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Private Enforcement of Commission Commitment Decisions: A Steep Climb not a Gentle Stroll

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John Davies and Manish Das

Abstract

This Article examines the validity of the Commission's position on the private enforceability of commitment decisions in national courts in the European Union in light of the current state of European law and other important procedural and practical considerations for third parties wishing to bring enforcement proceedings. As will become apparent, national courts faced with an application for private enforcement will have to grapple with a series of challenging legal issues concerning the nature of commitment decisions. The first of these questions will concern whether a commitment decision, which is a Community measure, will be capable of enforcement by application of the concept of direct effect of Community law. Our examination of the principles of direct effect indicates, however, that reliance on this concept may cause difficulties for national courts. Secondly, the principle of national procedural autonomy requires that enforcement proceedings will be governed by the procedural rules of the national court seized of the action. Even if commitment decisions are directly effective, there may consequently be substantial impediments to their effective private enforcement due to the national rules of procedure in the Member States.

ARTICLES

PRIVATE ENFORCEMENT OF COMMISSION COMMITMENT DECISIONS: A STEEP CLIMB NOT A GENTLE STROLL

*John Davies & Manish Das**

INTRODUCTION

Article 9 of Council Regulation 1/2003 ("Regulation 1")¹ brings about an important development in the enforcement of European Community ("EC" or "Community") competition law by introducing an entirely new type of European Commission ("Commission") decision. It enables the Commission, for the first time, to settle investigations formally by decision and to accept commitments to meet its competition concerns without coming to an infringement finding (a "commitment decision").²

Regulation 1 also brings about some fundamental changes

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1. Council Regulation 1/2003, O.J. L 1/1 (2002) (implementing the rules of competition laid down in Articles 81 and 82 of the Treaty Establishing the European Community ("EC Treaty")). Council Regulation 1/2003 ("Regulation 1") is the culmination of a five-year review by the European Commission ("Commission") on the reform of Regulation 17/62, which was the first regulation implementing EC Treaty Articles 81 and 82. The review formally began in 1999 with the Commission's White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty ("White Paper"), which was essentially a consultation document setting out the Commission's initial thinking and proposals for reform. *See* Commission of the European Communities, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, COM (99) 101 Final (Apr. 1999) [hereinafter White Paper], *available at* http://europa.eu.int/comm/off/white/index_en.htm. This was followed by the Commission's proposal for a Council Regulation on the implementation of the rules on competition to replace Council Regulation 17/62. *See* Commission of the European Communities, Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down by Articles 81 and 82 of the Treaty and Amending Regulations (EEC) No. 1017/68, (EEC) No. 2988/74, (EEC) No. 4056/86 and (EEC) No. 3975/87, COM (2000) 582 Final (Sept. 2000) [hereinafter Proposal], *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2000/com2000_0582en01.pdf.

2. *See* Council Regulation 1/2003, O.J. L 1/1 (2002).

to the enforcement of competition law. It facilitates decentralization in enforcement and encourages private enforcement,³ both of which are designed to enable the Commission to take on the challenges brought about by a better integrated market and enlargement.

Although the Commission is given full power to enforce commitments given to it under Article 9 by means of imposing potentially substantial fines,⁴ the Commission has stated in its memo answering frequently asked questions that "national courts must enforce the commitments by any means provided for by national law, including the adoption of interim measures."⁵ Further, in its notice on cooperation with national courts, the Commission has stated that, "[n]ational courts may thus have to enforce Commission decisions or regulations applying [Article 81(3) of the Treaty Establishing the European Community ("EC Treaty" or "Treaty")] to certain categories of agreements, decisions or concerted practices."⁶ In endnote fifteen of

3. See, e.g., *id.*, arts. 3, 5, 6, 11, 12, 15, 16, 22, 35, O.J. L 1/1, at 8-13, 16, 21-22 (2002); see also *id.* at recitals 6, 7, 8, 15, 16, 17, 18, 21, 22, 28, 35, O.J. L 1/1, at 2, 4-7 (2002). These articles and recitals in Regulation 1 envisage and require both national competition authorities and national courts to apply EC Treaty Articles 81 and 82 where they apply equivalent national competition laws. They also contemplate enforcement of competition laws by private parties in the national courts. See, e.g., Donncadh Woods et al., *Private Enforcement of Community Competition Law: Modernisation and the Road Ahead*, COMPETITION POL'Y NEWSL., Summer 2004, at 31, available at http://europa.eu.int/comm/competition/publications/cpn/cpn2004_2.pdf; Céline Gauer et al., *Regulation 1/2003: A Modernised Application of EC Competition Rules*, COMPETITION POL'Y NEWSL., Spring 2003, at 3, available at http://europa.eu.int/comm/competition/publications/cpn/cpn2003_1.pdf; Mario Monti, Former European Comm'r for Competition Matters, Address at the International Bar Association's 8th Annual Competition Conference: Private Litigation as a Key Complement to Public Enforcement of Competition Rules and the First Conclusions on the Implementation of the New Merger Regulation (Sept. 17, 2004), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/04/403&format=PDF&aged=1&language=EN&guiLanguage=EN>.

4. See Council Regulation 1/2003, art. 23(2)(c), O.J. L 1/1, at 16 (2002) (giving the Commission the power to impose fines on undertakings (up to ten percent of their worldwide turnover) for failure to comply with a commitment decision); see also *id.* art. 24(1)(c), O.J. L 1/1, at 17-18 (2002) (giving the Commission the power to impose periodic penalties in order to ensure an undertaking's compliance with commitments).

5. Press Release, European Commission, Commitment Decisions (Article 9 of Council Regulation 1/2003 Providing for a Modernised Framework for Antitrust Scrutiny of Company Behaviour), MEMO/04/217 (Sept. 17, 2004), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/04/217&format=HTML&aged=0&language=EN&guiLanguage=EN>.

6. Commission Notice, O.J. C 101/54, at 55, ¶ 7 (2004) [hereinafter *Cooperation*] (concerning the cooperation between the Commission and the courts of the [European Union ("EU")] Member States in the application of EC Treaty Articles 81 and 82).

the notice, the Commission clarifies that “a national court may be asked to enforce a Commission decision taken pursuant to Articles 7 to 10, 23 and 24” of Regulation 1.⁷ These statements confirm the Commission’s desire to see the policies of decentralization and private enforcement shape the enforcement of competition law in the Community by requiring not only the full and direct application of Community competition laws in the Member States by private parties on their own initiative, but also supplementary enforcement where the Commission has already taken primary enforcement action by adopting a commitment decision under Regulation 1.

Representatives of the Commission have also unofficially supported this position, giving the impression that the Commission wants to downplay its ability to enforce its commitment decisions directly by means of fines,⁸ stating that:

It is indeed highly desirable that commitments can be monitored and enforced by the market participants themselves. The main purpose of Article 9 is to ensure efficiency of enforcement action by the Commission. If the case comes back to us for enforcing the commitments, this aim would be not be achieved.⁹

This is a significant departure from the Commission’s enforcement practice under Regulation 17/62, where the Commission was well known for seeking to enforce its own decisions by utilizing its fining powers.¹⁰

Interestingly, Regulation 1 is itself silent on the private en-

7. *Id.* O.J. C 101/54, at 61 n.15 (2004).

8. See, e.g., Wouter P.J. Wils, *The Modernisation of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission’s Proposal for a New Council Regulation Replacing Regulation No. 17*, 24 Fordham Int’l L.J. 1655 (2001); Gauer et al., *supra* note 3, at 6; Stefan Wilbert, *Joint Selling of Bundesliga Media Rights—First Commission Decision Pursuant to Article 9 of Regulation 1/2003*, COMPETITION POL’Y NEWSL., Summer 2005, at 44.

9. David Samuels, *Q&A on Modernisation, with Kris Dekeyser*, GLOBAL COMPETITION REV., Spring 2005, at 11 (2005).

10. In past cases, the Commission has stated that a periodic penalty would be imposed on all the undertakings concerned if they did not bring to an end their infringements of competition laws within three months of the Commission’s infringement decision. See, e.g., Commission Decision No. 82/367/EEC, O.J. L 161/18, at 33, ¶ 82 (1982) (Hasselblad). Similarly, when imposing interim measures, the Commission also notified parties in its interim measures decision that periodic penalties would be imposed to secure compliance. See, e.g., Commission Decision No. 82/462/EEC, O.J. L 252/13, at 20, ¶ 38 (1983) (ECS/AKZO); Commission Decision No. 82/628/EEC, O.J. L 256/20, at 28, ¶ 49 (1982) (Ford Werke); Commission Decision No. 87/500/EEC, O.J. L 286/36, at 42, ¶ 25 (1987) (BBI/Boosey and Hawkes).

forceability of commitment decisions. This is surprising bearing in mind that the Commission intended to enable private enforcement of its commitment decisions from the very inception of Regulation 1.¹¹ In its White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty ("White Paper"), the Commission noted that it would be useful to make commitments offered by undertakings during the course of an investigation binding, "both in order to oblige the undertakings to comply with them and to enable the parties and others to rely on them before their national courts."¹² The Commission's Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down by Articles 81 and 82 of the Treaty and Amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ("Proposal")¹³ went further: The Explanatory Memorandum stated that commitment decisions could be "invoked" by third parties before their national courts¹⁴ and recital 12 of the draft Regulation 1 provided that "commitments can be relied upon by third parties before national courts."¹⁵ The fact that these statements did not survive to the final text of Regulation 1 as agreed by the Member States suggests that they may not have completely shared the Commission's view on private enforcement.

This Article examines the validity of the Commission's position on the private enforceability of commitment decisions in national courts in the European Union in light of the current state of European law and other important procedural and practical considerations for third parties wishing to bring enforcement proceedings. As will become apparent, national courts faced with an application for private enforcement will have to grapple with a series of challenging legal issues concerning the nature of commitment decisions.

The first of these questions will concern whether a commitment decision, which is a Community measure,¹⁶ will be capable

11. See generally Council Regulation 1/2003, O.J. L 1/1 (2002).

12. White Paper, *supra* note 1, COM (99) 101 Final, at 32, ¶ 90.

13. Proposal, *supra* note 1, COM (2000) 582 Final. The Proposal included an Explanatory Memorandum and an initial draft of Regulation 1. See *id.* at 2.

