/2003. Contrast von Rosenberg, op. cit. *supra* note 41, 241 et seq. (structural remedy in these cases proportionate) with Körber, op. cit. *supra* note 4, p. 87 (proportionality of the structural remedy in *RWE gas* foreclosure case is “highly doubtful”) and Immenga, op. cit. *supra* note 5, p. 296 (legality of the structural remedy in *E.ON* “doubtful”).

122. Possibly in the form of the Commission’s refraining from imposing a substantial fine (or possibly from initiating legislative action, which – given the unpopularity of energy suppliers at the time – might have had some chance of realization); the risk of private follow-on actions may also have been a consideration.

## 7. Abandoning the “struggle for law”

Much of the argument above has focused on the possible *disproportionality* of commitments. At least as problematic is the lack of supervision of the *adequacy* of commitments.

Many commentators have pointed out that the real danger of the commitment procedure is its overuse, resulting in a reduced body of litigated cases that define the boundaries of competition law and assert the legal principles at stake.<sup>123</sup> The concern is one that is familiar from the critique against the trend towards ADR in general. In the English-language literature on ADR, the standard point of reference is Owen Fiss’s 1984 article,<sup>124</sup> from which a rich literature has developed.<sup>125</sup> The concern is much older: in 1872, Rudolf von Jhering considered it the moral duty of every person who was consciously wronged by another person to contribute to the “struggle for law” by litigating the case in order to keep alive the legal principles at stake, instead of meekly absorbing the loss or settling the case.<sup>126</sup> For public officials, he considered this duty to be self-evident.<sup>127</sup> Similarly, the law and economics

123. Forrester, “Creating new rules or closing easy cases?” in Ehlermann and Marquis, op. cit. *supra* note 1, pp. 637–638, 647–648; Georgiev, op. cit. *supra* note 3, 1026–1029; Schweitzer, op. cit. *supra* note 5, pp. 648, 657; Waelbroeck, op. cit. *supra* note 1, p. 224; Wils, op. cit. *supra* note 3, 344–346; Wils, op. cit. *supra* note 2, 351–352; Bruzzone and Boccaccio, op. cit. *supra* note 63, 99; also cf. Gippini-Fournier, op. cit. *supra* note 65, 43. The danger of the Commission’s “flight into informality” was one of the earliest criticisms, see Schmidt, “Umdenken im Kartellverfahrensrecht”, (2003) BB, 1237, 1242; see also Körber, op. cit. *supra* note 4, pp. 82, 91; Schweitzer, op. cit. *supra* note 5, pp. 645, 657.

124. Fiss, “Against Settlement” 93 *Yale L.J.* (1984), 1073. Fiss’s article concerned primarily cases of unequal bargaining power, *ibid.* at 1076 (many of his arguments in this regard seem to be built on the wrong counterfactual – see my argument above (text following note 66) –, but this may be due to the historical context in which Fiss was writing, namely the proposal to introduce rules to penalize those parties that opt for litigation instead of settlement). But Fiss did not limit his observations to cases brought by indigent parties; he included a number of references to antitrust cases and procedures in his article, *ibid.* at 1076, 1081, 1083–1084. His concerns in these cases were (1) the limited factual basis on which settlements were made and (2) the lost opportunities for an authoritative interpretation of the law. It is these latter concerns that are directly relevant here.

125. E.g. Luban, “Settlements and the erosion of the public realm”, 83 *Georgetown L.J.* (1995), 2619; Resnik, “For Owen M. Fiss: Some reflections on the triumph and the death of adjudication”, 58 *Univ. of Miami L.Rev.* (2004), 173 ; see also Resnik, “Whither and whether adjudication?”, 86 *Boston Univ. L.Rev.* (2006), 1101, 1102, 1139 et seq.

126. Von Jhering, *Der Kampf um’s Recht*, 1<sup>st</sup> ed. (Manz’sche Buchhandlung, 1872), pp. 26–30 (in English: *The Struggle for Law*, 2<sup>nd</sup> ed. (Callahan, 1915; John J. Lalor, trans.)). Given Fiss’s insistence on America’s uniqueness and superiority to the rest of the world (see Fiss, op. cit. *supra* note 124, 1089–90), it is not surprising he made no reference to von Jhering.

127. See von Jhering, op. cit. *supra* note 126, p. 71: “the realization of public law and of criminal law is assured, because it is imposed as a duty on public officials”, a duty he considered to be “absolute and unlimited” (*ibid.* at p. 74). He devoted most of his presentation to private

literature has pointed to the positive externalities of adjudication, and the loss of these externalities where the parties, considering only their private interests, settle the case.<sup>128</sup> The critique of the commitment procedure has previously drawn on these two strands of literature.<sup>129</sup> If anything, however, the problem has been understated for two reasons.

First, in contrast to most cases discussed in the general ADR literature, the commitment procedure does not merely eliminate one plaintiff or a limited group of plaintiffs from a larger population of plaintiffs that could litigate the case. It eliminates adjudication initiated by the Commission, and indirectly curtails action by NCAs and private plaintiffs, and hence, at least *de facto*, prevents adjudication in many cases completely.<sup>130</sup> This may not be a problem where cases involving the same legal issue come up on a regular basis; but where opportunities for clarification are rare, the reduction in adjudication is worrisome.

Secondly, there are reasons to suspect that the incentives for the Commission are strong to settle precisely the “wrong” cases, namely those cases in which the public benefits of adjudication would have been particularly great. The most obvious benefit of fully adversarial adjudication is the clarification of the law on novel legal issues.<sup>131</sup> Such novel legal issues can arise either in the context of finding an infringement on a novel theory of harm, or in devising novel remedies. Unfortunately, the incentive for the Commission to opt for the commitment procedure in these cases is strong for several reasons. First, the probability of a reversal of an infringement decision based on a novel theory of harm or employing novel remedies on judicial review would be high – by definition the Commission is testing the boundaries of the legal provisions involved. By choosing the commitment procedure, the

law, because in the area of public law “even the dullest mind understands” that there is no question whether or not to fight for what is right under the law; von Jhering, *op. cit. supra* note 126, pp. 21–22; the English translation (*op. cit. supra* note 126, pp. 21–22) of that particular sentence does not quite capture the sentiment of the German original.

128. See e.g. Edwards and Padilla, “Antitrust settlements in the EU: Private incentives and enforcement policy” in Ehlermann and Marquis, *op. cit. supra* note 1, pp. 661, 664 (with further references).

129. See e.g. Georgiev, *op. cit. supra* note 3, 1015–1017.

130. For the *de iure* and *de facto* limitations facing NCAs and private plaintiffs as alternative enforcers, see above (text accompanying notes 86–97). Georgiev, *op. cit. supra* note 3, 1016–1017, does not sufficiently take into account this difference between the general ADR discussion and the antitrust settlement context when discounting the concerns against settlements by referring to Luban’s reply to Fiss (*op. cit. supra* notes 125 and 124, respectively). Having said this, in the U.S. some mandatory arbitration or mediation clauses in standard form contracts covering an entire industry have a similarly comprehensive effect on excluding potential plaintiffs.

131. Gippini-Fournier, *op. cit. supra* note 65, 42–43; Wils, *op. cit. supra* note 3, 344.

Commission can largely avoid judicial review.<sup>132</sup> In some of the commitment decisions to date, this consideration may have played a role.<sup>133</sup> The *Rambus* case concerned “patent ambush” in technological standard-setting procedures, an issue that had been the subject of heated discussion on both sides of the Atlantic, and whose importance in high-technology industries will arguably increase in the future. As a result of the Commission’s adoption of a commitment decision instead of an infringement decision, there is still no authoritative clarification of the European legal position on this issue.<sup>134</sup>

Structural remedies have never been used in the infringement procedure, and the legal standards required to overcome the statutory preference for behavioural remedies are consequently unclear. Instead of testing the limits in an adversarial procedure, the Commission opted for the commitment procedure in the energy cases.<sup>135</sup>

In the *Alrosa* case itself, the Commission sought the complete cessation of dealings between De Beers and Alrosa. Under the theory of harm based on Article 102 TFEU this would most likely have been an “overkill”, because anticompetitive foreclosure effects might have been preventable by a significant reduction of the sales volume (hence the qualms of the General Court). The need for a complete cessation was probably more motivated by a

132. Wils, op. cit. *supra* note 2, 352. Cook, op. cit. *supra* note 2, 213, raises similar concerns about the flight to the commitment procedure where the Commission perceives its case to be weak. Temple Lang, op. cit. *supra* note 4, p.143, appears to consider the possibility to “deal pragmatically with novel or complex cases” as an advantage.