14. See *id.* at 18.

15. *Id.* at 34.

16. For the benefit of non-European Community ("EC" or "Community") lawyers, it is worth clarifying that other Community measures or instruments include treaty provisions, Community regulations, directives, and, of course, decisions. See Europa, Com-

of enforcement by application of the concept of direct effect of Community law.¹⁷ Our examination of the principles of direct effect indicates, however, that reliance on this concept may cause difficulties for national courts. Secondly, the principle of national procedural autonomy requires that enforcement proceedings will be governed by the procedural rules of the national court seized of the action. Even if commitment decisions are directly effective, there may consequently be substantial impediments to their effective private enforcement due to the national rules of procedure in the Member States.

I. THE RELEVANCE OF DIRECT EFFECT

The absence of any provision for the private enforcement of commitment decisions in Regulation 1 is not decisive. The legal effects of Commission decisions, including the scope for their private enforceability, are not limited to the effects ascribed to them in Community legislation; they may also be derived from the terms of the Treaty and the case law of the Community courts, the latter of which has been instrumental in creating mechanisms to allow for the domestic application of Community law. One such mechanism is that of "direct effect,"¹⁸ which has often been called upon by individuals in domestic litigation to enable them to rely on rights derived from Community law and implementing Community instruments, such as regulations, directives, and decisions where the measure has not been implemented into national legislation.¹⁹ The doctrine of direct effect was conceived in the European Court of Justice's ("ECJ") celebrated judgment in *van Gend & Loos*²⁰ where the Court declared that the Treaty Establishing the European Economic Commu-

munity Legal Instruments, http://europa.eu.int/scadplus/glossary/community_legal_instruments_en.htm (last visited Mar. 31, 2005).

17. See Cooperation, *supra* note 6, O.J. C 101/54, at 55, ¶ 7 (2004) ("Apart from the application of Articles 81 and 82 [of the EC Treaty], national courts are also competent to apply acts adopted by EU institutions in accordance with the EC Treaty or in accordance with the measures adopted to give the Treaty effect, to the extent that these acts have direct effect.").

18. The other notable mechanism is, of course, the principle of supremacy of EC law. See, e.g., *Costa v. E.N.E.L.*, Case 6/64, [1964] E.C.R. 585, [1964] C.M.L.R. 425.

19. See, e.g., *Marshall v. Southampton & S.W. Hampshire Area Health Auth.*, Case 152/84, [1986] E.C.R. 723, [1986] 1 C.M.L.R. 688; *Roberts v. Tate & Lyle Indus. Ltd.*, Case 151/84, [1986] E.C.R. 703, [1986] 1 C.M.L.R. 714.

20. *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Neth. Inland Revenue Admin.*, Case 26/62, [1963] E.C.R. 1, [1963] C.M.L.R. 105.

nity ("EEC Treaty") was much more than simply an agreement among the Member States, because it created a "new legal order," the result of which was that "[i]ndependently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."²¹ The result has been that even where Community measures have not been implemented into national laws, they can, in certain circumstances, be relied upon by and applied in the dealings of individuals under national law.²² By referring to the concept of "direct effect" in its notice on cooperation with national courts, the Commission is clearly indicating that this mechanism will enable its commitment decisions to be subject to private enforcement.²³

The application of the concept of direct effect is not straightforward, however. There remains uncertainty over its precise meaning, its scope, and also its applicability to any given situation, which the Commission also appears to have acknowledged in its notice on cooperation.²⁴

Since commitment decisions are creations of EC law, establishing that they are directly effective will be prerequisite to enabling their national enforcement; otherwise, individuals will not be able to rely on them in domestic proceedings.²⁵ Establishing whether a Community instrument is directly effective is often taken to mean ascertaining whether the particular provision of the instrument in question is "unconditional and sufficiently precise."²⁶ We address this issue below.²⁷ We believe, however, that in the case of commitment decisions, this issue involves three prior exercises. These require establishing that the commitment decision: (a) is binding; (b) ought to be capable of direct effect because it applies Community law; and (c) confers the rights claimed by the individual. National courts may have greater difficulty in dealing with some of the questions raised by

21. *Id.* at 2, ¶ 3, [1963] C.M.L.R. at 129.

22. *See id.* at 3, ¶ 5, [1963] C.M.L.R. at 130.

23. *See* Cooperation, *supra* note 6, O.J. C 101/54, at 55, ¶ 7 (2004).

24. *See id.* The Commission's reference to direct effect is qualified by the inclusion of the phrase "to the extent that these acts have" prior to its reference to "direct effect." *Id.*

25. *See van Gend & Loos*, [1963] E.C.R. at 2, ¶ 3, [1963] C.M.L.R. at 129.

26. *See Pfeiffer v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, Joined Cases C-397/01 & C-403/01, [2004] E.C.R. I-8835, ¶ 103, [2005] 1 C.M.L.R. 1123, 1177-78.

27. *See infra* Part II.D.

the latter two exercises than the Commission may have, at least publicly, anticipated.

II. *SHOULD COMMITMENT DECISIONS BE CAPABLE OF DIRECT EFFECT?*

At the outset of this analysis, we should remind ourselves that, in seeking to answer this question, we cannot restrict ourselves to the realm of competition law, as there is a great deal of precedent in other areas of Community activity as to whether the acts of Community institutions, including decisions of the Commission in areas as diverse as export policies to taxation, are capable of direct effect.²⁸

The starting point for our analysis is Article 249 of the EC Treaty, which states:

In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions. . . . A decision shall be binding in its entirety upon those to whom it is addressed.²⁹

Article 85 of the EC Treaty specifically entrusts the Commission with the task of ensuring the application of the provisions of Articles 81 and 82.³⁰ It is, therefore, clear that the Commission's commitment decisions are binding on their addressees.³¹ But the issue of private enforcement raises a different question—namely, whether an individual can rely on the binding effect of a commitment decision under Community law so as to be able to enforce it under domestic law against the party to whom it was addressed. Article 249 of the EC Treaty does not answer this

28. The writers, who are competition lawyers, have embarked on this voyage with some trepidation.

29. Consolidated Version of the Treaty Establishing the European Community art. 249, O.J. C 325/33, at 132 (2002), 37 I.L.M. 79, 128 [hereinafter Consolidated EC Treaty].

30. See *id.* art. 85, O.J. C 325/33, at 66 (2002) ("Without prejudice to Article 84, the Commission shall ensure the application of the principles laid down in Articles 81 and 82 [of the EC Treaty]."); see also *id.* art. 211, O.J. C 325/33, at 119 (2002) (stating that the Commission shall "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied").

31. See *id.*

question.³² As an opinion of Advocate General Carl Otto Lenz in 1987 indicated, however, the question has already arisen, but not yet been resolved:

The circumstances in which a decision of the Commission, within the meaning of Article 189 of the EEC Treaty [now Article 249 of the EC Treaty], has direct effect have not been conclusively defined by the Court of Justice. Admittedly the Court has not ruled out the possibility, in particular cases, that decisions may have direct effect inasmuch as third parties who have an interest in the implementation of a decision may themselves be able to assert claims arising out of the decision. However the detailed requirements which a decision must satisfy in order for it to be recognised as having direct effect in general terms have not yet been laid down by the Court in its decisions.³³

Although a number of relevant judgments have been handed down since this statement, the Community courts³⁴ have, thus far, not been called upon, as far as the writers are aware, to decide whether a Commission decision can be directly effective and, therefore, capable of being relied upon by individuals against the addressees of the decision.

These issues have, however, a somewhat longer history. The first case considering the direct effect of Community decisions was *Grad*³⁵ in 1970, where a German court asked the ECJ to determine whether the provisions of a decision of the Council of Ministers (addressed to Germany) could be relied upon by an

32. See *id.* art. 249, O.J. C 325/33, at 132 (2002).

33. Opinion of Advocate General Lenz, *Albako Margarinefabrik Maria von der Linde GmbH & Co. KG v Bundesanstalt für landwirtschaftliche Marktordnung*, Case 249/85, [1987] E.C.R. 2345, ¶ 183. In *Albako*, the referring West German court asked the European Court of Justice ("ECJ") whether a Commission decision addressed to West Germany enabling promotion sales of butter on the West Berlin market was directly effective so as to enable it to take precedence over national competition laws. See *id.* at 2289. In doing so, the ECJ confirmed the holding of *Franz Grad v. Finanzamt Traunstein*, Case 9/70, [1970] E.C.R. 825, [1971] C.M.L.R. 1, in which it had held that a decision of the Council of Ministers was capable of direct effect, but also factually distinguished that case by re-characterizing the appropriate question to answer as one relating to the principle of supremacy of Community law. See *Rau*, [1987] E.C.R. at 2358, ¶ 10. The ECJ concluded in *Rau* that, pursuant to the principle of supremacy, the Commission decision was to take precedence over conflicting national law. See *id.* at 2360, ¶ 17.

34. By Community courts, we refer to the ECJ and the Court of First Instance ("CFI").

35. *Grad*, [1970] E.C.R. 825, [1971] C.M.L.R. 1.

individual to avoid a tax assessment in accordance with the pre-existing rules on transport taxes.³⁶ In that case, the ECJ had little hesitation in concluding that the Council decision was capable of direct effect, that it met the conditions for direct effect and could be relied upon by the individual as claimed.³⁷ The ECJ's reasoning was as follows:

In particular, the provision according to which Decisions are binding in their entirety on those to whom they are addressed enables the question to be put whether the obligation created by the Decision can only be invoked by the Community institutions against the addressee or whether such a right may possibly be exercised by all those who have an interest in the fulfilment of this obligation. It would be incompatible with the binding effect attributed to Decisions by Article 189 [now EC Treaty Article 249] to exclude in principle the possibility that persons affected may invoke the obligation imposed by a Decision. Particularly in cases where, for example, the Community authorities by means of a Decision have imposed an obligation on a Member State or all the Member States to act in a certain way, the effectiveness ("l'effet utile") of such a measure would be weakened if the nationals of that state could not invoke it in the courts and the national courts could not take it into consideration as part of Community law.³⁸

This clear statement of principle—which we note, applies expressly to Council decisions only which are in the language of the Court “particularly” susceptible to this approach—was then qualified by the ECJ in the following terms:

Article 177 [now EC Treaty Article 234], whereby the national courts are empowered to refer to the court all questions regarding the validity and interpretation of all acts of the institutions without distinction, also implies that individuals may invoke such acts before the national courts. Therefore, in each particular case, it must be ascertained whether the nature, background and wording of the provision in question are capable of producing direct effects in the legal relationships between the addressee of the act and third parties.³⁹

36. *See id.* at 827-28, [1971] C.M.L.R. at 3 (describing the facts of the case).