133. The enquiry into the Commission’s motives for choosing the commitment procedure is necessarily speculative. In all cases described below, a number of reasons – some legitimate, some less so –, can be advanced for choosing the commitment procedure. But even where there are legitimate reasons, this does not exclude the possibility that less legitimate reasons crucially influenced the decision.

134. The Qualcomm proceedings, raising related legal issues with regard to the level of – fair, reasonable and non-discriminatory (FRAND) – royalties for technologies that formed part of an industry standard, had been closed on 24 Nov. 2009, see MEMO/09/516. See now Proceedings COMP/39985, 39986 – *Motorola* and COMP/39939 – *Samsung*. The statements in the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, O.J. 2011, C 11/1, paras. 257 et seq., are neither authoritative nor do they give comprehensive guidance. In formulating similar concerns to those raised here Georgiev, op. cit. *supra* note 3, 1028, mentions the *Coca-Cola* commitment decision as a problematic decision, because it addressed the “important and contested area of law” of fidelity rebates; in this particular area of law, however, the Commission did litigate the *British Airways* case (as Georgiev himself notes, see *ibid.* fn. 254). I would consider it unobjectionable for the Commission to litigate one case to clarify the law and settle other cases that raise the same – or sufficiently similar – questions.

135. See the discussion of the energy cases by von Rosenberg, op. cit. *supra* note 41; Klees, op. cit. *supra* note 40; Chauve, Godfried, Kovács, Langus, Nagy and Siebert, “The E.On electricity cases: an antitrust decision with structural remedies”, (2009) *Competition Policy Newsletter*, 51; Sagowska, “Energy liberalization in an antitrust straitjacket: A plant too far?”, 34 *World Comp.* (2011), 449.

theory of harm under Article 101 TFEU: the anticompetitive effects of dealings between competitors. On this issue, again, the law is far from settled.<sup>136</sup> The Commission avoided any decision on this theory of harm by not only choosing the commitment procedure (in the Art. 102 TFEU case), but by closing the parallel proceeding under Article 101 TFEU entirely.

A second reason for which the Commission may be more inclined to choose the commitment procedure for novel legal issues is that such new issues in today's world often – though not always – arise in the context of complex technological issues, or – under the “more economic approach” – are built on complex economic models that require large amounts of input data. The complexity of a case, in turn, is a legitimate argument for the Commission to choose the commitment procedure. The danger is that the assessment focuses, for reasons of myopia, too much on the complexity of the specific case, and discounts hyperbolically the benefit of the precedential value that consists in resolving the novel legal issue for future cases, even where a clear precedent might have prevented these future cases, perhaps equally complex, from arising. This does not only mean that the novel issue is not authoritatively decided. It also means that in complex cases, where *more* fact-finding is necessary to identify the correct theory of harm and to tailor the remedies to this theory of harm, the Commission will actually spend *less* time and resources on finding the infringement and adequate remedies, and the Commission is therefore more likely to accept offers of inadequate remedies.<sup>137</sup>

A third aspect of cases involving novel legal issues is that the Commission would usually not impose a fine even in an infringement decision. This may, again, increase the probability that the commitment procedure is chosen by the Commission.<sup>138</sup>

136. For a discussion, see e.g. Wagner-von Papp, *Marktinformationsverfahren: Grenzen der Information im Wettbewerb* (Nomos, 2004), pp. 470–474.

137. Cf. Temple Lang, *op. cit. supra* note 4, p. 143. This is particularly problematic because the undertakings involved recognize the Commission's reluctance to embark on big, complex cases, and are therefore likely to offer only inadequate commitments, *ibid.*, pp. 142–143.

138. The absence of a fine could be significant for two reasons, but neither of them is likely to play a great role. First, the absence of a fine may seem to open up the possibility for using the commitment procedure in the first place (cf. Recital 13 of Reg. 1/2003). However, in practice Recital 13 is interpreted as ruling out commitment decisions only in hardcore cartel cases, and not in all cases in which a fine could conceivably be imposed (see *supra* notes 13 and 65). The second reason for which the absence of a fine could be significant is that the Commission may have less incentive to pursue the infringement procedure where no fine can be imposed. However, where it is *ex ante* sufficiently certain that no fine will be imposed, the undertakings concerned may be less eager to offer commitments, off-setting the increased willingness on part of the Commission.

Apart from this direct loss of an authoritative interpretation of novel legal issues, the use of commitment decisions arguably has indirect, but perhaps equally pernicious effects on the incentives for the Commission to develop the law through other means. Where “extra-legal” remedies can be extracted in negotiations, there is no need to argue for legislative change, or for recognition of a necessity for a broader remedial scope in the infringement procedure.<sup>139</sup> Perhaps structural remedies really should be more widely available, generally or in the energy sector.<sup>140</sup> Perhaps the Commission should be able to prohibit competitor dealings in certain circumstances.<sup>141</sup> Perhaps remedies should include more preventative measures, such as the elimination of interlocking directorships,<sup>142</sup> or of minority shareholdings between competitors,<sup>143</sup> or of an exchange of statistical information between previously colluding competitors that would be innocuous if exchanged between other undertakings.<sup>144</sup> Personally, I would welcome some of these developments, but they are changes from the status quo of the case law. The Commission may believe that some or all of these remedies are already available in infringement decisions *de lege lata*. If so, it should litigate cases to obtain an authoritative interpretation by the Court. Instead, in infringement decisions “[t]he Commission has always been unimaginative as far as remedies are concerned . . .”,<sup>145</sup> which is understandable in light of the restrictive stance of the Court of Justice.

More likely, the Commission believes that these remedies would *not* be available under the *lex lata*, as interpreted by the Court, but that the use of proactive remedies would instead require legislative action. If so, it would seem to be an usurpation of legislative power to use these remedies in negotiated procedures, an usurpation that results in an intermediate level of intransparent “quasi-law” in the form of commitment decisions and merger remedies. Having the ability to use these remedies in negotiated procedures –

139. For an excellent account of the concept of “discretionary remedialism” see Lianos, *op. cit. supra* note 9. See also the contributions in Lianos (Ed.), *Competition Law Remedies in Europe* (Hart Publishing, forthcoming).

140. See von Rosenberg, *op. cit. supra* note 41, 245.

141. See *supra* note 136.

142. The Commission has used commitments in the merger procedure to eliminate or prevent such interlocking directorships. See Wagner-von Papp, *op. cit. supra* note 136, p. 430 with references to the Commission practice.

143. Again, the Commission has used the merger procedure to extract commitments to divest minority shareholdings. See Wagner-von Papp, *op. cit. supra* note 136, pp. 427–431. In this respect, there is at least some authoritative precedent, cf. Joined Cases 142 & 156/84, *BAT and Reynolds v. Commission*, [1987] ECR 4487.

144. Which was disallowed in the infringement procedure in *Cartonboard*, see e.g. Case T-317/94, *Weig v. Commission*, [1998] ECR II-1235, para 172 (fine reduced on appeal, Case C-280/98 P, *Weig v. Commission*, [2000] ECR I-9757).

145. Temple Lang, *op. cit. supra* note 4, p. 142.

after *Alrosa*, with very little supervision from the Court –, the Commission lacks the incentive to press for legal change that would define the requirements for and bounds of such remedies.

## 8. Conclusions

The trend towards more “consensual competition law” is worrying, despite the benefits the negotiated solutions undoubtedly have. The main danger is that a level of “quasi-law in action” develops, uncontrolled by the courts and only tentatively guided by the law in the books.<sup>146</sup> A body of commitment decisions supplemented by equally non-authoritative guidelines by the Commission under a regime of self-assessment and in the times of an effects-based approach is perhaps not the environment most conducive to legal certainty. This likely leads into a vicious circle: where the legal principles are not clearly defined, but can only be extrapolated from non-authoritative guidance, there is less certainty as to the threat points in the bargaining process, which makes it more likely that parties opt for negotiated solutions; and negotiated solutions without a clear *ex ante* definition of the parties’ “property rights” become increasingly messy with each iteration. It does not help that from the Commission’s viewpoint this development is not necessarily unwelcome, because it increases the Commission’s power in setting discretionary remedies.<sup>147</sup>

One slightly unconventional way of addressing this would be to reduce the Commission’s relative incentive to opt for the commitment procedure, not by making the commitment procedure less attractive by imposing constraints, but by making the infringement procedure more attractive by allowing the Commission to adopt remedies in the infringement procedure that go beyond the merely backward looking termination of the infringement.<sup>148</sup> To date, the Courts have reacted in a hostile manner to any attempts by the Commission to

146. Pointedly Waelbroeck, op. cit. *supra* note 68, 3: “politique parallèle . . . qui échappe entièrement au contrôle du juge”; Cook, op. cit. *supra* note 2, 227–228, identified this danger from the very start, referring, *inter alia*, to the Commission’s announcement in press release IP/06/495 of 12 Apr. 2006, stating that Repsol’s commitments were a “benchmark for the few other competitors who still maintain similar practices”; see also Forrester, op. cit. *supra* note 123, p. 638, and his contribution to the discussion of Panel V in Ehlermann and Marquis, op. cit. *supra* note 1, p. 540; Schweitzer, op. cit. *supra* note 5, p. 648. Rab, Monnoyeur and Sukhtankar, op. cit. *supra* note 3, 175, consider this to be an advantage for undertakings (“Approved commitments may also serve as guidance for the undertaking concerned and others”); this seems a rather myopic view.