37. *See id.* at 841-42, ¶¶ 1-3, [1971] C.M.L.R. at 37-38.

38. *Id.* at 837, ¶ 5, [1971] C.M.L.R. at 33-34.

39. *Id.* at 837, ¶ 6, [1971] C.M.L.R. at 34.

Even though the decision in question was a Council decision, the ECJ's rationale is framed in such general terms that it is clearly arguable that it is capable of application to a Commission decision and possibly a commitment decision. It is also clear, however, that one must first confirm that commitment decisions meet the various criteria that the Court set for direct effect.

There are three discernible strands to the ECJ's reasoning that are relevant to the question of whether a decision has direct effect. The first is the reliance placed by the ECJ on the binding effect of a decision.⁴⁰ The second is the ECJ's reliance on the principle of effectiveness or "*l'effet utile*," which implicitly includes, as we shall see, an examination of the "nature" and the "background" of the provision in question.⁴¹ The third stage requires examining in any given case whether the "wording of the provision in question are capable of producing direct effects in the legal relationships between the addressee of the act and third parties."⁴²

It is worth noting that these considerations are quite separate from assessing whether the decision, as mentioned earlier, is "unconditional and sufficiently precise;" these conditions were considered separately by the ECJ, at the very end of its analysis, by reference to the precise wording of the decision in question.⁴³

A. *The Binding Nature of Commitment Decisions*

There should be little doubt that a commitment decision has a binding nature. First, the binding nature of Community decisions is made plain from the terms of the EC Treaty, which as explained above, provides in Article 249 that "[a] decision shall be binding in its entirety upon those to whom it is addressed."⁴⁴ Article 9 of Regulation 1 makes this explicit in the case of commitment decisions by providing that "the Commission may by decision make those commitments binding."⁴⁵

40. See *id.* at 837-38, ¶¶ 2-10, [1971] C.M.L.R. at 22-25 (addressing the binding effect of a decision).

41. See *id.* at 839, ¶¶ 11-15, [1971] C.M.L.R. at 25 (addressing the principle of effectiveness).

42. *Id.* at 837, ¶ 6, [1971] C.M.L.R. at 25-26. The ECJ subsequently clarified this passage to mean whether the provision created a right for the individual. See *id.* at 838, ¶ 10, [1971] C.M.L.R. at 23.

43. See *id.* at 838, ¶ 9, [1971] C.M.L.R. at 35.

44. Consolidated EC Treaty, *supra* note 29, art. 249, O.J. C 325/33, at 132 (2002).

45. Council Regulation 1/2003, art. 9, O.J. L 1/1, at 9-10 (2002). Recital 13 of

The Community courts have, on several occasions and in varying circumstances, confirmed the binding effect of the Commission's decisions.⁴⁶ In the competition field, the Court of First Instance ("CFI") recently noted in *MCI*,⁴⁷ in relation to a Commission decision under the Merger Regulation prohibiting a concentration, that an undertaking is obliged to comply with a Commission decision and that "[s]uch an obligation is inherent in the very nature of decisions, as is apparent from the fourth paragraph of [EC Treaty Article 249]."⁴⁸

These confirmations by the Community courts are, of course, relevant to the question of private enforceability. After all, the essence of any private action seeking to enforce a commitment decision will be to require the addressee to comply with the terms of the commitment it agreed to.⁴⁹ Moreover, by illustrating the Community courts' concern to ensure that the Commission's decisions are not to be undermined, these statements will also carry weight with national courts seized with a private enforcement action.

B. *The Principle of Effectiveness* ("effet utile")

Grad specifically identifies the well-established principle of

Regulation 1 echoes this provision by providing that the "the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned." *Id.* at recital 13, O.J. L 1/1, at 3 (2002).

46. In *SpA Unil-It.*, for example, the ECJ confirmed the principle that a Commission decision compels the addressee to behave in the manner prescribed. *See SpA Unil-It. v. Amministrazione Finanziaria dello Stato*, Case 30/75, [1975] E.C.R. 1419, 1425-28, [1976] 1 C.M.L.R. 115, 126-29. In *Deggendorf*, the court rejected an application by a recipient of State aid to challenge a Commission decision addressed to Germany, the State granting the aid, after the time limits for challenge had expired. *See TWD Textilwerke Deggendorf GmbH v. Bundesrepublik Deutschland*, Case C-188/92, [1994] E.C.R. I-833. The ECJ held that to allow a challenge would be to "overcome the definitive nature which the decision assumes against that person" after the expiry of time limits. *Id.* at I-853, ¶ 18.

47. *MCI, Inc. v. Commission*, Case T-310/00, [2004] E.C.R. ___, [2004] 5 C.M.L.R. 26.

48. *Id.* at 1290, ¶ 48. This statement was made in the context of identifying the right of parties to challenge a Commission decision prohibiting a concentration notwithstanding the fact that the parties had abandoned the merger. The CFI's conclusion that the parties had the right to challenge the decision was founded in part on its conclusion that compliance with the Commission's decision, by abandoning the concentration, was an obligation and, therefore, cannot be taken to be an indication that the parties have no interest in bringing proceedings. *See id.* at 1275.

49. *See van Gend & Loos*, Case 26/62, [1963] E.C.R. 1, 13, [1963] C.M.L.R. 105, 130.

effectiveness (“*effet utile*”) as one of the key justifications for finding that decisions are capable of being directly effective.⁵⁰ This principle derives from the purposive and teleological approach to interpretation taken by the Community courts and ultimately requires “the effective protection of Community rights, and more generally, the effective enforcement of Community law in national courts.”⁵¹

The Court in *Grad* held that the effectiveness of a measure requiring the addressee (a Member State in that particular case) to behave in a certain way would be undermined if individuals could not invoke the measure in the national courts.⁵² But before applying the same logic to a Commission commitment decision, it is worth recalling that *Grad* concerned a situation where a Council decision addressed to Member States sought to bring about harmonization in transport taxes across the Community but where Germany was seeking to apply conflicting national taxation laws.⁵³ The obligation imposed on Germany under the decision was the obligation not to apply such conflicting laws after the prescribed date.⁵⁴ The claimant’s action was in effect to protect the objectives, or the *purpose*, of the Council decision by preventing Germany from applying conflicting national taxation laws.⁵⁵

The integral nature of establishing the *purpose* of a Community instrument in assessing whether it is capable of having direct effect was further clarified and confirmed in the ECJ’s judgment in *Antonio Muñoz y Cia SA v. Frumar Ltd.*⁵⁶ In this case, the referring national court asked the ECJ whether certain provisions of a Community regulation, introducing inter alia a system of com-

50. See *Grad*, Case 9/70, [1970] E.C.R. 825, 837, ¶ 5, [1971] C.M.L.R. 1, 23.

51. TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EC LAW* 276 (1999). The principle of effectiveness has also been described as “the need to give full effect to a legislative provision.” Opinion of Advocate General Mischo, *Commission v. Council*, Case 242/87, [1989] E.C.R. 1424, 1440, ¶ 26, [1991] 1 C.M.L.R. 478, 485; see also *Brasserie du Pecheur v. Germany*, Case C-46/93, [1996] E.C.R. I-1029, I-1159, ¶ 95, [1996] 1 C.M.L.R. 889, 996; *Pfeiffer v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, Joined Cases C-397/01 to C-403/01, [2004] E.C.R. I-8835, __, ¶ 114, [2005] 1 C.M.L.R. 1123, 1179.

52. See *Grad*, [1970] E.C.R. at 837, ¶ 5, [1971] C.M.L.R. at 23.

53. See *id.* at 836, 839, ¶¶ 1, 11, 16, [1971] C.M.L.R. at 22, 25.

54. See *id.* at 839, ¶ 15, [1971] C.M.L.R. at 25.

55. See *id.* at 842, ¶ 2, [1971] C.M.L.R. at 27.

56. *Antonio Muñoz y Cia SA v. Frumar Ltd.*, Case C-253/00, [2002] E.C.R. I-7289, I-7320-21, ¶ 27, [2002] 3 C.M.L.R. 734, 758.

mon quality standards for fruit and vegetables, were capable of enforcement between individuals in civil proceedings.⁵⁷ This clearly has resonance for enforcement of a commitment decision by an aggrieved third party.

The facts of this case are notable, especially if this judgment is to be relied upon as support for the proposition that commitment decisions can be privately enforced. It concerned a dispute between a producer and a supplier of grapes in the United Kingdom: Muñoz and Frumar.⁵⁸ Muñoz claimed that Frumar was incorrectly labelling the grapes it sold and consequently was breaching its obligation under Regulation No. 2200/96⁵⁹ to correctly label.⁶⁰ Prior to commencing legal proceedings, Muñoz complained on several occasions to the Horticultural Marketing Inspectorate ("HMI"),⁶¹ which had the role of ensuring compliance with Regulation No. 2200/96.⁶² As a result of HMI's failure to take up Muñoz's complaint, Muñoz brought legal proceedings in the High Court in England to enforce the obligation on Frumar under the regulation to correctly label the grapes it was supplying.⁶³

In ultimately holding that the provisions of the regulation were capable of private enforcement, the ECJ first examined its purpose, as indicated in the recitals to the regulation.⁶⁴ It found that this was to facilitate trade relations between the individuals

57. *See id.* at I-7320, ¶ 24, [2002] 3 C.M.L.R. at 758.

58. *See id.* at I-7318, ¶¶ 17-18, [2002] 3 C.M.L.R. at 757.

59. *See* Council Regulation No. 2200/96, O.J. L 297/1 (1996).

60. *See Muñoz*, [2002] E.C.R. at I-7318, ¶ 19, [2002] 3 C.M.L.R. at 757.

61. *See id.* The Horticultural Marketing Inspectorate ("HMI") is part of the United Kingdom Ministry of Agriculture, Fisheries and Foods.