147. Cf. Schweitzer, op. cit. *supra* note 5, pp. 648–649; Schweitzer, op. cit. *supra* note 4, p. 559.

148. Cf. Lianos, op. cit. *supra* note 9. See also Rab, Monnoyeur and Sukhtankar, op. cit. *supra* note 3, 175 (noting that part of the attraction of the commitment procedure for the

take a proactive stance in devising remedies.<sup>149</sup> At first sight, this restrictive stance may seem to decrease the Commission's discretion and increase legal certainty. But such an assessment leaves out of the equation that the Commission can opt out of the infringement procedure altogether, and is more likely to do so where the range of available remedies in the commitment procedure is substantially greater than that in the infringement procedure. The Commission's discretion in devising more "creative" remedies in the infringement procedure would still be subject to Court control, whereas *Alosa* has practically eliminated all such control in the commitment procedure.

The alternative to making the infringement procedure more attractive is to subject the Commission to constraints in the commitment procedure. Neither the EU legislature nor the Courts appear willing to take on this task. While the Commission seems willing to exercise self-restraint in each individual case, it shows no willingness to adopt any self-binding instruments.

The EU legislature chose not to implement any *ex ante* mandatory court supervision of commitment agreements. This defect has often – and rightly – been criticized and contrasted to the U.S. Tunney Act.<sup>150</sup> Even though the U.S. procedure may often not be much more than a rubber-stamping of the negotiated solution,<sup>151</sup> it may well have a disciplining effect on the negotiations and the transparency of the procedure. The possibility of appealing commitment decisions in Europe is a very deficient substitute for an *ex ante* supervision. First, there will usually be no appellant, because the addressees have no interest in – and possibly not even the opportunity of – appealing the decision, third parties will not necessarily have *locus standi*,<sup>152</sup> and the public interest in the process of competition does not have an effective representative to begin with.<sup>153</sup> Secondly, even to the extent the decision is appealed, the appellant will not often be able to overcome the judicial deference to the Commission's assessment, especially where the appellant is the addressee that had voluntarily offered the commitments.

The Court of Justice had the opportunity in *Alosa* to provide for an effective proportionality review at least in those few cases that *are* appealed.

Commission is the advantage of commitments over the "less precise outcome in the infringement decision and a 'cease and desist' order") and 181.

149. Cf. e.g. the *Cartonboard* case, cited *supra* note 144.

150. The fullest comparison is made by Georgiev, *op. cit. supra* note 3, 1007 et seq.; see also Schweitzer, *op. cit. supra* note 5, pp. 651–652, 658; Cook, *op. cit. supra* note 2, 210.

151. Georgiev, *ibid.*

152. Immenga, *op. cit. supra* note 5, p. 302. Schweitzer, *op. cit. supra* note 5, p. 653, discusses whether the ECJ's statement that the Commission has to take into consideration the interests of third parties could be interpreted as demanding a wide understanding of the *locus standi* requirement.

153. Schweitzer, *op. cit. supra* note 5, pp. 656–658.

The ECJ has chosen to forgo this opportunity. Concededly, even the strict approach of the General Court would probably not have made a great difference in terms of actual challenges: the constellation of a third-party appellant with clear *locus standi* was exceptional, and the parties that have agreed themselves to the commitments – however grudgingly – are *de facto* not likely to seek judicial review and risk the Commission’s adopting an infringement decision.<sup>154</sup> Yet, again, the mere *possibility* of a meaningful *ex post* proportionality review might have had a disciplining effect on the negotiations *ex ante*. The General Court’s approach would arguably not only have improved the probability that the remedies are *proportionate*: the approach would have forced the Commission to explain the theory of harm as a definition of the objective to be pursued, and to explain how the remedies further this objective. This burden of explanation, the resulting need for investigating the facts and the relation of the remedies to the theory of harm, and the reduction of the attractiveness of the commitment procedure relative to the infringement procedure, would have prodded the Commission to give deeper thought to the *adequacy* of the commitments as well.

The parties could under the ECJ’s *Alrosa* decision still try to coax a proportionality analysis from the Commission by submitting not one set of commitments, but a range of incremental commitments (“salami tactic”). It is impossible to tell how the Commission would react to such a tactic. Even if it worked, the facts remain that the undertakings that have successfully obtained a commitment decision are unlikely to challenge it,<sup>155</sup> and that third parties cannot employ the salami tactic, because they cannot usually offer alternative commitments for the undertakings concerned.

Nor does the Commission seem willing to exercise self-restraint by adopting self-binding guidelines on the case selection for commitment procedures and/or the standard for the reasoning to be employed in commitment decisions.<sup>156</sup> It would already help if, in its commitment decisions, the Commission set out in abstract terms, but in detail, which legal theories of harms it is pursuing as a major premise, what legal precedent supports these theories of harm and how the remedies chosen relate to these theories of harm – why they are deemed adequate, necessary and proportionate.<sup>157</sup> Where the Commission is not able to support the stated

154. See *supra* note 114.

155. *Ibid.*

156. See *supra* note 10.

157. Of course, the commitment decisions already set out the “practices raising concerns”, and since the GC’s judgment in *Alrosa*, contain a section on proportionality. However, these sections not infrequently commingle facts and law, and are often cursory. For a similar call for an extended proportionality analysis that is challengeable before the Court under a less deferential standard of review, see Cengiz, *op. cit. supra* note 5, 129 and 152.

theories of harm with precedent, this indicates that a novel legal issue is involved, and the Commission should refrain from using the commitment procedure altogether. If the stated theory of harm in itself is erroneous *as a matter of law*,<sup>158</sup> the decision should be challengeable even in the absence of a manifest error. The manifest error standard should only apply to the complex economic assessment that is involved in subsuming the – preliminarily assessed – facts under the major premise; there is no reason to apply the deferential standard to the framing of the major premise. The current practice of intermingling the theory of harm (the major premise) with the assessment of the facts (the minor premise and conclusion) in the section on “practices raising concerns” in commitment decisions leads to an unjustified extension of the deferential standard to pure questions of law.

It is equally important to clarify the limitations that commitment decisions have on actions by NCAs and private parties. Recitals 13 and 22 of Regulation 1/2003 produce only apparent clarity in this regard. The ostensibly unaffected opportunities for control by NCAs and private plaintiffs result in the misleading assumption that commitment decisions are little more than a qualified closing of the file. *De facto*, however, it appears unlikely that private enforcement and enforcement by NCAs will act as a sufficient check on infringements that escape the Commission’s attention in the commitment procedure; and where it is the commitments themselves that have anticompetitive effects, this safety valve does not even exist *de iure*. The practical effect of a commitment decision is therefore more akin to a negative clearance or an individual exemption under the notification system than to a closing of the file, because third-party actions are largely forestalled by the commitment procedure. The Commission should realize the responsibility that comes with this *de facto* monopoly, a responsibility that is obscured by the misleading pronouncements in Recitals 13 and 22.

This article is not necessarily meant to be a criticism of the Commission’s actual practice in commitment decisions issued to date. The Commission often does investigate to the point of issuing a Statement of Objections instead of confining itself to a preliminary assessment. Its reasoning is often

158. Mische and Visnar, *op. cit. supra* note 5, 20, point out that the ECJ in *Arosa* never reached the question whether the GC was right in assuming that *ad hoc* voluntary purchases by the dominant undertaking did not constitute an infringement of Art. 102 TFEU. I share the A.G.’s view that the GC’s statements in this regard were not well founded, as they ignored that the dominant undertaking may be willing to pay a premium that reflects the unilateral effects of the foreclosure, so that voluntary *ad hoc* purchases may well be infringements of Art. 102 TFEU. The ECJ’s silence could be interpreted as implying, however, that a commitment decision could be based on a theory of harm that is erroneous as a matter of law, provided only that the undertaking offers commitments; this would be worrying and unnecessary for ensuring the institutional effectiveness of commitment decisions.

elaborate. The fact remains, however, that the institutional set-up does not ensure the continued high quality of commitment decisions. While trust in the Commission's self-restraint in each individual case is good, providing for a system of control is usually better when devising an institutional framework. Such a framework should guarantee that we do not substitute unprincipled case-to-case negotiations for the struggle for the rule of law.

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