62. *See id.*

63. *See id.* at I-7318, ¶ 20, [2002] 3 C.M.L.R. at 757. The fact that the ECJ eventually had to rule upon whether Muñoz was entitled to privately enforce the terms of Regulation No. 2200/96 indicates that the English courts were uncertain whether Muñoz's claim was valid. In fact, at first instance, the English courts held that purpose of the regulation in question was limited to ensuring that the grapes reached the market in good condition and, therefore, precluded the possibility for Muñoz to privately enforce them. *See id.* at I-7319, ¶ 22, [2002] 3 C.M.L.R. at 757. It was only at the domestic appeal stage that the question of whether Regulation No. 2200/96 was capable of being privately enforced was referred to the ECJ. *See id.* at I-7319, ¶ 23, [2002] 3 C.M.L.R. at 757-58. Consequently, Muñoz's rights in this case were protected only because he was in a position to appeal and the national appellate courts were willing to refer the question of the correct interpretation of the regulation to the Community courts. In other instances, claimants may not have been as fortunate.

64. *See id.* at I-7321, ¶ 29, [2002] 3 C.M.L.R. at 758-59.

based on fair competition.⁶⁵ On this basis, the ECJ was able to conclude that, in order to ensure the “full effectiveness” of the rules in the regulation, it must be possible to enforce the obligations it contained by means of civil proceedings between individuals.⁶⁶

It appears, therefore, that establishing that an appropriate *purpose* of commitment decisions would be undermined without private enforcement will be crucial to the success of any private enforcement action. At first sight, this issue would appear capable of easy resolution but, as we explain below, national courts are likely to have to consider some interesting arguments, which will undoubtedly be raised by defendants determined to avoid private enforcement of their bilateral commitments “deal” with the Commission.

1. Is the Purpose a Clear Application of Community Competition Rules?

If commitment decisions were based on a finding of infringement of either Article 81 and/or Article 82 of the EC Treaty, their purpose would be clear: the protection of competition by the application of the prohibitions contained in those provisions.⁶⁷ Therefore, if commitment decisions clearly applied Articles 81 and/or 82, there would be strong grounds to argue that the proper effect of those articles would be undermined if their implementation through the private enforcement of commitments was not permissible.⁶⁸

65. *See id.*

66. *See id.* at I-7321-22, ¶ 30, [2002] 3 C.M.L.R. at 759. Advocate General Leendert Geelhoed carried out a more exhaustive examination of the purpose of the regulation and came to the same conclusion. *See* Opinion of Advocate General Geelhoed, *Muñoz*, [2002] E.C.R. at I-7297-300, I-7311, ¶¶ 27-36, 79, [2002] 3 C.M.L.R. at 743-45, 755.

67. It is settled case law that the prohibitions in EC Treaty Articles 81 and 82 produce direct effects in relations between individuals and create direct rights in respect of the individuals concerned that the national courts must safeguard. *See* *Belgische Radio en Televisie v. SV SABAM*, Case 127/73, [1974] E.C.R. 51, 63, ¶ 22, [1974] 2 C.M.L.R. 238, 271.

68. *See Muñoz*, [2002] E.C.R. at I-7322, ¶ 31, [2002] 3 C.M.L.R. at 759 (holding that the possibility of bringing private proceedings strengthens the practical working of Community rules on quality standards); *see also van Gend & Loos*, Case 26/62, [1963] E.C.R. 1, 13, [1963] C.M.L.R. 105, 130-31 (“The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.”).

The potential problem here arises from the fundamental nature of a commitment decision, as clearly spelled out in Regulation 1, that there should be no finding of infringement.⁶⁹ Recital 13 of Regulation 1 states: "Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether there has been or still is an infringement."⁷⁰ If there is no finding of infringement, then it must follow that Articles 81 and 82 have not in fact been "applied" by the Commission.

Article 9, nevertheless, (understandably) comes close to suggesting that commitment decisions apply EC Treaty Articles 81 and 82 by stating that they may only be adopted where the "Commission intends to adopt a decision requiring that an infringement be brought to an end,"⁷¹ thereby indicating that there must at least be a *prima facie* case that there is a threat to competition. This may be enough to persuade a national court that the purpose of a commitment decision is to enforce EC competition rules, even if technically Articles 81 and 82 have not been applied. In a hotly contested case, however, this issue would appear capable of giving rise to a reference to the ECJ from the national court under EC Treaty Article 234.⁷²

It may, therefore, be very important to the chances of success before the national court that the Commission's commitment decision spells out in considerable detail the competition infringement that would have been found by the Commission but for the offering of commitment.

The Commission's practice so far in this respect is not consistent and leaves room for improvement.⁷³ In *Bundesliga*, the

69. See Council Regulation 1/2003, recital 13, O.J. L 1/1, at 3 (2002).

70. *Id.*

71. *Id.* art. 9, § 1, at 9.

72. EC Treaty Article 234 enables national courts to request rulings on the interpretation and validity of acts of Community institutions, including those by the Commission. See Luigi Malferrari, *The Functional Representation of the Individual's Interests Before the EC courts: The Evolution of the Remedies System and the Pluralistic Deficit in the EC*, 12 IND. J. GLOBAL LEGAL STUD. 667, 669 (2005).

73. At the time of writing, the Commission had published only one decision under the Article 9 procedure—in the *Bundesliga* case. See Commission Decision No. 2005/396/EC, slip op. (Eur. Comm'n Jan. 19, 2005), cited in O.J. L 134/46 (2005) (*Bundesliga*). We understand that there are at least four other Article 9 decisions in contemplation: *Coca-Cola*, *Repsol*, *De Beers/Alrosa*, and *BUMA/SABAM* where the Commission has, thus far, published only Article 27(4) notices and draft commitments. See Commission Notice, O.J. C 200/11 at 12, ¶ 13 (2005) [hereinafter *BUMA/SABAM*]; see

Article 9 decision reveals that it is, in fact, based on an assumption—that the selling arrangements raised competition concerns in the same markets that corresponded to those identified in the Commission’s investigation into the joint selling of commercial rights of the UEFA Champions League.⁷⁴ Furthermore, it provides little detail as to what the anticompetitive effects of the agreements were on the proper functioning of competition.⁷⁵ Indeed, the Commission does not appear wholly convinced of its findings.⁷⁶ The Article 27(4) notice, which invites third party comment, in *Repsol* provides a greater level of detail but again falls short of indicating that there was a clear intention on the Commission’s part to adopt a decision finding that there was an infringement. The Commission’s concerns arose from certain non-compete clauses in the notified agreements, which the Commission found “might” contribute significantly to a foreclosure effect.⁷⁷ No statement of objections was sent to the parties in this case.⁷⁸

In *De Beers/Alrosa*, although the Article 27(4) notice is very short,⁷⁹ the Commission comes close to indicating that it intended to adopt a decision requiring the infringement to end.⁸⁰ Not only does this notice disclose that the Commission sent several statements of objections to the parties,⁸¹ but it also makes clear the Commission’s competition concerns.⁸² For example, it states in relation to the notified agreements that they “would enhance the already existing market power of De Beers with the effect of hindering the growth or maintenance of competi-

also Commission Notice, O.J. C 136/32, at 32, ¶ 2 (2005) [hereinafter *De Beers/Alrosa*]; Commission Notice, O.J. C 289/10, at 10, ¶ 2 (2004) [hereinafter *Coca-Cola*]; Commission Notice, O.J. C 258/7, at 11, ¶ 33 (2004) [hereinafter *Repsol*].

74. Compare *Bundesliga*, slip op. at ¶ 17 (2005), with Commission Decision No. 2003/778/EC, O.J. L 291/25, at 43-44, ¶¶ 114-16 (2003) (UEFA).

75. See *Bundesliga*, slip op. at 6-7, ¶¶ 21-24 (2005).

76. See, for example, paragraph twenty-three of the *Bundesliga* decision, where the Commission says joint marketing “could have an adverse effect.” *Id.* at ¶ 23.

77. See *id.* at 8-9, ¶¶ 15, 23-24.

78. Compare *De Beers/Alrosa*, O.J. C 136/32, at 32, ¶ 7 (2005) (stating specifically that supplementary statements of objection were addressed to the parties), with *Repsol*, O.J. C 258/7 (2004) (lacking any statements of objection).

79. See *De Beers/Alrosa*, O.J. C 136/32 (2005). This document was two pages in total. The Commission’s final decision is currently awaited.

80. See *id.* at 33, ¶¶ 12-16.

81. See *id.* at 32, ¶ 7.

82. See *id.* at 32, ¶ 9.

tion.”⁸³ In the next paragraph, it goes on to say that “competition on this market as a result of the Trade Agreement would be substantially weakened.”⁸⁴

The Article 27(4) notices in *BUMA/SABAM*⁸⁵ and *Coca-Cola*⁸⁶ also appear to indicate that there were competition concerns on the Commission’s part. In *BUMA/SABAM*, the notice states that the Commission sent a statement of objections to the parties based on concerns of market division because the arrangements under examination sought to grant the parties “absolute exclusivity” by territory.⁸⁷ In *Coca-Cola*, the notice states (perhaps less emphatically) that, “all practices have made access to the outlets more difficult for competitors to the ultimate detriment of consumers.”⁸⁸

The purpose of the brief examination above is to illustrate that the Commission’s practice, thus far, tends towards merely outlining the supposed competition concerns it was seeking to remedy through the commitments it accepted.⁸⁹ As explained, it may help to get over the technical issue (that EC Treaty Articles 81 and 82 have not been applied) in the case of an attempted private enforcement if the Commission were to ensure that its commitment decisions clearly spell out that the purpose is to remedy clear and present competition concerns, which otherwise would have been dealt with by proceeding to an infringement decision, thereby making it easier for the national court to establish clearly in its mind the competition *purpose* of the commitment decision.⁹⁰ That said, the national courts may well feel

83. *Id.*

84. *Id.* at 32, ¶ 10.

85. *BUMA/SABAM*, O.J. C 200/11 (2005). The Commission’s final decision is pending.

86. *Coca-Cola*, O.J. C 289/10 (2004).

87. *BUMA/SABAM*, O.J. C 200/11, at 11, ¶ 6 (2005).

88. *Coca-Cola*, O.J. C 289/10, at 10, ¶ 6 (2004).

89. *See, e.g.*, *Repsol*, O.J. C 258/7, at 7-8, ¶¶ 5-12 (2004); *De Beers/Alrosa*, O.J. C 136/32, at 32, ¶¶ 4-5 (2005); *BUMA/SABAM*, O.J. C 200/11, at 11, ¶¶ 6-7 (2005); *Coca-Cola*, O.J. C 289/10, at 10, ¶¶ 4-6 (2004). It is worth noting, from the perspective of undertakings, that the fact that the Commission provides only brief details on the nature of its competition concerns under Article 9 may make the commitments procedure extremely attractive. Not only will such a course avoid the negative publicity that often comes with findings of infringement but it may also hinder follow on actions by third parties for damages. There will consequently always be a tension between the need for the Commission to set out clearly its reasons in the commitment decision and the motivations of the undertakings under investigation.

90. It is possible that any difficulties in enforcement resulting from the Commis-

that this issue should be referred to the ECJ under the EC Treaty Article 234 reference procedure.

2. Is the Purpose Merely to Make Life Easier for the Commission?

The Commission has identified another possible *purpose* for a commitment decision—that of improving the Commission’s administrative efficiency.⁹¹ In a memo dated September 17, 2004, the Commission stated that it can consider commitment decisions if and when: (a) “the companies under investigation are willing to offer commitments which remove the Commission’s initial competition concerns as expressed in a preliminary assessment;” (b) “the case is not one where a fine would be appropriate (this therefore excludes commitment decisions in hardcore cartel cases);” and (c) “efficiency reasons justify that the Commission limits itself to making the commitments binding, and does not issue a formal prohibition decision.”⁹²

The first and second points of this rationale are already provided for in Regulation 1.⁹³ Article 9 itself provides that it is for the companies under investigation to offer the commitments and recital 13 of Regulation 1 stipulates that a commitment decision is not appropriate in cases where the Commission intends to impose a fine.⁹⁴ By a process of elimination, therefore, the deciding factor in whether the Commission will exercise its discretion to adopt a commitment decision appears to be that of administrative efficiency.⁹⁵

It will not come as a revelation that a key factor behind the

sion’s summary description of its competition concerns would be remedied by cooperation between national courts and the Commission, which could be effected under the cooperation provisions (between national courts and the Commission) incorporated into Regulation 1. See Council Regulation 1/2003, art. 15, O.J. L 1/1, at 12 (2002). Article 15(1) of Regulation 1 provides that a national court may ask the Commission to transmit to it information in its possession on the application of Community competition rules. See *id.* art. 15(1), at 12. Alternatively, the Commission is entitled under Article 15(3) to submit observations to a national court on its own initiative. See *id.* art. 15(3), at 12. Consequently, in cases of doubt, it may be possible for a national court to satisfy itself, when enforcing a commitment decision, that it is giving effect to EC Treaty Articles 81 or 82. See *id.* art. 15(1)-(3), at 12

91. See *supra* note 9 and accompanying text.

92. Commission Memo, MEMO/04/217 (Sept. 17, 2004).

93. See Council Regulation 1/2003, O.J. L 1/1 at 3, 9 (2002).

94. See *id.*

95. See *supra* note 9 and accompanying text.

decision to agree commitments will, inevitably, be the associated time and costs savings on both sides. However meritorious these savings may be, an argument can (and probably will) be made that commitment decisions ought not to be directly effective if their purpose is simply to save the Commission time and effort. If this is the purpose, then it will already have been realized in the savings achieved by the Commission in adopting a commitment decision as opposed to an infringement decision. Bearing in mind that Regulation 1 provides substantial enforcement powers to the Commission,⁹⁶ there is no other purpose or objective that would, therefore, be undermined by refusing to permit the private enforcement of commitment decisions. This argument may cause skeptical national judges to think twice before enforcing a commitment decision.

Of course, it can be claimed that efficiency considerations are legitimate. Modernization of the implementation of EC Treaty Articles 81 and 82 through Regulation 1 has brought about fundamental changes to the enforcement of competition law by facilitating decentralization in enforcement and encouraging private enforcement.⁹⁷ Both of these policies underpin Regulation 1.⁹⁸ As a result, the Commission hopes that its resources will be freed to focus on the most serious infringements of Community law, such as dealing with cross border cartels.⁹⁹

Further, in *Automec Srl v. Commission* ("Automec II"), the CFI recognized that the Commission should be entitled to determine its enforcement priorities given the extensive and general nature of the task that it is entrusted with in the field of Community competition law enforcement.¹⁰⁰ There may, therefore, be some merit in the proposition that the overall objectives of Regulation 1 may be undermined by requiring the Commission to monitor and enforce every breach of a commitment decision. There may be cases, for example, where the alleged breach is confined to one Member State. In these circumstances, the Commission may be legitimately entitled to claim that the breach does not present sufficient Community interest to re-

96. See Council Regulation 1/2003, O.J. L 1/1, at 3 (2002).

97. See *supra* note 3 and accompanying text.

98. See Council Regulation 1/2003, O.J. L 1/1, at 1 (2002).

99. See White Paper, *supra* note 1, COM (99) 101 Final, at 5, ¶¶ 8, 13.

100. See *Automec Srl v. Commission* (*Automec II*), Case T-24/90, [1992] E.C.R. II-2223, II-2274-75, ¶¶ 73-77, [1992] 5 C.M.L.R. 431, 477.

quire the Commission to intervene.¹⁰¹ The Commission is obliged, however, to carefully assess whether a complaint of a breach of a commitment decision is such that it can be better dealt with at the national level and consider the scope of the remedies available in the Member State in question.¹⁰² We consider the issue of remedies below.

C. Does a Commitment Decision Create Rights in Favor of Third Parties?

The third stage of the direct effect analysis in the ECJ's judgment in *Grad* was to ascertain whether the provision in question created rights in favor of the individual seeking to rely on them.¹⁰³

There is still a debate on the precise scope of direct effect in this area. While the ECJ's jurisprudence in *van Gend & Loos*¹⁰⁴ might be said to create the impression that a provision of Community law may be directly effective where it has the capacity to be invoked before a national court (also known as "objective" direct effect), its jurisprudence in other cases, such as *Becker*¹⁰⁵ and *Enichem*,¹⁰⁶ suggests that only those provisions of EC law that confer rights on an individual may be enforced before a national court (also known as "subjective" direct effect).¹⁰⁷

101. See *id.* at II-2277, ¶ 85, [1992] 5 C.M.L.R. at 479.

102. In *Automec II*, the CFI observed that a decision by the Commission to refer complainants to their national courts instead of dealing with the complaint itself should be based on the extent to which the national courts concerned can provide protection to the complainant's rights under the relevant provisions of Community competition law. See *id.* at II-2278, ¶ 89, [1992] 5 C.M.L.R. at 480.

103. See *Grad v. Finanzamt Traunstein*, Case 9/70, [1970] E.C.R. 825, 836, ¶ 2, [1971] C.M.L.R. 1, 22.

104. *Van Gend & Loos*, Case 26/62, [1963] E.C.R. 1, [1963] C.M.L.R. 105.

105. *Becker v. Finanzamt Münster-Innenstadt*, Case 8/81, [1982] E.C.R. 53, 71, ¶ 25, [1982] 1 C.M.L.R. 499, 512-13. See also *Alfons Lütticke GmbH v. Hauptzollamt Sarrelouis*, Case 57/65, [1966] E.C.R. 205, 209-10, [1971] C.M.L.R. 674, 677-85 (commenting on Article 90 (ex Article 95) of EEC Treaty in force at the time). The Court held that the provisions of Article 90 (on internal taxation), which subjected Members States to the obligation of non-discrimination, conferred on individuals the right to benefit from it. *Id.*

106. *Enichem Base v. Comune di Cinisello Balsamo*, Case 380/87, [1989] E.C.R. 2491, 2506-07, ¶ 11, [1991] 1 C.M.L.R. 313, 324-25.

107. See PAUL CRAIG & GRAINNE DE BURCA, *EU LAW: TEXT, CASES, AND MATERIALS* 179-80 (3d ed. 2002); see also Walter van Gerven, *Of Rights, Remedies and Procedures*, 37 COMMON MKT. L. REV. 501 (2000); Sacha Prechal, *Does Direct Effect Still Matter?*, 37 COMMON MKT. L. REV. 1047 (2000).

Although the debate about the precise definition of direct effect may continue, the ECJ's judgment in *BRT v. SABAM*,¹⁰⁸ which established that EC Treaty Articles 81 and 82 were directly effective, refers only to the notion of the creation of rights.¹⁰⁹ It seems likely, therefore, that the narrower subjective notion of direct effect will prevail for the purposes of Community competition rules.¹¹⁰ Notably, in this regard, recital 7 of Regulation 1 contemplates only the protection of individuals' "subjective rights" by a national court.¹¹¹ The practical result may be to render some of the obligations imposed on undertakings by a commitment decision difficult to enforce by third parties, such as competitors, who may not be able to show that the decision was intended to confer any rights upon them. In *Bulk Oil*,¹¹² for example, the ECJ refused to allow an individual to attack the export policy of the United Kingdom in the English courts on the basis that the United Kingdom had failed to fulfill its obligation, imposed under a series of Council decisions, to notify changes in its rules on exports to Member States and the Commission.¹¹³ In coming to this conclusion, the ECJ held that the notification obligation on the United Kingdom concerned only the "institutional relationship" between it, the Member States and the Community, and, therefore, did not create individual rights that national courts were obliged to protect.¹¹⁴

The commitments accepted by the Commission in both the

108. *BRT v. SABAM*, Case 127/73, [1974] E.C.R. 51, 62, ¶ 16, [1974] C.M.L.R. 238, 271.

109. *See id.*

110. *See, e.g.,* *Courage Ltd. v. Crehan*, Case C-453/99, [2001] E.C.R. I-6297, I-6322, ¶ 23, [2001] 5 C.M.L.R. 1058, 1078 (referring to EC Treaty Articles 81 and 82 as creating rights for individuals).

111. Regulation 1 does not provide a definition of what is meant by "subjective" in this context, in particular, whether this is an indication of the nature of the rights that will be directly effective. The ECJ's case law has also frequently referred to the concept of "subjective rights" but has not yet defined what this means. Walter van Gerven provides an explanation based on the differences among European languages. He proposes that "subjective rights" seeks to describe simply the rights available to a person (the "subject") as recognized by the law and enforceable before a court of law. *See* Van Gerven, *supra* note 107, at 501-36.

112. *See* *Bulk Oil (Zug) AG v. Sun Int'l Ltd.*, Case 174/84, [1986] E.C.R. 559, 594, ¶¶ 61-62, [1986] C.M.L.R. 732, 766.

113. *See id.*

114. *See id.* The effect of this ruling was to prevent the claimant from relying on the Community's rules on exports over national rules and thereby succeeding in a claim for damages in separate litigation.

*Bundesliga*¹¹⁵ and *De Beers/Alrosa*¹¹⁶ cases illustrate the potential difficulties that could be faced by third parties.

In *Bundesliga*, the Commission reached the preliminary assessment that the exclusive selling of the commercial broadcasting rights by the League Association prevented clubs from marketing their rights independently and could, therefore, have an adverse effect on the downstream television market and the market in new media, where football content played an important role in competition between program providers.¹¹⁷ In order to address its competition concerns, the Commission accepted a series of detailed undertakings relating to the procedure and the terms for the marketing of rights.¹¹⁸ Some of the key obligations accepted by the League Association included: the selling of rights by reference to key principles,¹¹⁹ a three season cap on the duration of contracts,¹²⁰ allowing all qualifying third parties to bid for the rights¹²¹ and bid for several rights packages at the same time,¹²² and granting increased rights to clubs to exploit rights to their games on a non-exclusive basis.¹²³

Clearly, some of these obligations purport to confer discernable rights on certain categories of third parties, such as the entitlement to bid for media rights.¹²⁴ Arguably, therefore, a national court could enforce such an obligation (subject to its procedural rules) at the behest of an affected third party.¹²⁵ Similarly, the provisions conferring increased freedom on individual clubs forming the League Association to sell rights to their games indicate that the third parties intended to benefit from the provision, such as free-TV broadcasters,¹²⁶ mobile phone networks¹²⁷ and free-to-air radio broadcasters.¹²⁸ The

115. *See supra* note 73.

116. *See supra* note 73.

117. *See* Commission Decision No. 2005/396/EC, slip op. at ¶ 23 (Eur. Comm'n Jan. 19, 2005), *cited in* O.J. L 134/46 (2005) (*Bundesliga*).

118. *See id.* at slip op. ¶¶ 41, 43.

119. *See id.* at annex, commitment 2.2.

120. *See id.* at annex, commitment 2.3.

121. *See id.* at annex, commitment 3.4.

122. *See id.* at annex, commitment 2.2.

123. *See, e.g., id.* at annex, commitments 2.4, 2.7, 5.1.

124. *See id.* at annex, commitment 3.6.

125. *See, e.g., Courage*, Case C-453/99, [2001] E.C.R. I-6297, I-6322, ¶ 23, [2001] 5 C.M.L.R. 1058, 1078.

126. *See Bundesliga*, at annex, commitment 5.1.

127. *See id.* at annex, commitment 5.3.

ban on bundling,¹²⁹ which is the key prohibition on individual clubs when selling their rights, makes no reference to such third parties, however.¹³⁰ Other crucial provisions, such as the three-season cap on contract duration,¹³¹ also express no conferral of rights on third parties, nor do they identify the category of persons that are intended to benefit.¹³²

In *De Beers/Alrosa*, the Commission required similar commitments from each of the companies.¹³³ At the time of writing, these had only been published in draft.¹³⁴ The commitments imposed include the obligation to: (a) cap the amount of rough diamonds that the parties purchase from one another;¹³⁵ (b) take steps to ensure that the parties do not purchase (directly or indirectly) diamonds originating from and sold by either party to third parties;¹³⁶ and (c) implement the commitment pursuant to a trade agreement.¹³⁷ In this case, there is no explicit mention of third parties intended to benefit from rights created as a result of the commitments.

Proponents of the direct effect of commitment decisions (not least the Commission) may argue, however, that even if one relies upon the narrower "subjective" concept of direct effect, third parties will nevertheless be able to effectively enforce commitment decisions before national courts.¹³⁸ This is because the

128. See *id.* at annex, commitment 5.8.

129. See *id.* at annex, commitment 2.4.

130. See *id.*

131. See *id.* at annex, commitment 2.3.

132. See *id.*

133. See *De Beers/Alrosa*, O.J. C 136/32, at 32, ¶ 1 (2005).

134. See generally Commitments for Alarosa, *De Beers/Alrosa Trade Agreement*, Case No. COMP/E-2/38.381 (Dec. 2004) [hereinafter *Alarosa Commitments*], available at http://europa.eu.int/comm/competition/antitrust/cases/decisions/38381/commitments_alrosa_en.pdf; see also Commitments for De Beers, *De Beers/Alrosa Trade Agreement*, Case No. COMP/E-2/38.381 (Dec. 2004) [hereinafter *De Beers Commitments*], available at http://europa.eu.int/comm/competition/antitrust/cases/decisions/38381/commitments_de_beer_en.pdf.

135. See *Alarosa Commitments*, *supra* note 134, at commitment 2.1; see also *De Beers Commitments*, *supra* note 134, at commitment 2.1.

136. See *Alarosa Commitments*, *supra* note 134, at commitment 3(b); see also *De Beers Commitments*, *supra* note 134, at commitment 3(b).

137. See *Alarosa Commitments*, *supra* note 134, at commitment 4; see also *De Beers Commitments*, *supra* note 134, at commitment 4.

138. Advocate General Karl Roemer's opinion in *Grad* provides some support for this view, arguing that "there are side effects in favour of the citizens of the market which, just like the corresponding provisions of the Treaty, must be directly guaranteed by the national courts in the case of clear, unambiguous and unconditional directions."

Commission's concern is to restore effective competition to the market. The ECJ's judgment in *Courage* indicates that rights arise not only where they are expressly granted, but also by virtue of obligations imposed in a clearly defined manner on other individuals.¹³⁹ In this context, the concept of rights holders under the decision should be considered to be a broad one, including those individuals who have indirect or incidental rights conferred upon them. On this basis, the draft commitments agreed to in *De Beers/Alrosa* should be interpreted as intending to benefit both competitors and customers, because the purpose of the commitments appears to be to preserve the supply of diamonds to the remainder of the market and constrain *De Beers'* market power. Similarly, the "ban on bundling" on clubs in the *Bundesliga* commitments¹⁴⁰ can be viewed in this light as a measure seeking to grant third parties better access to rights by prohibiting the sale of more than two games¹⁴¹ to any one person.

Although it may appear that the ECJ's judgment in *Courage* in relation to EC Treaty Articles 81 and 82 is conclusive on this particular issue, we believe that its application is more limited than it may first appear. As these Treaty articles are themselves of general application, it is correct to say that the obligation to abide by them gives rise to a corresponding right for any third party to have them privately enforced—general obligations give rise to general rights. It may be stretching this logic too far, however, to say that each of the specific undertakings given by a party only to the Commission gives rise to a corresponding right for all third parties. Taken to the extreme, this logic would suggest that *De Beers* and *Alrosa's* obligation to appoint a trustee to

Opinion of Advocate General Roemer, *Grad v. Finanzamt Traunstein*, Case 9/70, [1970] E.C.R. 825, 847, [1971] C.M.L.R. 1, 28. The Court's decision in *Muñoz* also supports the view that a liberal approach must be taken to assessing whether the Community provision, which the individual is seeking to enforce—a regulation in that case—confers the necessary rights on the individual to secure enforcement against a third party. See *Muñoz*, Case C-253/00, [2002] E.C.R. I-7289, I-7297-99, ¶¶ 25, 26, 29, 30, [2002] 3 C.M.L.R. 734, 758-59.

139. *Courage*, Case C-453/99, [2001] E.C.R. I-6297, I-6321, ¶ 19, [2001] 5 C.M.L.R. 1058, 1077.

140. Commission Decision No. 2005/396/EC, slip op., annex, at commitment 2.4 (Eur. Comm'n Jan. 19, 2005), cited in O.J. L 134/46 (2005) (*Bundesliga*).

141. Four games may be sold in some circumstances.

carry out the monitoring of commitments¹⁴² also gives rise to general rights.¹⁴³ Logically, it would seem that only the Commission would have an interest in ensuring that the terms of the trustee appointment, as set out in the commitments, were properly adhered to.

Therefore, in the circumstances, we believe that a national court will need to determine on each occasion whether the particular claimant seeking enforcement benefits from the rights under the commitment in question that he or she is claiming. The outcome will in part depend on the national court's individual interpretation of the commitment. It is also possible that national courts from different Member States could come to differing conclusions as a result of their different traditions of interpretation.

D. *Are Commitments Unconditional and Sufficiently Precise?*

The preceding discussion goes to the core question of whether commitment decisions should be capable of direct effect. A separate and subsequent issue that a national court will also have to deal with is to determine whether the exact terms of the commitment are "unconditional and sufficiently precise."¹⁴⁴

142. See Alarosa Commitments, *supra* note 134, at commitment 6; see also De Beers Commitments, *supra* note 134, at commitment 6.

143. The ECJ's judgment in *Courage* did not consider the effects arising from the imposition of specific obligations under Community instruments, such as commitment decisions, in the same way. See generally *Courage*, [2001] E.C.R. I-6297, [2001] 5 C.M.L.R. 1058.

144. These conditions for direct effect were first formulated in *van Gend & Loos* as clear, negative, unconditional, containing no reservation on the part of the Member State, and not dependent on any national measure. See *van Gend & Loos*, Case 26/62, [1963] E.C.R. 1, [1963] C.M.L.R. 105. The Community courts' application of these criteria in subsequent cases has shown that they are not rigidly adhered to, especially where it is clear that the instrument in question is "self-executing" and, therefore, capable of application by a national court. See, e.g., *Becker v. Finanzamt Münster-Innenstadt*, Case 8/81, [1982] E.C.R. 53, 71, ¶ 25, [1982] 1 C.M.L.R. 499, 512-13 (referring only to "unconditional and sufficiently precise" as the conditions for direct effect); *Regina v. Sec'y of State for Home Affairs, ex parte Santillo*, Case 131/79, [1980] E.C.R. 1585, 1600, ¶ 13, [1980] 2 C.M.L.R. 308, 328 (stating in relation to a directive that "[t]hese provisions, taken together, are sufficiently well defined and specific to enable them to be relied upon by any person concerned and capable, as such, of being applied by any court"); *Hurd v. Jones*, Case 44/84, [1986] E.C.R. 29, 83, ¶ 47, [1986] 2 C.M.L.R. 1, 46 (referring to the requirements of "clear and unconditional and not contingent on any discretionary implementing measure"); *Pfeiffer v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, Joined Cases C-397/01 & C-403/01, [2004] E.C.R. I-8835, —, ¶ 103, [2005] 1 C.M.L.R. 1123, 1177-78 (referring to "unconditional and sufficiently precise").

The Court's practice in determining whether these criteria have been met has often been simply to declare, as if a matter of fact, whether the provisions are unconditional and sufficiently precise.¹⁴⁵ In *Cava*,¹⁴⁶ the ECJ took the opportunity to clarify in greater detail what both of these conditions meant. In relation to "unconditional," the Court stated "[a] Community provision is unconditional where it is not subject, in its implementation or effects, to the taking of any measure either by the institutions of the Community or by the Member States."¹⁴⁷ Accordingly, the ECJ has held, for example, that EC Treaty Article 255 is not unconditional so as to be directly effective, because its implementation is dependent on the adoption of subsequent measures.¹⁴⁸

In relation to "sufficiently precise," the ECJ stated in *Cava* that "a provision is sufficiently precise to be relied on by an individual and applied by the court where the obligation which it imposes is set out in unequivocal terms."¹⁴⁹ The ECJ concluded in *Cava* that the provisions of the Community instrument in question (a directive) were not sufficiently precise as they only laid down an overall framework for the implementation of measures that the Member States were required to follow.¹⁵⁰

Arguably, there is also a link between this last criteria and the earlier discussion on whether a commitment decision confers rights on an individual. The greater the precision of the commitment decision, the clearer conferral of rights will be. It may, therefore, be open for defendants in any enforcement action to claim that the lack of clarity in the creation of rights also harms a commitment decision's enforceability under these conditions and vice versa.

It is likely that commitment decisions, especially having regard to the commitments published thus far, will satisfy the requirement of unconditionality. It is possible, however, that the

145. See, e.g., *Pfeiffer*, [2004] E.C.R. at __, ¶ 103, [2005] 1 C.M.L.R. at 1177-78.

146. *Comitato di Coordinamento per la Difesa della Cava v. Regione Lombardia*, Case C-236/92, [1994] E.C.R. I-483.

147. *Id.* at I-502, ¶ 9.

148. See *Petrie v. Commission*, Case T-191/99, [2001] E.C.R. II-3677, [2002] 1 C.M.L.R. 519. EC Treaty Article 255 grants individuals rights of access to Community documents in accordance with provisions laid down by the Council and the other Community institutions. See Consolidated EC Treaty, *supra* note 29, art. 255, O.J. C 325/33, at 135 (2002).

149. *Cava*, [1994] E.C.R. at I-502, ¶ 10.

150. See *id.* at I-503, ¶ 14.

same may not be true for criterion of “sufficiently precise.” It will be for the Commission to ensure clarity and certainty by exact and unambiguous drafting, which is, of course, in the Commission’s own interests to achieve.

III. CONCLUSION ON DIRECT EFFECT

The Commission’s conclusion that its commitment decisions can benefit from direct effect presupposes that its commitment decisions have certain characteristics, something that is not as clear as the Commission may wish. Whilst there are clear points of principle to be resolved, much may ultimately depend on the precise terms of the commitments themselves and the interpretation of their purpose by the national courts. As we have seen in *Muñoz*, where the national court was faced with a similar task in relation to a Community regulation to the one the Commission is expecting the national courts to carry out for its commitment decisions, it was only as a result of a reference to the ECJ by the national court (at the appeal stage) that the purpose of the regulation was clarified, thus allowing for the protection of Muñoz’s rights.¹⁵¹ The fact that the national court initially interpreted the purpose of the regulation as not giving rise to rights of private enforcement may give the Commission an indication of the difficulties that national courts will face when dealing with an action seeking to enforce a commitment decision. The scores of references by national courts to the ECJ in cases where direct effect of Community laws has been claimed is testament to the fact that private actions to enforce commitment decisions may be a lengthy and difficult exercise for courts and litigants alike.

A. Can EC Treaty Article 10 Help?

In reviewing the issues surrounding the direct effect of commitment decisions, it has occurred to the writers that a third party may seek to “short-circuit” some of the difficulties identified above by looking at the obligations imposed directly on Member States by the EC Treaty. Article 10 of the EC Treaty provides:

Member States shall take all appropriate measures, whether

151. *Muñoz*, Case C-253/00, [2002] E.C.R. I-7289, [2002] 3 C.M.L.R. 734.

general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.¹⁵²

In summarizing the case law of the Community courts, the Commission's notice on cooperation with the national courts provides:

[I]n its interpretation of Article 10 [of the EC Treaty], which obliges the Member States to facilitate the achievement of the Community's tasks, the Community courts found that this Treaty provision imposes on the European institutions and the Member States mutual duties of loyal co-operation with a view to attaining the objectives of the EC Treaty. Article 10 EC thus implies that the Commission must assist national courts when they apply Community law. Equally, national courts may be obliged to assist the Commission in the fulfilment of its tasks.¹⁵³

As mentioned above, the Treaty specifically entrusts the Commission with the task of ensuring the application of the provisions of EC Treaty Articles 81 and 82,¹⁵⁴ and subsequently confirms that, in carrying out its tasks, the Commission has the power to take decisions.¹⁵⁵ Moreover, Regulation 1, which creates the Commission's power to adopt commitment decisions, is the implementing legislation for Articles 81 and 82.¹⁵⁶ It can be argued, therefore, that national courts are obliged to assist the Commission by enforcing commitment decisions pursuant to their obligations under EC Treaty Article 10. In *Roquette Frères*, the ECJ was asked to clarify the obligation of national courts to assist the Commission in the enforcement of competition

152. Consolidated EC Treaty, *supra* note 29, art. 10, O.J. C 325/33, at 42 (2002).

153. Cooperation, *supra* note 6, O.J. C 101/54, at 56, ¶ 15 (2004). *See also id.* at 62 n.37 (2004) (referring to *Zwartveld*, Case C-2/88, [1990] E.C.R. I-3365, I-3372-73, ¶¶ 16-22, [1990] 3 C.M.L.R. 457, 463-64; *Delimitis v. Henninger Bräu AG*, Case C-234/89, [1991] E.C.R. I-935, I-994, ¶ 53, [1992] 5 C.M.L.R. 210, 253); *id.* at 62 n.38 (referring to *Roquette Frères SA v. Directeur General de la Concurrence*, Case C-94/00, [2002] E.C.R. I-9011, I-9054, ¶ 31, [2003] 4 C.M.L.R. 46, 79).

154. *See* Consolidated EC Treaty, *supra* note 29, art. 85, O.J. C 325/33, at 66 (2002).

155. *See id.*

156. *See id.* art. 83, at 65-66.

laws.¹⁵⁷ The case was brought by Roquette, who objected to an authorization granted by French national courts to the French government to assist the Commission in a competition infringement investigation by entering and searching the premises of Roquette without first satisfying itself that there were indeed grounds for suspecting the existence of anti-competitive practices.¹⁵⁸ In finding that the French court was not entitled to carry out a review of the nature claimed, the ECJ referred to the obligation on national courts under EC Treaty Article 10 and went on to state that:

In order to comply fully with that obligation and to assist, as it must, in ensuring that the Commission's action is effective, the competent national court is therefore required as rapidly as possible to inform the Commission, or the national authority . . . of the difficulties encountered, where necessary by asking for the additional information needed.¹⁵⁹

Article 10, therefore, appears to be a promising alternative route for enforcement.

In light of the terms of Article 10,¹⁶⁰ however, it is likely that the successful application of this article to the enforcement of commitment decisions will depend upon the national court being satisfied that the decision in question is intended to achieve the objectives of the Treaty. In the field of competition, it is reasonable to assume that this means assisting the Commission to apply Community competition laws to ensure the protection of competition on the market.¹⁶¹ Whether commitment decisions are designed to achieve the objectives of the Treaty and assist the Commission as suggested will no doubt remind readers of the earlier discussion of the purpose of commitment decisions. Consequently, we believe that, although Article 10 potentially creates one further possible mechanism to enforce commitment decisions, the difficulties for national courts will remain essentially the same as those identified under direct effect. National courts,

157. See *Roquette Frères*, [2002] E.C.R. at I-9051, ¶ 21, [2003] 4 C.M.L.R. at 77.

158. *Id.* at I-9049, ¶ 16, [2003] 4 C.M.L.R. at 76.

159. *Id.* at I-9070, ¶ 92, [2003] 4 C.M.L.R. at 90.

160. Consolidated EC Treaty, *supra* note 29, art. 10, O.J. C 325/33, at 42 (2002).

161. See, e.g., Council Regulation 1/2003, at recital 9, O.J. L 1/1, at 2 (2002) (stating that the objective of EC Treaty Articles 81 and 82 is the protection of market competition).

therefore, may need to seek further guidance from the ECJ under the EC Treaty Article 234 reference procedure.

B. *Procedural Problems*

Assuming the substantive issues described above can be dealt with, a prospective third party enforcer of a commitment decision will need to be satisfied that appropriate procedures and remedies exist before the relevant national courts to justify the time and expense of bringing enforcement proceedings. As things currently stand, they are likely to be far from satisfied.

Community law provides that, in the absence of Community rules, it is for the domestic legal system of each Member State to institute such rules and procedure that ensure the effective protection of Community rights.¹⁶² The Community courts have sought to achieve this by imposing two key obligations on national procedural rules: (a) national procedural rules must not be less favorable for Community rights than those governing similar domestic actions (the principle of equivalence); and (b) national rules must not render it practically impossible or excessively difficult to exercise rights conferred by Community law (the principle of effectiveness).¹⁶³

In theory, these principles should mean that once a Community right has been established, the right to receive effective protection is a foregone conclusion. The ECJ applied these principles in *Courage* and established that national law must in principle provide an action for damages against an individual for breach of Community law.¹⁶⁴ Notwithstanding the ECJ's judgment, then-Commissioner Mario Monti reported in 2004 that the Directorate General ("DG") for Competition's study on private enforcement of competition rules¹⁶⁵ found that "not only [was] there 'total underdevelopment' of actions for damages for

162. See Opinion of Advocate General Warner, *Rewe-Zentralfinanz EG v. Landwirtschaftskammer fuer das Saarland*, Case C-33/76, [1976] E.C.R. 1989, 1997, ¶ 5, [1977] 1 C.M.L.R. 533, 550; see also *Comet BV v. Produktschap voor Siergewassen*, Case C-45/76, [1976] E.C.R. 2043, 2053, ¶¶ 12-16.

163. See *Courage*, Case C-453/99, [2001] E.C.R. I-6297, I-6324, ¶ 29, [2001] 5 C.M.L.R. 1058, 1079 (citing *Palmisani v. Istituto Nazionale della Previdenza Sociale*, Case C-261/95, [1997] E.C.R. I-4025, I-4046, ¶ 27).

164. See *Courage*, [2001] E.C.R. at I-6323-24, ¶¶ 25-29, [2001] 5 C.M.L.R. at 1078-79.

165. See DENIS WAELEBROECK ET AL., ASHURST, STUDY ON THE CONDITIONS OF CLAIMS FOR DAMAGES IN CASE OF INFRINGEMENT OF EC COMPETITION RULES 1 (Aug. 31, 2004),

breach of EC competition law, but there [was] also ‘astonishing diversity’ in the approaches taken by the Member States.”¹⁶⁶ Our own brief survey of national procedural rules in certain Member States¹⁶⁷ in the context of the possible enforcement of commitment decisions confirms this finding. Although the national competition laws of the Member States are gradually being updated to bring them into line with Regulation 1, it appears that no specific attention is being paid to ensuring the enforcement of Commission commitments or other decisions under Regulation 1.¹⁶⁸

Unsurprisingly, the national procedural rules of the individual Member States all reveal different requirements for bringing enforcement proceedings and correspondingly impose differing burdens of proof on claimants. This will no doubt lead to a discrepancy in the uniform enforcement of commitment decisions in the European Union (“EU”). We give some illustrative examples below.

In France, we understand that an enforcement action would have to be brought under the general regime for tort.¹⁶⁹ Consequently, in order to succeed, a claimant will have to prove fault, damage, and a causal link between the two. It is worth noting that whilst the requirement on the claimant to show fault (breach of the commitment concerned) and damage (harm caused to the claimant by the breach) is to be entirely expected, the requirement to show a causal link between the two may harm the prospects of successful enforcement, having regard to the

available at http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/comparative_report_clean_en.pdf.

166. Monti, *supra* note 3.

167. We have reviewed legislation in France, Germany, Italy, and the United Kingdom.

168. See, for example, Competition Act, 1998, c. 41 (Eng.), which is the key statute for antitrust enforcement in the United Kingdom. This was updated in 2004-2005, following the adoption of Regulation 1. Although the reformed legislation provides for its own domestic system to accept and enforce commitments in antitrust cases, it makes no provision for the enforcement of the Commission’s commitment decisions. The enforcement process in the United Kingdom will be a court-led process where the Office of Fair Trading (the national competition authority) must apply to a court for an order requiring compliance with commitments.

169. More specifically, the statutory basis for the action would be Article 1382 et seq. of the French Civil Code, which states that any act of a person that causes damage to another obliges that person to compensate the damaged party. See CODE CIVIL [C. civ.] art. 1382 et seq. (Fr.).

complex economic and factual assessments that inevitably need to be undertaken in competition cases. There is a clear difference here between the simple enforcement mechanism given to the Commission under Regulation 1 (the power to impose fines for breach of the commitment without the need to show more) and the criteria needed to satisfy a French judge.¹⁷⁰ Similar problems arise in other Member States.

In the United Kingdom, the cause of action will also need to be framed as breach of statutory duty.¹⁷¹ The claimant must establish that the breach caused it loss and damage of the type the commitment decision was designed to prevent.¹⁷² In proceedings for an injunction (the most likely remedy sought), a claimant must show why damages would not be an adequate remedy.¹⁷³ Consequently, enforcement of a commitment decision by requiring compliance with its terms pursuant to an injunction, whether interim or permanent, could be rare.

In Italy, it appears that claimants have two options available. As an alternative to bringing an action in tort, we understand that an action could potentially also be brought under competition laws.¹⁷⁴ An action under competition laws would, however, be limited to claims between direct competitors.¹⁷⁵ It would also be the first of its kind. In bringing an action under Italian competition laws, the claimant will need to show the unfair conduct on the part of the defendant, meaning that the defendant's conduct was contrary to principles of fairness (derived from general commercial practice) and the conduct was capable of harming the claimant.¹⁷⁶ We understand that the impact of the second limb of the test may be especially adverse for claimants with strong market positions: the stronger the market position of the claimant, the harder it will be to show that the conduct com-

170. *See* C. civ. art. 1382 et seq. (Fr.).

171. The statutory duty arises as a result of the incorporation of the Treaty into English legislation via the European Communities Act, 1972, c. 62, § 2(2) (Eng.).

172. *See generally* European Commission, Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules, National Report for United Kingdom, available at http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/national_reports/united_kingdom_en.pdf.

173. *See id.*

174. *See* CODICE CIVIL [C.c.] arts. 2598-600 (Italy).

175. *See id.*

176. *See id.*

plained or could harm them.¹⁷⁷

In Germany, we understand that an action could currently be brought under either the statutory tort law or the Act Against Unfair Competition. The action under tort law would require the claimant to show breach of the claimant's rights protected by Community law, fault, damage, and causation. It is interesting to note the standard of proof that claimants must meet. This is the standard for civil proceedings, but claimants must satisfy the court to a high level of "plausibility" or "practical certainty." The alternative could be an action under the Act Against Unfair Competition. As the issue of enforcement of a Commission decision by a third party has not yet arisen, however, the position is somewhat uncertain. Germany has also recently introduced a substantial package of reforms to its competition laws (the so-called seventh amendment to competition law),¹⁷⁸ which it is anticipated will facilitate private enforcement. We understand, however, that these reforms are primarily intended to enable claims for damages for losses suffered as a result of breaches of competition law. Therefore, they may not improve the position of parties seeking to enforce a commitment decision.

Needless to say, this brief overview above is only the tip of the iceberg. National rules will diverge on other issues that will also be of concern to potential claimants, such as *locus standi*, evidence, discovery, and remedies.

It will also be relevant that the principle established by the ECJ's judgment in *Courage*¹⁷⁹ may not provide sufficient support for claimants seeking to establish their rights to a remedy for a breach of a commitment decision. In this regard, a claimant will no doubt seek an order as its remedy on final judgment so as to prevent or deter the defendant from future breaches.¹⁸⁰ It will also seek damages in compensation for loss sustained by breach of the commitments for the period until the final judgment is delivered, however. In these circumstances, we believe that the lack of a finding of infringement by a commitment decision may create some substantial hurdles for claimants.

We believe that a claimant will have two possible lines of

177. *See id.*

178. These entered into force on July 1, 2005.

179. *Courage*, Case C-453/99, [2001] E.C.R. I-6297, I-6326, ¶ 36, [2001] 5 C.M.L.R. 1058, 1080-81.

180. *See id.*

argument: either to show that there was a breach of Article 81 and/or Article 82 of the EC Treaty as a result of a breach of the commitment, or alternatively, argue that breaching a commitment decision in itself gives rise to a claim for damages. It is likely, however, that *Courage* will not support this latter argument, because its finding of a right to damages is based on an underlying finding of breach of competition laws and not the breach of a Commission decision.¹⁸¹ A claim for damages solely for the breach of a commitment may therefore necessitate a new reference to the ECJ under Article 234 of the EC Treaty.

CONCLUSION

There are many good policy reasons for allowing commitment decisions to be enforced in national courts by third parties such as customers or competitors. The Commission understands this and has sought to encourage the concept as best it can. It is clear, however, that the public statements of the Commission on the subject¹⁸² mask some significant legal complexities and practical pitfalls that any aspiring claimant would do very well to surmount. In preparing this Article, the writers were struck by a parallel with the difficulties faced (and time spent) since the possibility of claiming damages for breaches of Articles 81 and 82 was first raised by the Commission in 1985.¹⁸³ It took some sixteen years until the ECJ's decision in *Courage* for the principle to be finally established.¹⁸⁴

Even if national courts can satisfactorily conclude that they can enforce commitment decisions, there remains a question over the potential effectiveness of Commission commitment decisions if their enforcement is left primarily to third parties in the national courts. Whilst the Commission will already be seized of the facts and familiar with the underlying objectives of its commitment decision in any given instance, a national court may not share the same degree of appreciation. Furthermore, a national court, whether of its own volition or due to limitations imposed on it by its national procedural rules, may find itself

181. *See id.*

182. *See supra* notes 8-9 and accompanying text.

183. *See* COMMISSION OF THE EUROPEAN COMMUNITIES, XVTH REPORT ON COMPETITION POLICY 1985, at 48, ¶ 39 (1985).

184. *See Courage*, [2001] E.C.R. I-6297, [2001] 5 C.M.L.R. 1058.

constrained from granting what the Commission may have considered to be the most appropriate remedy in the circumstances, such as interim measures. This may render the outcome and the terms of any enforcement action unpredictable and unsatisfactory.

The simplicity of the Commission's statements on private enforcement belies a complicated and difficult proposition. There remain some considerable challenges, given the current development of Community law and the procedural difficulties created by national laws, for third parties and the Commission to be assured that commitment decisions will be enforced in national courts in the way that they were intended. These issues will probably not be satisfactorily resolved without a preliminary reference to the ECJ under Article 234 of the EC Treaty. Until they are, as a matter of enforcement policy, we consider that the most appropriate enforcer of commitment decisions is the Commission itself, which retains the power under Regulation 1 to impose substantial fines and periodic penalties to ensure compliance with what are, after all, its own decisions.